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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LVII.

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AMERICAN STATE REPORTS.

VOL. LVII.

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AMERICAN STATE REPORTS
VOL LVII

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LOVENTHAL v. HOME INSURANCE COMPANY.

[112 ALABAMA, 108.]

INSURANCE—INSURABLE INTEREST.—A vendee of land in possession, exercising acts of ownership under an executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner of the land in fee, and entitled to recover for the loss of an insured building thereon, under a policy of insurance containing a condition that it "shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

Mountjoy & Tomlinson, for the appellant.

Ward & John, for the appellee.

112 HEAD, J. Contested policy of fire insurance. That portion of the policy material to the main question raised by the record, is as follows: "Mrs. Rebecca Loventhal, \$700, on her two-story, frame, shingle roof building," etc. (describing it). "This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple." The interest of Mrs. Loventhal in the land was that of vendee, under an executory contract of purchase holding the bond of the vendor to make title to her upon full payment of the purchase money—a portion of which remained unpaid. She was, and had been, for several years, in actual possession, under the contract of purchase, exercising all the claim and acts of ownership of an absolute owner; and had, since the purchase, erected upon the land the house forming the subject of insurance. The

last installment of purchase money was past due. Upon these facts, is the policy void? It cannot be questioned that if the policy had merely defined the assured as the owner of the building, with stipulation, even, that it should be void if she was not owner, her interest would have answered the stipulation and rendered the contract of insurance valid and binding. No doubt can be raised that such an interest constitutes ownership that is insurable. The authorities are many, and all one way, upon the point.

Speaking of the character of title such as Mrs. Loventhal's, we said in *Wimbish v. Montgomery etc. Loan Assn.*, 113 69 Ala. 575: "The general principle prevailing in a court of equity is, that from the time a valid contract for the purchase of lands is entered into, the vendor, as to the land, becomes a trustee for the vendee, and, as to the purchase money, the vendee becomes a trustee for the vendor. When, as in the present case, the agreement is, in its legal nature, executory, the vendor covenanting to make title on the payment of the purchase money at a future day, a court of equity, pursuing its own maxim of looking upon or treating that as done which ought to have been done, or which the parties contemplate shall be done in the final execution and consummation of the contract, for most purposes, regards the contract as specifically executed. The vendee is the equitable owner of the land—the vendor is the owner of the purchase money. To the land a trust attaches; of it the vendor is seised for the use of the vendee. The trust binds the land, while the legal estate remains in the vendor; and it binds the heir or devisee succeeding to it, and every one claiming under the vendor, with the exception of a bona fide purchaser without notice: 1 Story's Equity Jurisprudence, secs. 789, 790. As land, the vendee may convey or devise it; and as land it is descendible to his heirs, who may, in a court of equity, compel the specific execution of the contract. If there is not a stipulation to the contrary, the contract of itself operates a transmutation to the vendee of the possession, entitling him to the right of entry and enjoyment: *Reid v. Davis*, 4 Ala. 83." We substantially reiterated these principles in *Ashurst v. Peck*, 101 Ala. 499. They are familiar to the text-writers: 2 Story's Equity Jurisprudence, secs. 789, 790; 1 Pomeroy's Equity Jurisprudence, secs. 368-372; 3 Pomeroy's Equity Jurisprudence, secs. 1161-1406. Again, in many of our decisions, we have said that the relation of vendor to vendee, in cases like the present, is precisely that of mortgagee or mortgagor. All the incidents of the latter relation attach to it: *Bankhead v.*

Owen, 60 Ala. 457, where the authorities are collated on page 467. See, also, Ashurst v. Peck, 101 Ala. 499, where we recognized this rule, and held that such a vendor in possession is liable to the vendee for rents and profits to the same extent that a mortgagee in possession is liable to the mortgagor. And see, also, Hester v. Hunnicutt, 104 Ala. 282, where we enforced the principle with emphasis. In Conner v. Banks, ¹¹⁴ 18 Ala. 42, 52 Am. Dec. 209, Judge Dargan said: "It is a well-settled rule that the vendor of real estate, who has not executed a deed to the purchaser, holds the legal title as a security for the payment of the purchase money; and if he executed a bond to make titles when the purchase money is paid, the contract, in a court of equity, will be considered in the nature of a conveyance to the purchaser and a reconveyance back by way of mortgage": See, also, Moses v. Johnson, 88 Ala. 517; 16 Am. St. Rep. 58, which states the principle very broadly. In view of these unassailable principles, we must regard Mrs. Loventhal as owner of the property, and just such an owner as she would have been if her vendor had conveyed to her, by deed, the entire, absolute, and unconditional estate therein, in fee simple, and she had reconveyed it to him, by way of mortgage, to secure payment of the purchase money. Then the simple question is, Was that interest, so held by her, unconditional and sole ownership, or was the ground owned by her "in fee simple," within the meaning of the policy?

Conditions in a policy of insurance, limiting or avoiding liability, are strictly construed against the insurer, and liberally in favor of the insured: Queen Ins. Co. v. Young, 86 Ala. 424; 11 Am. St. Rep. 51. No intendments will be indulged to invalidate the policy, unless forced by the plain language and import of the contract. It is really not contended by counsel for the insurer that the interest of the assured in the land is not unconditional and sole. Indeed, that clause of the policy is not set up in the pleas. We refer to it, that no question may be raised upon it hereafter; for that Mrs. Loventhal was the unconditional and sole owner of the equitable title admits of no question. She was confessedly armed with the right to go into a court of equity and obtain the absolute, unconditional, legal estate in the lands, upon simply discharging the encumbrance created thereon by the quasi mortgage for the purchase money. There was no condition annexed to her equitable estate, the nonperformance of which would forfeit or foreclose her right thus to obtain the legal title. Such a forfeiture could occur only by judicial proceedings, at the

suit of her vendor, decreeing the foreclosure of her equity; and these proceedings themselves she could defeat, at any time before decree, by paying the purchase money and thereby removing the ¹¹⁵ encumbrance. Such an estate is not one upon condition, as conditional estates are commonly understood in the law. Then, was her estate one in fee simple? The term "fee simple" has never been used to distinguish between legal and equitable estates. It is used to denote the quantity or duration of estates—whether the enjoyment is limited or unlimited in point of continuance or duration. It defines the largest estate in land known to the law. It is an estate of inheritance unlimited in duration, descendible to all the heirs alike of the owner to the remotest generations. It may be of a legal or equitable nature. If of the latter, the legal holder is a mere trustee for the equitable, who is the real owner, and, restrained by no provision of the trust, in cases not within the statute of uses, may at any time be compelled to execute the legal estate in him. It was well recognized that fee simple estates, by that name, were created by deeds of bargain and sale and covenants to stand seised to uses, when, before the effect of the statute of uses upon them, those forms of conveyance were inoperative to transfer the legal title—when they created only an equity in the bargainee or covenantee. And Chancellor Kent says that prior to the statute of uses, the fee, in the view of a court of chancery, passed, by reason of the consideration, in a bargain and sale, or covenant to stand seised to uses, without any express limitation to the heirs—such a limitation being, as is well known, at common law, necessary to the creation of a fee simple, cognizable in a court of law: See 4 Kent's Commentaries, 5, 6. We hold that Mrs. Loventhal was the owner in fee simple within the meaning of the policy. In support of the principles we announce, we will, at the risk of unduly extending this opinion, set forth, somewhat at length, some of the many authorities in point.

In *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, the condition was, "If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." Plaintiff was in possession under an executory agreement to purchase, being entitled to a deed upon full payment of purchase money. He had partially paid, and made valuable improvements. The court, after disposing of another question, ¹¹⁶ said: "We think, too,

that the evidence conduced to prove that the plaintiff's interest in that property was an absolute interest; that is, an absolute interest in property, which is so completely vested in the individual, that he can, by no contingency, be deprived of it without his own consent. And by this contract with Eliakin Hough, and its part performance, the plaintiff had acquired a right to the whole property, of which he could not be deprived without his own consent. So, too, he is the owner of such absolute interest, who must necessarily sustain the loss if the property is destroyed. The subject of insurance was an interest, not a title. It is an interest, not a title, of which the conditions of insurance speak. The terms 'interest' and 'title' are not synonymous. A mortgagor in possession, and a purchaser holding under a deed defectively executed, have, both of them, absolute, as well as insurable, interest in the property, though neither of them has the legal title. . . . 'Absolute' is here synonymous with 'vested,' and is used in contradistinction to 'contingent' or 'conditional.' That the plaintiff had a vested interest in the property, of which he could not be deprived against his will—an interest dependent upon no contingency for its existence or continuance—an absolute interest, . . . the evidence undoubtedly conduced to prove, and was properly received."

In *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13, 93 Am. Dec. 289, the condition was substantially the same as in *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, and the evidence of plaintiff's interest consisted of a certificate of purchase at a foreclosure sale, under the laws of a state allowing fifteen months for redemption; and it was shown that, after the loss occurred, he received his final deed conveying the property in fee, no redemption having taken place. The court said: "An equitable title that would be protected by a court of equity as such may be an ownership as absolute as the legal title. The clause does not concern the particular character of the owner's title." And it was held that the right of redemption did not come within the special intent of the clause, which related rather to lesser estates or interests, of the class particularly enumerated. And the court properly remarked that they could see no reason for a different construction; for if the title had failed by reason of a redemption, there ¹¹⁷ could have been no recovery on the policy even without the condition. Not so failing, the loss, in case of fire, would fall on the plaintiffs, and they would be justly entitled to indemnity. If redeemed before loss, all insurable interest in

plaintiffs would have failed, and they could not recover on the policy, it being a settled principle that the insured, in order to recover, must have had an insurable interest both at the time of insurance and the loss." The court went farther, in this case, and upheld the policy, on the additional ground that the fiction of relation applied—that the reception of a deed by plaintiffs, after the loss, had relation to the time of the sale, and vested the legal title as of that date: Citing 4 Kent's Commentaries, 7th ed., 456-460.

In *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271, the condition was the same as above, and the court applied the decision in *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, and upheld the policy.

In *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732, it was held that a condition in a policy that any interest in the property insured, not absolute, or less than a perfect title, must be represented and expressed in the policy, is not broken by the existence of a lien for purchase money reserved in the deed of the premises.

In *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, 60 Am. Rep. 818, this language was used: "We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate within the meaning of the policy. In answer to this question we have to say that we think it does. Lint (the vendee) was the real owner of the house that was burned. The loss was his. The plaintiff (the vendor) lost nothing, unless he needed the house for security. If Lint is responsible, or the property, without the house, is sufficient security for the balance of the purchase money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not ¹¹⁸ been burned. If he is allowed to collect the insurance and the purchase money both, he will profit by the destruction of the property."

In *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191, the court quotes the case of *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, and remark that no doubt the case was correctly decided; and they say that the property was the ven-

dee's, absolutely, in every sense of the word material to the risk. "The decision," they say, "was in line with hundreds of others in which the courts everywhere have refused to defeat recovery upon insurance policies by giving effect to the literal terms of clauses of forfeitures. Such clauses are always, and justly, construed with the utmost strictness against the insurer, and always with reference to their only legitimate effect, i. e., the protection of the insurer against risks that are materially different from those which he has undertaken." Cases from Pennsylvania, Texas, Vermont, Missouri, and Iowa, are cited and declared to be substantially like *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, and rest upon the same ground.

As early as 1836, Chancellor Walworth, in *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385, 30 Am. Dec. 90, observed: "It is also a fact of public notoriety that, in common parlance, the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole of the purchase money and gotten the legal title or not, is called the owner thereof, and the property is usually called his by others. In equity, it is, in fact, his; and the vendor has only a lien thereon for the security of his unpaid purchase money; and I am yet to learn that the person who is in the actual possession of property as the real owner thereof, in equity, and who must sustain the whole loss thereof primarily, in case of its destruction by the perils insured against, cannot insure it, as owner, unless there is something in the terms of the policy, or in the conditions referred to therein, requiring the true state of the legal title to be disclosed."

In *Johannes v. Standard Fire Office*, 70 Wis. 196, 5 Am. St. Rep. 159, the condition was, "if the interest of the assured in the property be other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured; or ¹¹⁹ if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy to be void." The insured held under an agreement for purchase, a balance of the purchase money due being unpaid. The court say: "But if the plaintiff is held to the exact language of the condition, which it is perfectly clear he never saw until long after the policy was issued, still the evidence shows that his interest in the property was an entire, unconditional, and sole ownership. He was the real owner of the property, in equity, and for all purposes of in-

insurance. The condition does not relate to a legal title, in fee simple, nor is that the interest described. An equitable title, if sole and unconditional, answers the description fully, and, if the property was destroyed, the entire loss would fall upon the plaintiff." And the court proceeds to quote and approve the same rulings, in many of the cases cited in this opinion.

In Dupreau v. Hibernian Ins. Co., 76 Mich. 615, the syllabus, which is strictly accurate, is as follows: "Under a stipulation avoiding an insurance policy on a building in case the insured is not the sole and unconditional owner of the land on which the building is, in fee simple, the policy is valid, though the insured has but an equitable interest, being in possession under a contract of purchase from the owner in fee, and having paid part of the purchase money."

In Hamilton v. Dwelling House Ins. Co., 98 Mich. 535, it was held that the vendor, in an executory contract of sale, the vendee being in possession and having paid part of the purchase money, was not sole and absolute owner; and it was put upon the ground that the vendee was the entire sole and unconditional owner of the premises, the vendor holding merely the legal title for his security.

In Knop v. National Fire Ins. Co., 101 Mich. 359, the condition avoided the policy, "if the interest of the insured be other than unconditional and sole ownership." Insured was vendee, in possession under executory contract of purchase. The court say: "It has been repeatedly held that such a condition will not invalidate the policy, in such a case": Citing authorities.

In Farmers' etc. Ins. Co. v. Fogelman, 35 Mich. 481, where the applicant for insurance was, at the time in ¹²⁰ the occupancy of the premises under an oral arrangement between his wife, her father, and himself, whereby the father in law had advanced two thousand dollars of the six thousand dollars purchase price of the premises, and caused the same to be conveyed to his daughter, subject to a mortgage of four thousand dollars, for a home for herself and husband, with the understanding that she was to deed it to her husband, the applicant, when she should have paid off the encumbrance, and he had accordingly gone into possession, made improvements, and made large payments on the encumbrance, in reliance upon this arrangement, and all parties were proceeding in good faith under the same, it was held that this was sufficient to make out such an equitable title in the applicant as would answer the representation that he was owner

of the property. The court said: "He was owner of the barn by equitable title, and the risk of its destruction was his risk. Nobody was under obligation to rebuild for him, and he could protect himself only by insurance."

In *Imperial etc. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686, plaintiff insured certain buildings on land which he had contracted to purchase, but on which he had made no payment, but upon which he had erected a sawmill and made other improvements. The purchase price was five thousand one hundred and twenty-nine dollars and fifty cents, payable in three equal annual installments, the first falling due December 1, 1880. The policy was issued February 8, 1883. It was conditioned to be void if assured's interest was other than the entire, unconditional, and sole ownership, or if the insured property be a building on land not owned by him in fee simple. (The precise condition as in the present case.) Held, that the interest of insured answered the condition. The court discuss the case elaborately, in view of the authorities. They say: "This provision of the policy does not necessarily distinguish between the legal and the equitable estate. If the title is conditional or contingent, if it is for years only, or for life, or in common, it is not the entire unconditional and sole ownership; but whether the title be legal or equitable, the interest of the assured is the same, so far as it affects the contract of insurance. The purpose of the provision is to prevent a party who had an undivided or contingent, but insurable, interest ¹²¹ in property, from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove him from the temptation to perpetrate fraud and crime; for without this a person might thus be enabled to exceed the measure of an actual indemnity. But, where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist; and in the absence of any particular inquiry as to the specific nature of the title, or of any express stipulation in the policy that the assured held the legal or equitable title—either being available to secure an entire, unconditional, and sole ownership—the provision referred to can, we think, have no force to defeat the plaintiff's recovery in this case. Where articles of agreement are entered into for the sale of land, the purchaser is considered the owner. It does not seem to be necessary, to produce this effect, that any part of the purchase money should be

paid; it results from the contract. When a part of the purchase money is paid, the interest of the purchaser in the land is not circumscribed by the extent of the money paid, but embraces the entire value of the land over and above the purchase money due. He is treated as the owner of the whole estate, encumbered only by the purchase money. If the land increase in value, it is his gain; if it decreases, if improvements are destroyed by fire or otherwise, it is his loss." The court then proceeds to support its conclusions by the practically unbroken line of authorities, directly in point. To the same effect is *Elliott v. Ashland etc. Ins. Co.*, 117 Pa. St. 548; 2 Am. St. Rep. 703.

It seems unnecessary to extend this opinion by further quotations. We have examined critically all of the following cases, and find them expressly applicable, and squarely supporting the principles of the cases above referred to: *Ramsey v. Phoenix Ins. Co.*, 2 Fed. Rep. 429; *Lewis v. New England etc. Ins. Co.*, 29 Fed. Rep. 496; *Ellis v. Insurance Co. of North America*, 32 Fed. Rep. 646; *Pelton v. Westchester etc. Ins. Co.*, 77 N. Y. 605; *Millville etc. Ins. Co. v. Wilgus*, 88 Pa. St. 107; *Chandlcr v. Commerce etc. Ins. Co.*, 88 Pa. St. 223; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328.

We have not included in our citations any of the vast ~~122~~ array of cases holding that the creation, by the legal holder, of a mortgage or other encumbrance upon the premises is not violative of the condition in question. Many of them are collected in the printed brief of appellant's counsel: See, also, 7 Am. & Eng. Ency. of Law, 1022, note. Our extended research has not discovered a case to the contrary. Indeed, the cases proceed virtually upon the same principles which underlie the rulings, above set forth, in the cases of executory contracts of sale and purchase. We will quote just one, which furnishes the key to the rulings in them all: *Dolliver v. St. Joseph etc. Ins. Co.*, 128 Mass. 315; 35 Am. Rep. 378. The court say: "It has long been settled in this commonwealth that as to all the world, except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession [citing a number of authorities]. 1. This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified, or conditional fee, it might well be described as the entire and unconditional owner-

ship; and as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant (the insurance company), the mortgages and the lease were mere encumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and mortgagees. All the characteristics of such tenancies are lacking in their relation to the property. The lease for years created only a chattel interest in the premises, not affecting the ownership of the fee. It was merely an encumbrance. It has been held by the supreme court of the United States, in a recent case, that an outstanding lease did not invalidate a policy in which the ownership of the assured was described as entire, unconditional, and sole": Citing *Insurance Co. v. Haven*, 95 U. S. 242. That the existence of a private ¹²³ easement on the land does not violate the condition, see *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571.

The cases of *Smith v. Bowditch etc. Ins. Co.*, 6 Cush. 448; *Bowditch etc. Ins. Co. v. Winslow*, 3 Gray, 415; *Brown v. Williams*, 28 Me. 252; *Merrill v. Farmers' etc. Ins. Co.*, 48 Me. 285; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; 31 Am. Rep. 326, and *Mers v. Franklin Ins. Co.*, 68 Mo. 127, will be found, upon examination, not to be in conflict with the above cases. Besides what is said in *Liberty Ins. Co. v. Boulden*, 96 Ala. 508, the only case we have found which appears to be opposed to the line of cases touching the interest of vendees in executory contracts, is that of *Hinman v. Hartford etc. Ins. Co.*, 36 Wis. 159; but the court cites none of the controlling authorities to which we have referred, a number of which are cited approvingly by the later Wisconsin case of *Johannes v. Standard Fire Office*, 70 Wis. 196; 5 Am. St. Rep. 159.

The expressions of the court in *Liberty Ins. Co. v. Boulden*, 96 Ala. 508, in so far as they conflict with the conclusion reached in this opinion, are hereby modified.

We cannot attempt to bring order out of the confusion with which the record attempts to present the rulings of the court on demurrers to the special pleas, on the subject of occupancy. If it is desired to have those questions passed upon, they must be brought back here on a better record.

The court erred in giving the general charge for the defendant.

Reversed and remanded.

INSURANCE—UNCONDITIONAL AND SOLE OWNERSHIP—AGREEMENT FOR PURCHASE OF PROPERTY.—The insured has an "entire, unconditional, and sole ownership" within the conditions in a policy, although the possession of the realty on which the insured property stands is held by him under an agreement for its purchase, and a part of the purchase price is unpaid when the policy is issued: *Johannes v. Standard Fire Office*, 70 Wis. 196; 5 Am. St. Rep. 159. The condition in a policy of insurance that it shall be void in case the interest of the insured be other than "unconditional and sole ownership" refers only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance: *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326; *Caplis v. American etc. Ins. Co.*, 60 Minn. 876; 51 Am. St. Rep. 585; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747; 58 Am. St. Rep. 846.

BIENVILLE WATER SUPPLY COMPANY v. MOBILE.

[112 ALABAMA, 260.]

EVIDENCE—JUDICIAL NOTICE.—Courts take judicial notice that a contract entered into between a city and a water company for a supply of water for public purposes becomes in a sense perpetual.

INJUNCTION AGAINST WATER COMPANIES—ENFORCEMENT OF PUBLIC DUTY—SHUTTING OFF WATER SUPPLY.—After a water company has entered into a contract with a city to furnish it with a supply of water for public purposes, it may be enjoined from summarily shutting off such water to enforce a disputed demand for water already furnished. Such proceeding by injunction is not strictly one for the specific performance of the contract, but rather a proceeding to enforce the performance of a public duty.

Overall, Bestor & Gray, for the appellant.

P. J. Hamilton, for the appellee.

262 **BRICKELL, C. J.** The city of Mobile and the Bienville Water Supply Company, under authority conferred by their respective charters, entered into a contract by which the latter undertook to supply water to the inhabitants of the city for private purposes at fixed rates and to supply to the city itself water for public purposes, including service at fires. The charter of the company, by its sixteenth section, provides for the erection of hydrants upon request of residents of certain localities, to be paid for by taxation, and that other hydrants erected under other conditions shall, with certain other apparatus connected with the fire service, be paid for by the city. It is further provided that the

water for this service shall be furnished "free," except as paid for from the sources mentioned. Under these conditions, it is evident that the water is actually paid for by the inhabitants of the city.

By the second section of the contract it was provided as follows: "Said Bienville Water Supply Company further agrees to erect or cause to be erected in some suitable place, to be agreed upon by the general council of said city, a gauge which shall indicate an average pressure of eighty (80) pounds at the hydrant for every twenty-four hours; failure to maintain such pressure shall abate the price proportionately for the time such failure continues after the expiration of such twenty-four hours. In addition, said water supply company ²⁸³ agrees and guarantees to furnish for fire service during the existence of any fire or conflagration at any time within the city within reach of the hydrants, through three hundred feet of two and one-half inch double leads of hose with one inch nozzle, six vertical streams of eighty feet each; through same hose with one and one-quarter inch nozzle, six vertical streams sixty feet each. For failure to render this service at any time during such fires or conflagration, said water supply company hereby agrees to forfeit to the said city the sum of one thousand dollars, and that thereupon this contract shall immediately cease and terminate; provided, however, that such company shall not be subject to such forfeiture or termination of this contract, if, by any reason of any illegal, unlawful, or improper interference by parties other than said company with the pipes, mains, hydrants, or machinery of said water supply company, it shall be unable to render the service," etc.

The bill is brought by the city of Mobile. It alleges that an extensive conflagration occurred in that city on the night of March 16, 1894; that hose was attached to hydrants near by, but that with only three streams playing through hose not over three hundred feet long, and through nozzles not exceeding one and one-quarter inches, the vertical streams furnished failed to reach sixty feet each. That a proper supply was not furnished until after the company's superintendent had ridden eleven miles out to the pumphouse and increased the pressure, and that the greater part of the damage had occurred before this was done.

It is alleged that the general council subsequently declared by resolution that the water company had, by reason of the alleged breach of contract, forfeited to the city the sum of one

thousand dollars. Pursuant to this action, the city deducted that sum from the monthly installment next due. The water supply company thereupon directed its attorney to demand payment of the sum declared forfeited, and gave notice to the city that, in default of payment, it would shut off water used for public purposes. The bill is filed to enjoin this threatened action, and the case is before us on appeal from the decree of the chancellor overruling the demurrers of the defendant.

Treating the case as controlled by the principles applicable ²⁶⁴ to ordinary bills for specific performance, it is insisted by the demurrers, first, that the contract, providing, as it does, for the performance of continuous duties extending over a series of years—duties involving personal labor and skill—is not one which a court of equity will superintend or specifically enforce. And next, that aside from this feature of the case, the city itself is not in a position to ask specific performance, by reason of its own repudiation of the contract.

1. If the bill be of the character asserted in the first contention, it would be wanting in equity and should be dismissed. In *Electric Lighting Co. v. Mobile etc. Ry. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927, we held, and we now repeat, that the “general doctrine is, that a court of equity will decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance. It will not decree a party to perform continuous duty extending over a series of years, but will leave the aggrieved party to his remedies at law.” But we do not understand it to be the purpose or prayer of the present bill, that the court should assume to specifically enforce, during the continuance of the contract, the mutual duties resting upon the parties by reason of their contractual relations. It alleges, it is true, the existence of the contract, and its breach by the defendant; but it is fairly deducible from the pleading that these averments are by way of inducement only, a statement of successive occurrences leading up to the final act—the threatened shutting off by the defendant of all water for public purposes.

The abstracts furnished are not full or precise in the statement of the case. They were doubtless prepared on the assumption that they would be amplified by reference to the transcript. This, under our construction of our rule, we are not at liberty to do: *O’Neal v. Simonton*, 109 Ala. 369.

If the bill is broader in its prayer for relief than we have

construed it to be, it seeks more extended relief than can be decreed. But regarding it as filed solely for the purpose of preventing such injury to the public as might arise if the water company should shut off the water, it is not open to the objection urged. The duty of furnishing water for the extinguishment of fires is one which might well attach to the municipality without²⁰⁶⁵ being specially imposed: 1 Dillon on Municipal Corporations, 3d ed., 143, 146. But here it is expressly enjoined by charter: Acts 1886-87, p. 223. The defendant contracted with the city not only with full knowledge of this duty to the public, but by its own charter, in consideration of valuable public franchises, it consented to be "charged with the duty of introducing (into the city) such supply of pure water as the domestic, sanitary, and municipal wants thereof may require." We have shown, with respect to the water to be furnished for fire service and sanitary purposes, that while, nominally, no charge was to be made, the company was indirectly compensated for it; and it may be that, when its obligations are measured by strictly contractual relations, it should not be required to further proceed in the execution of its contract, if the other party had wrongfully abandoned it by withholding the agreed compensation.

But the company also owes a duty to the public. Neither it nor the city would be permitted, summarily and without making some other provision for the safety of the public, to shut off the water. We judicially know that contracts of this character, once entered upon, become, in a sense, perpetual. They may contain provisions for forfeiture or for expiration by limitation; but, from their very character, there is expectation, if not assurance, that so inseparable and necessary an adjunct of municipal existence will be carried forward by some one, if not by the original projectors. Changes may and do take place; but, where such agencies have thus become incorporated into the municipality itself, it would be the duty of the court to see that these changes are not so violent or summary as to endanger public or private property.

While the state has no recognized interest in the property of its citizens, its right to appeal to the courts for the protection of the public interest is well settled: Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 556; Sparhawk v. Union etc. Ry. Co., 54 Pa. St. 401; People v. Powers, 83 Hun, 450; United States v. American Bell Tel. Co., 128 U. S. 315.

The prevention and abatement of nuisances affecting the health or comfort of the public at the instance of municipalities is also a recognized branch of equitable jurisdiction: ²⁰⁶ 1 Dillon on Municipal Corporations, 3d ed., 379; Story's Equity Jurisprudence, secs. 921, 923, 924; Pomeroy's Equity Jurisprudence, sec. 1349; High on Injunctions, secs. 745, 1554.

The duty of the state extends, in respect to corporations, to a resumption by forfeiture of grants of power which have been abused to the detriment of the public. Can it be that the state may not prevent by injunction a wrong which, if perpetrated, would warrant a forfeiture? And, if such a duty rests upon the state, why, on like principle, should it not also devolve upon the municipality charged with the protection of the lives and property of its inhabitants? In cases like the present, some way can doubtless always be found to protect the rights of the public without invading or infringing the contractual rights of the parties. But if cases should arise where all these rights in their fullness could not be protected, the rights of the public, in view of which the contract was made and in consideration of which valuable franchises have been accorded, should not be defeated because of incidental embarrassment to some extent of the rights of parties to the contract. In such cases, the proceeding is not strictly one for specific performance of the contract, but is one rather by the negative means of injunction of enforcing the performance of a public duty: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 508; 3 Am. St. Rep. 758.

If the city may not adopt this remedy, it is without any remedy. If, pursuant to the notice given, the company should shut off its water supply, and damage should result, no matter how extended, it is settled, that neither the city nor the owners of private property injured by the breach of public duty, could maintain an action against the company: *Moundsville v. Ohio River R. R. Co.*, 37 W. Va. 92. On the other hand, if the city has wrongfully declared the forfeiture, the courts are open to the company to have that fact judicially determined and secure the full measure of its rights. It cannot be permitted, however, to enforce its construction of the contract by way of reprisal fraught with such dangerous consequences to the public.

What we have said renders it unnecessary, if not improper, to determine other questions presented by the demurrers. We remark in conclusion that, under the allegations of the bill, the final decree should go no ²⁶⁷ further than to enjoin the threatened action of the defendant.

Affirmed.

EVIDENCE—JUDICIAL NOTICE.—The general subject of judicial notice is discussed in the note to *Lanfear v. Mestier*, 18 La. Ann. 407; 89 Am. Dec. 658; *Temple v. State*, 15 Tex. App. 304; 49 Am. Rep. 200; *City Council v. O'Donnell*, 29 S. C. 355; 13 Am. St. Rep. 728.

INJUNCTION—BREACH OF CONTRACT—SPECIFIC PERFORMANCE.—A prayer in a bill of equity for an injunction, to be continued during the terms of a contract, restraining the defendants from threatened breaches of the contract, is the equivalent of a prayer for specific performance: *Electric Lighting Co. v. Mobile etc. Ry. Co.*, 109 Ala. 190; 55 Am. St. Rep. 927, and note to *Dills v. Doebler*, 36 Am. St. Rep. 345. An injunction to restrain the breach of a contract will not be granted, unless the injury to be apprehended is not susceptible of adequate damages at law: *Dills v. Doebler*, 62 Conn. 366; 36 Am. St. Rep. 345.

HIGMAN v. CAMODY.

[112 ALABAMA, 267.]

BAILMENTS FOR HIRE—DEGREE OF CARE REQUIRED: A bailee for hire must exercise that degree of care in respect to the property bailed which a man of average prudence and diligence would bestow upon his own like property under like conditions, and which is denominated ordinary care, and he is also liable for ordinary negligence.

BAILMENTS FOR HIRE—BURDEN AND SHIFTING OF PROOF.—In an action by a bailor against a bailee for hire to recover for the destruction of, or injury to, the property through the negligence of the latter, the burden of proof is first upon the bailor to show the bailment, the condition in which the bailee took the property, and that he returned it in a damaged condition, or did not return it at all; and, if the property was in good condition for the uses of the bailment when delivered, and was returned in a damaged condition or not at all, the burden of proof shifts to the bailee to show a cause producing the injury which, *prima facie*, did not arise or result from, or operate on account of a want of ordinary care on his part. This being shown, the burden of proof shifts back to the bailor to affirmatively show some negligence on the part of the bailee producing the injury complained of.

AGENCY.—NOTICE OR KNOWLEDGE coming to an employé in the line of his service is notice to the principal.

BAILMENTS—KNOWLEDGE OF DEFECTS—NEGLIGENCE.—A bailee for hire who acquires knowledge of a dangerous defect in the thing bailed arising after the bailment has no right to further rely upon the bailor's statement that the thing bailed was all right and in good condition at the time of the bailment. The bailee, upon acquiring such knowledge, must discontinue the use of the thing bailed, and repair it himself, or inform the bailor of the defect and thus put the responsibility on him. Not doing this, and continuing the use of the thing bailed in its dangerous condition, he is guilty of negligence, although the condition of the thing bailed in other respects may have been bad at the time the bailment was made.

BAILMENT—SECRET INSTRUCTIONS TO AGENT—EVIDENCE.—In an action against a bailee for hire to recover damages to the thing hired, evidence of secret instructions given by the bailee

to his agent who made the contract of bailment, is not admissible, unless the bailor had notice of such instructions.

BAILMENTS—EVIDENCE.—In an action against a bailee for hire to recover damages for injury to a barge hired, the fact that evidence that such barge was defective in construction in not being strengthened by "rift bolts" is admitted, does not admit evidence that greater care should be exercised in loading such a barge, as this is a matter of inference for the jury from the absence of such bolts and the testimony as to their utility.

E. W. Godbey, for the appellant.

D. W. Speake and S. T. Wert, for the appellee.

²⁷² **McCLELLAN, J.** The bailment involved in this case was for hire and use, the letter receiving compensation for the use of his chattel by the hirer. Being thus for the mutual benefit of both parties, the law imposed upon the bailee the duty of exercising that degree of care in respect of the property which a man of average prudence and diligence would bestow upon his own like property under like conditions, and which the law denominates ordinary care: Schouler on Bailments, secs. 134, et seq; 3 Am. & Eng. Ency of Law, 54, et seq; Woodruff v. Painter, 30 Am. St. Rep. 786; Seals v. Edmondson, 71 Ala. 509; Prince v. Alabama State Fair, 106 Ala. 340.

The care thus required of such bailee—what is meant by the phrase "ordinary care" in this connection—is aptly illustrated by Mr. Schouler, as follows: "Let us take, for example, a case by far the most familiar under this head to English and American courts, namely, that of a horse hired for use. Now, unless the bailee took the animal for too short a time, or under a special arrangement whereby the bailor was to look after his own property, he ought to provide the creature regularly with proper food and drink, afford due shelter and repose, and, in general, to take reasonable heed that the animal, while resting, is so fastened up that it may not readily run away or be stolen. While putting the horse to active ²⁷³ use, he should not harness carelessly, overload, overdrive, be heedless of what he perceives to be the creature's frailties, nor fail to supply, prudently, wants essential to its health and good condition. If disease or bruise be discovered during the bailee's term, he should be discreet in its treatment, and in extremity call in some farrier or expert; or else, informing his bailor promptly, throw the responsibility, as he may generally do upon the owner. During his whole term of use the bailee ought to act honorably, humanely, and with such reasonable regard for preserving the animal's value unimpaired as from prudent men might be expected": Schouler on Bailments,

sec. 137. As the particular point involved appears to have a close application to one phase of the case at bar, we quote further, in illustration of the care required of bailees of this sort, from the supreme court of Georgia: "The hirer of a horse is bound to take the same care of it that a prudent man would of his own property; and is responsible for all injuries that result from his neglect. If the horse becomes sick, or exhausted, it is his duty to abstain from using it, and if he pursues his journey, he is liable for all the injury occasioned thereby: Story on Bailments, sec. 405. In this case, the horse hired by the defendant was discovered to be sick, and the attention of the hirer called to that fact, while he had as yet accomplished but a small portion of his journey. He then ought to have abstained from the further use of the horse in that condition. As he did not, but continued the journey, and the horse died at the end of it, the defendant is liable": *Thompson v. Harlow*, 31 Ga. 348.

In an action by a bailor against a bailee for the destruction of, or injuries to, the chattel while held under the bailment, through the negligence of the latter, the burden of proof shifts from one side to the other and rests with plaintiff or the defendant upon the development of the circumstances in the evidence. It is, of course, on the plaintiff to show the bailment, that the defendant took the property under it and returned it in a damaged condition, or did not return it at all. It is also, it seems, with him to show the condition of the chattel when it was delivered to the defendant. If the property was in good condition for the uses of the bailment, and it is not returned or returned in an injured²⁷⁴ state, or, if though there be an infirmity or defect in the chattel, but the injury sustained by it is not of a character attributable to such defect—as, for instance, where a leaky boat is let and is injured by an explosion of gunpowder—the burden is on the bailee, since, in either of the cases put, the injury would not have happened in the ordinary course of things had he been duly prudent and diligent, not indeed to acquit himself of all negligence, but to show a cause producing the injury which *prima facie* did not arise or result from or operate on account of a want of ordinary care on his part. This being done, the burden shifts back to the plaintiff to affirmatively show some causal negligence on the part of the defendant. To illustrate: the hirer of a boat loses it in a storm of sufficient severity to have probably caused the loss without fault on his part. He acquits himself of negligence *prima facie* by showing these facts, and throws the

onus on the letter to prove that notwithstanding the storm the boat would not have been lost but for defendant's negligence in going out in the storm, or, being out, his want of care and diligence in handling the boat. And in such case it is with the plaintiff to reasonably satisfy the jury by a preponderance of evidence that not the storm alone, but the failure of the defendant to act with prudence, and diligence in view of the storm caused the loss: Schouler on Bailments, sec. 23; Collins v. Bennett, 46 N. Y. 490; Boies v. Hartford etc. R. R. Co., 9 Am. Rep. 347; Woodruff v. Painter, 30 Am. St. Rep. 786; Seals v. Edmondson, 71 Ala. 509; Prince v. Alabama State Fair, 106 Ala. 340.

The bailment here was of a barge belonging to plaintiff for use by the defendant in transporting logs on the Tennessee river. It seems that the hiring was for one trip only, and that the injury complained of was sustained during a second trip. The letter, however, accepted compensation for the use of the vessel on this second trip, so that the case stands as if the original letting had been for both trips. The evidence is conflicting as to the condition and river-worthiness of the barge when it was let and delivered to the defendant, and the jury might have reached either conclusion, that it was, or that it was not, in proper condition. There is no conflict in the evidence showing serious injuries to the barge, and that they were sustained during the second ²⁷⁵ voyage. They were of a character which ordinarily would not have been suffered had the barge been in good condition when it was let to defendant and had the defendant and his employes been prudent and diligent in the use of it. Assuming, as the jury had a right to find, that the condition was good, the prima facie presumption on these facts was, that the injuries complained of resulted from defendant's negligence. Charge 1, given for defendant, is bad in view of these facts and this principle. Its effect was to put the burden on plaintiff to show negligence on the part of the defendant even though the jury should have concluded that the barge was in proper condition when delivered to the bailee.

When the barge was being unloaded, after the first trip, a dangerous leak in it was discovered by defendant's employes in charge of it. This discovery, being made by the employes in the line of their service, stands upon the same footing for all purposes in the case as if it had been made by the defendant himself—their knowledge of it was his knowledge: Pepper v. George, 51 Ala. 190; Birmingham Trust etc. Co. v. Louisiana Nat. Bank, 99 Ala. 379; Alabama Nat. Bank v. Halsey, 109 Ala. 196.

With this knowledge of a defect arising after the letting, defendant had no right to further rely upon plaintiff's statement made at the time of the letting that the barge "was all right," nor to indulge a presumption, against the supervening fact, that it was all right. Charge 3 given for defendant was, therefore, erroneous.

The discovery of this leak and defendant's constructive knowledge of it make the analogy between this case and that of *Thompson v. Harlow*, 31 Ga. 348, where the bailee continued his journey after having knowledge that the horse he had hired and was riding was sick. As the rider should have abstained from continuing his journey on this horse, and been "discreet in his treatment" of the horse, and called in a farrier or expert, if unable to properly administer to the animal's ills himself, or else, should have promptly informed his bailor of the horse's sickness, and was guilty of negligence in not so doing, so, here, the defendant, upon coming to a knowledge of this dangerous leak in the barge, which had been sprung after it came into his possession, should have discontinued its use and repaired the boat himself, ²⁷⁶ or have informed the plaintiff of the fact and put the responsibility on him; and doing nothing of this, and continuing to use the boat in its dangerously defective condition, he was clearly guilty of negligence. And this would be equally true though the jury should find that the condition of the barge in other respects than this leak was bad at the time it came to defendant, for though one hire a blind horse, he should desist from the use of him if he should have an attack of colic, or should sprain a leg in consequence of being blind, and for injuries resulting from the continued use of the horse with colic or with a crippled leg he would be responsible. On these considerations we hold that charges 2, 4, 5, 6, 7, 11, and 12 should have been given for the plaintiff. Charges 2 and 4 given for defendant are bad, and should have been refused, because they take no account of defendant's negligence in using the barge at all after discovering its dangerous condition consequent upon the springing of this leak. Charge 2 of defendant's series, moreover, is bad for taking a distinction between the effect of defendant's knowledge of the condition of the barge, and that of his employés.

There was evidence of improper loading of the barge by the defendant, in that logs were piled at one end of it and it was left in this condition for several days of very rainy weather and until it sunk, the unequal distribution of the burden having the

effect to depress that end of the boat, the weight then being constantly increased by leak and rain water flowing into the depression. But we do not understand that any further loading was done after the submergence of that end of the boat was indicated, or that any further use was made of the barge by defendant before it sunk. We cannot, therefore, say that charge 9 should have been given for plaintiff, or charge 3. Of course, it was negligence for defendant to load the barge in this way, and leave it to fill with water at the depressed end and sink; but it is to be assumed that the jury were so instructed on the hypothesis of their belief from the evidence that this was done. And, of course, also, the duty was on the defendant, and his employés, persisting, as the evidence goes to show he did, in using the barge after discovering the leak, to handle it with due regard to that fact and the danger of loss or injury to the property incident to it.

277 The defendant should not have been allowed to prove the instructions he gave to Neville "when sent to hire the barge the second time," in the absence of notice to plaintiff of such instructions: *Birmingham Trust etc. Co. v. Louisiana Nat. Bank*, 99 Ala. 380.

There was no error in excluding the proposed testimony of Smith that "greater care should be exercised in loading a barge devoid of rift bolts." This was matter of inference for the jury from the absence of such bolts in this barge and the testimony as to their utility, etc.

Reversed and remanded.

BAILMENT FOR HIRE—CARE REQUIRED OF BAILEE.—A bailment for hire requires that the bailee exercise ordinary care: *Woodruff v. Painter*, 150 Pa. St. 91; 30 Am. St. Rep. 786. A dress-maker, being a bailee for hire, is held to that degree of skill and care which will enable her to do the work in a reasonable and proper manner: *Lincoln v. Gray*, 164 Mass. 537; 49 Am. St. Rep. 480; and note.

BAILMENT FOR HIRE—NEGLIGENCE OF BAILEE—BURDEN OF PROOF.—The law of bailment is that plaintiff is not entitled to recover where he has brought injury on himself, or has been guilty of negligence, which in any way concurs in causing loss or damage: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89; and see note to *Schmidt v. Blood*, 9 Wend. 268; 24 Am. Dec. 143. If a bailee wishes to exonerate himself from liability for the loss of the bailment, he must show the fact and manner of the loss. The burden must then be assumed by the bailor to show that the loss was due to the bailee's negligence: *Woodruff v. Painter*, 150 Pa. St. 91; 30 Am. St. Rep. 786, and note; also *Wintringham v. Hayes*, 144 N. Y. 1; 43 Am. St. Rep. 725, and note; *Lancaster Mills v. Merchants' etc. Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586.

AGENCY—NOTICE TO AGENT—WHEN NOTICE TO PRINCIPAL.—As to third persons, notice to an agent while acting within the scope of his authority is notice to the principal; but it must relate to business or transactions as to which the agent is authorized to act: *Pennoyer v. Willis*, 26 Or. 1; 46 Am. St. Rep. 594, and note. See, also, note to *Harris v. Fisher*, 44 Am. St. Rep. 454.

AGENCY—SECRET INSTRUCTIONS TO AGENT.—Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions, of which those who deal with the agent know nothing: *Austrian v. Springer*, 94 Mich. 843; 34 Am. St. Rep. 350, and note; also, see *Brown v. Franklin etc. Ins. Co.*, 165 Mass. 565; 52 Am. St. Rep. 534.

SIMMONS v. SHELTON.

[112 ALABAMA, 284.]

FRAUDULENT CONVEYANCES—SALE FOR VALUABLE CONSIDERATION—NOTICE OF FRAUDULENT INTENT—BURDEN OF PROOF.—A sale or conveyance made upon a valuable consideration by a debtor who is insolvent, or in failing circumstances, can be set aside at the instance of his creditors only upon proof by them that the purchaser participated in or knew of the purpose on the part of the debtor to place his property beyond the reach of his creditors, or had such information as charges him with notice of that purpose. If the purchaser, before full payment, is chargeable with knowledge of the fraudulent intent of the seller he is not permitted to make further payments, but must hold them for the paramount claims of the debtor's creditors.

FRAUDULENT CONVEYANCES—RESERVATION OF BENEFIT.—If an insolvent debtor conveys his property to his creditor in payment of a bona fide debt, and for an adequate price, the sale is not rendered fraudulent simply by the fact that the husband of such debtor is subsequently employed as a clerk by the purchaser, without any prior agreement for such employment.

FRAUDULENT CONVEYANCES—NOTICE OF INSOLVENCY OF DEBTOR—EVIDENCE.—In an action to set aside a conveyance by a debtor to his creditor as fraudulent toward other creditors, evidence that shortly after the conveyance the purchaser had reason to suspect that the seller owed money to others, is not sufficient to charge the purchaser with knowledge or notice of an intent on the part of the seller to delay and defraud his other creditors.

FRAUDULENT CONVEYANCES—NOTICE OF INSOLVENCY OF DEBTOR—EVIDENCE.—In an action to set aside a conveyance by a debtor to his creditor as fraudulent toward other creditors, evidence that suits were instituted against such debtor and the purchaser garnished, and that the latter made several payments of the purchase money, without showing when they were made, is not sufficient to show that such payments were made after notice of the insolvency of the debtor or after such suits were instituted.

JUDGMENTS AS EVIDENCE OF PRIOR INDEBTEDNESS. A judgment is conclusive evidence of the existence of a debt at the time of its rendition, but it is not evidence against strangers or inno-

cent purchasers that such debt existed at any time anterior to the rendition of such judgment.

FRAUDULENT CONVEYANCES—ACCOUNTING BY RECEIVER—PRACTICE.—If a bill is filed by creditors to set aside a conveyance by their debtor as fraudulent, and a receiver is appointed at their request, the bill cannot be dismissed without requiring the receiver to report and settle his account.

B. Carter, for the appellants.

W. M. Spencer, for the appellees.

²⁹¹ HARALSON, J. 1. The principle underlying the question as to whether the sale from Peace & Son to I. G. Wyatt was fraudulent has been well settled by our former adjudications, and is, that a sale or conveyance upon a new consideration, though valuable, made by a debtor who is insolvent, or in failing circumstances, will be set aside at the instance of his creditors, if the purchaser or grantee participated in it or knew that the purpose of the debtor was to place his property beyond the reach of his creditors, or had such information as charges him with notice of that purpose. The burden of making this proof is on the attacking creditor: *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221; *Cromelin v. McCauley*, 67 Ala. 548; *Smith v. Collins*, 94 Ala. 394. But if the purchase be made without such knowledge, and without such information as reasonably to put the purchaser on inquiry, he acquires a good title, no matter how fraudulent the intent of the seller. If the purchaser, before full payment, is chargeable with knowledge of the fraudulent intent of the seller, he is not permitted to make further payments, but must hold the same for the paramount claims of the creditors of the seller: *Crawford v. Kirksey*, 55 Ala. 282; 28 Am. Rep. 704; *Lehman v. Kelly*, 68 Ala. 202; *Smith v. Collins*, 94 Ala. 394.

2. The contention here, it may be well to state, is not as to a debt by the Wyatts to complainants, but in respect to a debt alleged to be owing by Peace & Son to complainants. The fraud alleged is as to the sale by Peace & Son to W. P. Wyatt for his wife, I. G. Wyatt, in which the latter is averred to have participated, so as to hinder, delay, and defraud the complainants in the collection of their debt against Peace & Son. If Wyatt procured the conveyance of the goods from Peace & Son to his wife, as is alleged, to hinder and delay his creditors, that fact, if established, is of no consequence here, ²⁹² since Wyatt was not a debtor of complainant, and the rights of no creditor of his are involved in the litigation.

It may be admitted, since it reasonably enough so appears, that at the time of the alleged fraudulent sale by Peace & Son to Wyatt, Peace & Son were the debtors of complainant, by open account, in the sum of \$447.30.

For the purpose of showing that the sale of Peace & Son to Wyatt was fraudulent, the complainants examined said W. P. Wyatt as a witness. His evidence tends to show, without conflict, that the price his wife agreed to pay for the goods and fixtures, and for which their notes, which it is averred in the bill were negotiable, were given, was full and adequate. The notes were for about \$1,550. He testified that the goods and the store fixtures which he bought, were not in fact worth more than from \$850 to \$900.

He was asked the question if, at the time of this purchase, he knew that Peace & Son owed anything, and he answered he did not, and had no knowledge of it. He was also asked if he knew whether Peace & Son's creditors were pressing them at the time, and he replied he did not know anything about it. This statement was made on his first examination. Afterward he was recalled by complainants, and examined a second time, and he was again asked if, when the goods were purchased by him for his wife, he knew that Peace & Son owed any debts, and he again responded he did not. He was also asked to state any facts tending to show why he did not, and he replied that he had no idea in the world of buying out Peace & Son, until one of them, W. H. Peace, came to his place, as he supposed, to see him, and called his attention to it; that that conversation lasted only about twenty minutes, and the next morning he went over to Peace & Son's place of business to see about the proposed sale, that they agreed as to the kind of trade they would make, and the day following they took an account of the stock, and that before the sale no facts or circumstances came to his knowledge to cause him to suspect or know that Peace & Son owed any debts. He also swore that he had known D. W. Peace about ten years, but not intimately; that he knew him in Crawford, Mississippi, where they both resided before removing to Birmingham; that Peace was a religious man, and he, Wyatt, was in the saloon business, 293 next door to him, and they both were burned out there, when the whole town was burned up; and before this sale he had not seen Peace & Son for six months, and knew nothing of their being pressed by their creditors.

The complainant offered other proof tending to show that

Peace & Son owed other debts besides the one to them; that some of their creditors were pressing them, and that their commercial credit was not good. On the other side, the proof tended to show that they had been extended and enjoyed good credit in the town, and had been in the habit of paying their bills every week.

Wyatt, who was in the same business, had just been burned out, and his stock was insured. It was natural to suppose that he would desire again to start his business, and to buy a stock of goods, if he could, on such terms as would enable him to do so. There was no secrecy about the transaction, and no proof that the Wyatts knew at the time that Peace & Son were insolvent or embarrassed, or were attempting a transaction to defraud their creditors. Peace & Son transferred the purchase money notes for the goods to H. V. Peace, in part payment of a debt they owed him. Their accounts and claims, amounting to from \$1,500 to \$1,700, they did not sell or dispose of, but proceeded to collect, applying the collections, amounting to about \$1,000 or \$1,200, to the payment of their creditors, including the complainants. They were enjoined in this case from collecting the others. The next day after the sale to Mrs. Wyatt, they went to the complainants and told them of the sale to Wyatt, and asked for the amount of their own account, promising to pay the same, and afterward, before this bill was filed, had paid them over \$200.

Without further reviewing the evidence, of which there is a great mass, it is sufficient to add that, on the evidence, we must agree with the chancellor that the sale does not appear to have been an invalid one.

3. As to the subsequent sale by Wyatt to Shelton & Co., there appear no reasons for questioning its validity. The existence and bona fides of the antecedent debt due by I. G. Wyatt to these parties, constituting the consideration of the sale, are fully and satisfactorily established, without conflict in the evidence; and the price ²⁹⁴ paid was adequate and fair. An attempt was made to show that a benefit was reserved to Mrs. Wyatt, in that Shelton & Co., after their purchase, employed her husband as a clerk, but the evidence of Wyatt and Shelton leaves no room for the charge. Wyatt swore that he and his wife had no interest whatever in the goods and that he was employed after the sale. Shelton swore, that at the time of the agreement for the sale, there was not a word said about employing Wyatt as a clerk; he did not know that he would be employed, and he was not employed until the day afterward. Shelton & Co. needed a clerk to sell the goods,

and Wyatt, acquainted with the stock and the customers of the store, it would seem, if not the best, was, at least, a very fit person to be employed for the purposes. Shelton & Co., according to the evidence, had no intimation or knowledge that complainants regarded the sale from Peace & Son to Wyatt as fraudulent, or that they or anybody else questioned its fairness or intended to call it in controversy. Three months had elapsed since that sale, and Wyatt had been conducting his business as before, buying most of his goods from Shelton & Co. They certainly had the right to buy, to save their debt, if that was their purpose. Wyatt had a right to prefer them, if that was her purpose, and that of her husband, and the sale, for these reasons, could not be disturbed. The proof established that this purchase was made and the goods delivered before this bill was filed and a receiver appointed.

The only evidence tending to show that Wyatt, after the sale, acquired knowledge of the fact that Peace & Son were indebted at the time of the sale, was that furnished by himself on his examination by complainants. He stated that he suspected, within two or three days after the sale, that they owed money; that parties came in and said that they owed them, and they did not deny it. But this was not, without more, sufficient to charge him with knowledge of Peace & Son's alleged fraud, such as would reasonably put him on inquiry concerning it. They might have owed debts without having any intention to delay or defraud their creditors. It was not calculated, under the circumstances of this case, to arouse suspicions of their insolvency.

The complainants make the further point that Peace ²⁹⁵ & Son were sued by these complainants in the city court of Birmingham on the sixteenth day of September, 1891, and said W. P. Wyatt was garnished therein as debtor to the defendants; that, on the 22d of September, 1891, Collins & Co. sued said defendants in said court and garnished Mrs. I. G. Wyatt and H. V. Peace, and that these facts gave said Wyatt notice, that said Peaces were insolvent or in failing circumstances, and he is liable, therefore, for any money he may have paid on the Peace & Son notes, after such notice. It is shown by Wyatt that he paid on these notes about \$600; from \$200 or \$300 in money, and the balance in an account he held against one McPolland, which W. H. Peace agreed to be liable for. When it was that the cash payments were made is not shown, but it does appear that the McPolland debt existed before the notes were made. We are not

authorized, under this evidence, to draw the inference that these payments were made after the institution of said suits against Peace & Son, in which said Wyatt was garnished, and the proof fails to show that Wyatt made any payments after the notice of the alleged insolvency or failing condition of Peace & Son, of which, it is contended, such proceedings gave notice to Wyatt. No personal judgment or decree can be rendered against Wyatt on this evidence.

6. No personal decree is prayed against H. V. Peace, except for any payments that may have been made to him by Mrs. Wyatt on the notes transferred to him within the amount of complainants' debt. It is not shown that he ever received a dollar on the notes. The prayer as to these notes is, that "said notes to I. G. Wyatt be decreed to be void and for nothing held."

7. It may be added that the proofs submitted do not show that Peace & Son were insolvent at the date of the filing of the bill, nor when they sold out to Mrs. Wyatt. They sold, as has been seen, for between \$850 and \$900, making no sale of their book accounts and choses in action, amounting to between \$1,500 and \$1,700. It is true the complainants offered in evidence several judgments which were recovered against them in 1892. It was agreed between the parties, in respect to the transcript of judgments offered in evidence, that they did not show they were valid or subsisting judgments or causes of action against the defendants, or ²⁹⁶ that such judgments had been paid in whole or in part. A judgment is conclusive evidence of the existence of a debt at the date of its rendition, but is not evidence against strangers that it existed at any time anterior thereto: *Lawson v. Alabama Warehouse Co.*, 73 Ala. 289; *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50; *Troy v. Smith*, 33 Ala. 471. Outside of these judgments, the proofs do not satisfactorily establish the insolvency of said Peace & Son.

8. There was a receiver appointed in the case, and the decree dismisses the bill without requiring him to report and settle his account. The bill should not have been dismissed without requiring him to settle. The dismissal will be set aside, and the decree corrected to the extent of requiring the receiver to file his written report in the court below, within ten days after being notified of this order, showing what property or money he has received, in order that his receivership may be finally settled, and as thus corrected, the decree of the court below is affirmed. The clerk will cause a copy of this order to be served on the receiver.

Corrected, affirmed in part, and remanded in part.

FRAUDULENT CONVEYANCES—NOTICE BY GRANTEE OF GRANTOR'S FRAUDULENT INTENT—BURDEN OF PROOF.—A sale made to hinder, delay, or defraud creditors is, as to them, absolutely void: *Mason v. Vestal*, 88 Cal. 396; 22 Am. St. Rep. 310; also, extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 747. But it must be proven that the purchaser had notice of such facts tending to show a fraudulent purpose on the part of the grantor, as would put a person of ordinary prudence on inquiry, and that the purchaser participated in such purpose: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607.

FRAUDULENT CONVEYANCES—GRANTOR'S INSOLVENCY—PREFERENCE OF CREDITORS.—When a preference is given by an insolvent debtor to one or more creditors who receive goods in satisfaction of bona fide debts, actual participation in the fraud is necessary to render the acceptance of the goods fraudulent: *State v. Mason*, 112 Mo. 874; 34 Am. St. Rep. 390, and extended note; *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756, and note. As to what is sufficient notice to grantee of grantor's insolvency, see *Bush v. Boutelle*, 156 Mass. 167, 32 Am. St. Rep. 442, and note to *State v. Mason*, 34 Am. St. Rep. 390.

JUDGMENTS AS EVIDENCE OF DEBT.—A judgment rendered by a court of competent jurisdiction, in the regular course of judicial proceedings, without fraud or collusion, is conclusive evidence of the amount and existence of a debt existing at the time of its rendition: *Wooten v. Steele*, 109 Ala. 563; 55 Am. St. Rep. 947; though it is not evidence of an indebtedness existing at any time anterior to its rendition: *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50, and note.

CREDITORS' SUITS—APPOINTMENT OF RECEIVER—RECEIVER'S DUTIES.—As to when a court of equity will appoint a receiver in creditor's suits, see *Albany etc. Co. v. Southern etc. Works*, 76 Ga. 135; 2 Am. St. Rep. 26. As to the duties of a receiver thus appointed, see *Heffron v. Rice*, 149 Ill. 216; 41 Am. St. Rep. 271,

PEET v. HATCHER.

[112 ALABAMA, 514.]

CONTRACTS AS TO THEIR VALIDITY are governed by the laws of the state wherein they are to be performed.

EVIDENCE—PRESUMPTIONS.—THE COMMON LAW is not presumed to exist in the state of Louisiana.

EVIDENCE—PRESUMPTIONS—COMMON LAW.—In states having a common origin or populated by citizens coming from states having a common origin, the common law is presumed to exist.

EVIDENCE—PRESUMPTION—COMMON LAW.—If there is no proof of the law of another state nor judicial knowledge of the origin of such state, such as raises the presumption that the common law prevails there, it is presumed that the law of the forum in which the issue is being tried is the law of that state on the question under consideration.

CONFLICT OF LAWS.—If a contract made in a state or country wherein the common law is not presumed to exist is sought to be enforced in the courts of another state, and the *lex loci* is not produced, the law of the latter state must be applied.

CONTRACTS—BY WHAT LAW GOVERNED.—A contract made and to be performed in the same state is governed by the law of that state as to its nature, obligation, and interpretation.

CONFLICT OF LAWS—LAWS OF ANOTHER STATE WHEN NOT CONSIDERED.—The supreme court of one state will not look into the codes and opinions of the supreme court of another state to ascertain what the law of that state is, unless such opinions and code provisions are set out in the bill of exceptions or properly presented by the transcript on appeal.

CONTRACTS—VALIDITY—DEALING IN FUTURES.—At common law, contracts founded on dealings in "futures" are void; but if such a contract is made by a broker who has no interest therein except to realize his commissions, which are payable in any event, the principal is bound to reimburse the broker for advances made by him, if he subsequently executes his note or bill therefor, or makes a promise to pay them, or, with full knowledge of the facts, without objection, permits the transaction to proceed, unless a statute makes such contracts absolutely void.

CONTRACTS—VALIDITY—DEALING IN FUTURES—CONFLICT OF LAWS.—A contract of dealing in "futures" made and to be performed in another state, where it is valid, may be enforced in a state where it is forbidden by statute and contrary to its public policy.

JUDGMENTS—RES JUDICATA—EVIDENCE OF CONSIDERATION.—If a note is given to close an account which is subsequently sued on, a recovery on the account establishes the validity of its consideration and of the consideration of the note, and if a subsequent suit is brought in equity to foreclose a mortgage given to secure such note, the validity of its consideration is res judicata, and no other or further defenses as to the validity of the debt are open than could be made if the action were one at law upon the debt.

JUDGMENTS—RES JUDICATA—VALIDITY OF CONSIDERATION.—A judgment and recovery upon a gambling contract establishes the validity of the consideration as between the parties to the action, and precludes inquiry into such consideration by a court of equity, although no reason is shown why the defense was not made at law.

JUDGMENTS OF OTHER STATES—CONCLUSIVENESS.—A judgment rendered in one state has the same effect and is as conclusive in any other state where brought into controversy as it has or is in the state where rendered.

JUDGMENTS OF OTHER STATES—WHEN CONCLUSIVE.—If a judgment obtained in one state has the same effect and is afterward sued and recovered upon in another in a court having jurisdiction of the parties and of the subject matter, the latter judgment is conclusive of the validity of the consideration of the former judgment, and is enforceable in the latter state, although by the statute of the former state judgments obtained upon such contracts are void, and may, in any proceeding seeking their enforcement, be annulled by proof of the nature of the consideration.

Norman & Son, for the appellants.

Thornton & Chilton, Peabody, Brannon & Hatcher, and J. W. Foster, for the appellee.

⁵¹⁸ HEAD, J. This is a bill filed by the appellants to foreclose a mortgage executed by the appellee, B. T. ⁵¹⁹ Hatcher, and his wife, to one C. P. Ellis, on the twenty-sixth day of June, 1885, on certain lands therein described, situate in Russell

county, Alabama, to secure a note executed by him to the said Ellis, in the sum of ten thousand dollars, payable on the first day of November, 1885. In the fall of 1883, the complainants, Peet & Co., were cotton brokers in the city of New Orleans, engaged in buying and selling cotton futures, for customers, on the New Orleans Cotton Exchange, of which they were members. They operated for stipulated commissions of so much per bale, and made advances for their customers, to keep up their contracts, when so agreed upon. Said C. P. Ellis was then the agent of Peet & Co. Respondent, B. T. Hatcher, was a cotton warehouseman, residing and doing business in the city of Columbus, Georgia. At the time mentioned, fall of 1883, Ellis and Hatcher met in Columbus and an arrangement was made between them, by which Peet & Co. were to buy cotton futures for Hatcher in New Orleans, and make advances for him when necessary to keep up his contracts. Accordingly, the purchases began, and continued until the latter part of 1885. When the note and mortgage in controversy were executed, June 26, 1885, if the then existing contracts had been closed, Hatcher was largely in arrears to Peet & Co., for commissions and advances; and he being about to depart for Europe, on an extended business trip, Peet & Co. desired security for the present arrearages, and to cover future losses which might develop during his absence in Europe—a continuation of the business of buying being contemplated. Ellis visited Columbus to attend to the matter, and thereupon this note and mortgage were executed to afford the desired security. The note was at once indorsed by Ellis, and, with the mortgage, was delivered by him to Peet & Co., on his return to New Orleans. The business relations between the parties continued, as we have said, until the latter part of the year 1885, when it was ascertained that Hatcher's indebtedness amounted to over \$17,000.

It is attempted to be maintained, as a defense to the present bill, that the execution of the note and mortgage was a private transaction between Hatcher and Ellis, had upon consideration of a personal loan of \$10,000 then made by Ellis to the former, in ⁵²⁰ the shape of a check for that sum drawn by Ellis in Hatcher's favor, on Peet & Co., which it was agreed by Ellis that Peet & Co. would honor and place the amount to his, Hatcher's, credit on their books; that the check was given and forwarded to Peet & Co., who failed to give credit for the amount; wherefore, it is contended that the consideration of the note and mortgage failed. This defense finds no satisfactory sup-

port in the evidence. It is shown to our entire satisfaction that the use of Ellis' name in the papers, and the drawing of the check by him, were suggested either by Ellis or Hatcher (whose respective accounts of the matter are given in their depositions), and were observed as a mere form. Hatcher's account is, substantially, that Ellis suggested it to conceal the gambling nature of the transaction. Ellis says Hatcher suggested it to prevent injury to his credit, he supposing that such injury might follow a general public knowledge that he was dealing so largely in cotton speculations, which fact would be indicated by the use of the names of New Orleans cotton brokers. It is immaterial to determine which of these versions is the correct one, for the result is the same under either. The evidence leaves no reasonable doubt that there was, at the time, no thought or intention, on the part of either, of a personal loan of \$10,000, or any other sum, by Ellis to Hatcher, but that the securities were executed for the sole use and benefit of Peet & Co., upon the consideration we have stated. We would reach this conclusion upon the answers to the bill and testimony of Hatcher alone.

The defense mainly relied on is that the dealings between Hatcher and Peet & Co. were gambling transactions, such as the courts will not enforce. It is pleaded and insisted that those transactions were governed by the laws of Georgia, where the arrangement under which they were had was entered into by Hatcher and Ellis, the latter acting for Peet & Co., by force of which laws the contracts made in the purchase of cotton were wagers and void. It is settled by the decision of this court in *Hawley v. Bibb*, 69 Ala. 52, in a case precisely like the present, except that the dealings were on the New York instead of the New Orleans Exchange, that the contract under which the cotton dealings were to be had, as to its validity, was governed by the laws of the ⁵²¹ state wherein it was to be performed—in that case, the state of New York; and as the statutes of that state were not pleaded and introduced, it was held that the validity of the contract was to be determined by the principles of the common law, which were presumed to obtain in the state of New York. But we do not presume the existence of the common law in the state of Louisiana. It is only those states having a common origin with our own, or populated by citizens coming from states having such common origin, that the presumption of the existence of the common law therein obtains here: 1 *Brickell's Digest*, sec. 9, p. 349; 3 *Brickell's Digest*, sec. 1, p. 122; *Drake v. Glover*,

30 Ala. 382. Louisiana is not one of those states: *Castleman v. Jeffries*, 60 Ala. 380; *Norris v. Harris*, 15 Cal. 226. There is, in the present record, no pleading or proof bringing before us any local law of Louisiana. In this state of the case, following the intimations of the court in *Castleman v. Jeffries*, 60 Ala. 380, section 3 of the opinion, *Western Union Tel. Co. v. Way*, 83 Ala. 542, section 16 of the opinion, and *Drake v. Glover*, 30 Ala. 382, we held, in the former opinion delivered in this cause, in substance and effect, that whatever the law of Louisiana might be, in the absence of pleading and proof to the contrary, contracts made there would be presumed to be lawful, and being so, under the influence of *Hawley v. Bibb*, 69 Ala. 52, they furnished a valid consideration of a contract made and to be performed in another state, to wit, in the state of Georgia. There was no local law of Georgia before us altering the principles of *Hawley v. Bibb*, 69 Ala. 52. Since our former decision, however, the case of *Kennebrew v. Southern Automatic etc. Machine Co.*, 106 Ala. 377, came under our consideration. It was an action for the price of a machine sold the defendant, in Louisiana. The question was whether there was an implied warranty that the machine was suitable for the purposes for which it was sold. The law of Louisiana was not introduced. Declaring what was said to the contrary, in *Castleman v. Jeffries*, 60 Ala. 380, to be dictum, opposed to the overwhelming weight of authority, we said that it is "almost universally held that where there is no proof of the law of another state, nor judicial knowledge of the origin of such state which would raise up a presumption that the common law prevails there, it will be presumed that the ⁵²² law of the forum in which the issue is being tried is the law of that state on the question under consideration." We cited many authorities in support of the principle. The law touching implication of warranty in such a sale, as we understood it to obtain in Alabama, was applied to the sale in question. We still think that decision is sound and supported by the weight of authority, and we adhere to it. It will be applied though our law be statutory. It may be well said that, as we judicially know no other law of the case than our own, the parties litigant, by failing to produce the *lex loci contractus*, impliedly agree that it is the same as the *lex fori*, be the latter common law or statute. Thus, it may be regarded as settled in this state that when a contract, made in a state or country wherein we cannot presume the existence of the common law, is sought to be enforced in the courts of this state, and the *lex loci* is not produced, we will apply to it our own law.

But, in the present case, there is yet the distinguishing characteristic which, in the view we at first took of the case, we did not consider it necessary to discuss, that the cotton contracts made in New Orleans, and here assailed as wagers, are not sought directly to be enforced. They were not even contracts entered into by and between the parties litigant, but money paid and services rendered by the complainants as the retained brokers of the respondent, who now assails them, in the creation and furtherance of the contracts, form the consideration of the promissory note which was made by the respondent to the complainants, in the state of Georgia, by its terms payable at a designated bank in the state of Georgia, and which is now sought to be enforced by the foreclosure of the mortgage given to secure it, executed in Georgia, upon lands situate in this state. The questions then arise, Is the obligation of the note and mortgage governed by the law of Georgia? If so, what is that law, and what its effect upon a note founded upon such a consideration, assuming that the cotton contracts were, in fact, wagers? If valid and enforceable under the laws of that state, will comity permit the application of those laws to be affected by our statute which renders void all contracts founded upon gambling considerations, and authorizes recoveries of all moneys, etc., paid thereon, ⁵²³ when the note and mortgage are sought to be enforced in our courts?

1. We deem it unnecessary to discuss the axiom that, in the absence of a qualifying element, when a contract is both made and to be performed in the same state, the law of that state will govern its nature, obligation, and interpretation. This rule determines that the law of Georgia governs the present note; and, considered as a security merely, the mortgage.

2. What is that law? We are not legally advised of any local law of Georgia on the subject. The answer avers a particular local law of that state, and the note of submission states that the case was submitted on the following data: On behalf of defendants: "9. Code of Georgia, sec. 2753; 10. National Bank v. Cunningham, 75 Ga. 366; 11. Walters v. Comer, 79 Ga. 796," but these data are not found in the record. There appears a written agreement of counsel to abridge the record by omitting certain specified matter, not including the above, and it is therein expressly stipulated that all other matter should be included in the transcript. There is no agreement that we may look into the Georgia code and reports to supply the omission; on the contrary, is it earnestly contended by appellant's counsel, in their brief, that we have no evidence of a local law of Georgia. This ques-

tion was very clearly settled in *Drake v. Glover*, 30 Ala. 382. There, the record showed that several articles of the code of Louisiana were read in evidence by each party, none of which was set out in the bill of exceptions; and there was no agreement of counsel in reference to them. Judge Walker said, in his opinion: "The sections of the code of Louisiana referred to in the bill of exceptions are not set out; and we cannot look into the code of Louisiana for the purpose of ascertaining what those sections contain. In doing so, we should violate a principle of law well recognized in this court, and take judicial notice of what the statute laws of a sister state are." Georgia being of common origin with our own state, we must presume the common law there prevails. Then what is the common law on the subject under consideration? We have it tersely declared in *Hawley v. Bibb*, 69 Ala. 52, readopted in *Hubbard v. Sayre*, 105 Ala. 440. It is, that gambling contracts, such as the cotton ⁵²⁴ transactions are alleged by the respondents to have been, are void, as offensive to public policy; but, further, where brokers are employed to make such contracts and advance upon them, if in them the broker has no interest; if, in any event, he cannot gain or lose; whether there is profit or loss he is entitled to his commissions only; the principal is bound to reimburse him for advances, if he subsequently executes his note or bill, or makes an express promise to pay them, or if, with full knowledge of the facts, without objection, he permits the transaction to proceed. A number of authorities are cited by the court. In the state of Georgia, looking to the cases merely as authority, and not as evidence controlling our decision, it was held in *Warren v. Hewitt*, 45 Ga. 501; *Heard v. Russell*, 59 Ga. 25; *Champion v. Wilson*, 64 Ga. 184, and *Thompson v. Cummings*, 68 Ga. 124, that where the alleged illegal contracts have been executed, the broker can recover any money advanced in the transaction by the previous authority or subsequent ratification of the principal. Though questioned in the later case of *Cunningham v. National Bank of Augusta*, 71 Ga. 400, 51 Am. Rep. 266, the principle was not overruled: See *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and extended note 752-766.

Applying these principles to the facts of the present case, we find the courts of Georgia were open to the complainants to enforce the note in question. Then,

3. Will the comity which exists between sister states be not extended by Alabama to the state of Georgia, to the end of enforcing the note in question according to the latter's laws governing its validity and obligation, by reason of any opposing pub-

lic policy or positive law obtaining in the state of Alabama? The rules of the common law, above stated, defining the rights of a broker advancing upon gambling contracts, does not obtain where there is a statute applicable to the case expressly denouncing the contracts as void: *Hawley v. Bibb*, 69 Ala. 52. Under that authority, the broker cannot recover, in such case, for advances. The statutes of Alabama expressly declare void contracts founded, in whole or in part, on gambling considerations, and authorize recoveries for moneys paid thereon. It is earnestly insisted by counsel that these statutes establish a local rule or policy in Alabama, which forbids recognition by us of the validity of such contracts under the ⁵²⁵ laws of another state by opening our courts to their enforcement. The courts of the Union are divided on this question. *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, presents an elaborate and well-considered argument, reviewing authorities, opposing the extension of comity to such a case: See the authorities there referred to, and the cases collected in 8 Am. & Eng. Ency. of Law, 1020, note 6. It seems that New York, Massachusetts, Pennsylvania, Kentucky, and Georgia enforce the comity. The earlier New Jersey cases confined its refusal to cases where the parties were citizens of that state. Such was actually the case in *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, but the decision seems to regard the distinction immaterial. Money won at play, or lent for the purpose of gambling in a country where the games in question are not illegal, may be recovered in the courts of England, though such contracts be void under the law of England when made there: *Quarries v. Colston*, 1 Phill. Ch. 147; 6 Jur. 959; 12 L. T., N. S., 57; *King v. Kemp*, 8 L. T., N. S., 255, Willes. We cannot yield to the present contention without overruling the cases of *Hawley v. Bibb*, 69 Ala. 52, and *Hubbard v. Sayre*, 105 Ala. 440. The former case was a bill like this to foreclose a mortgage given to secure a note founded upon a consideration of precisely the same character as that alleged for the present note; and because the cotton speculations which gave rise to the consideration were had in New York, where the common law was presumed to obtain, it was held that our statutes did not apply, and the mortgage was foreclosed. The principle decided in *Hubbard v. Sayre*, 105 Ala. 440, is the same. Realizing the force of the opposite contention, we might be disposed to grant the request of counsel to restore the case to the docket, that this question might be reargued, if there were not other grounds, which we will proceed to notice, clearly fatal, as we conceive, to the respondents' cause.

The bill very distinctly avers and puts in issue the fact that, after the close of the transactions between the parties, the complainants brought suit against Hatcher, in the supreme court of the city and county of New York, in that state, to recover upon the same indebtedness (and more) as that represented by the note which the mortgage, now sought to be foreclosed, was given to secure; that Hatcher was personally served with process ⁵²⁰ and appeared by attorney in defense of the action; and on the eighth day of January, 1889, the complainants recovered judgment in the action, in the sum of \$19,576.80, and costs. This recovery and the jurisdiction of the court of the subject matter and person are conceded. It is objected against its effect as res judicata, in the cause, that the note in question was not declared on. The action was upon the indebtedness in its original form of account. It seems useless to argue so plain a proposition that if the note represented the same consideration as the account sued on, the recovery upon the account, establishing the validity of its consideration, is conclusive of the validity of the consideration of the note. The account and note were cumulative evidences of the same debt—both simple contracts. An action could have been maintained upon either. Indeed, it being shown that the note was given to close the account, the former was admissible evidence to support the declaration upon the latter. Whatever the form of the action, whether upon the account or note, both being supported by the same consideration, the recovery precluded further inquiry into the validity of the consideration of either. And, as we said in *Hawley v. Bibb*, 69 Ala. 52, on bill to foreclose the mortgage, no other or further defenses as to the validity of the debt are open than could be made if the action were at law upon the debt.

Again, it is insisted that, at common law, a recovery upon a gambling contract does not establish the validity of the consideration between the parties to the action, precluding inquiry into the consideration by a court of equity, though no reason be shown why the defense was not made at law. We think no principle or authority has yet been promulgated in support of this contention. The remark of the court in *Fenno v. Sayre*, 3 Ala. 458, (476, 477), relied on, simply recognize the jurisdiction of equity, without legislation, upon a proper showing being made. Besides, there was no judgment in that case; but it was contended that it was not permissible for the complainants to prove that the contract between Paulling and Fenno was tainted with gaming, be-

cause Fenno had been called on to disclose the entire transaction, and his answer was conclusive. The complainants were creditors of Paulling seeking to annul a certain alleged gambling transaction between him and Fenno, by which, ⁵²⁷ if permitted to stand, a certain mortgage security given them by Paulling would be impaired or destroyed. In support of the supposed conclusiveness of the answer, counsel in the case referred, arguendo, to the statute of 1812, providing that: "The courts of equity shall have jurisdiction, in all cases of gambling consideration, so far as to sustain a bill of discovery, or to enjoin judgments at law." In response to this, the court said: "This statute does not confer upon our courts of chancery the entire jurisdiction they possess in cases of gambling contracts; independent of legislation upon the subject, they may grant relief in such cases, upon a proper showing being made." Counsel overlooked what the court said immediately following this remark, when stating the reasons for the act of 1812, thus: "Anterior to the act, a party against whom a judgment was recovered, upon a contract obnoxious to the law against gaming, was not entitled to go into equity without showing some excuse for the failure to avail himself of a legal defense. To open the door of chancery, in such cases, although the opportunity of defending at law had been neglected, was the only additional end proposed by the statute": See, also, *Cheat-ham v. Young*, 5 Ala. 353; *Finn v. Barclay*, 15 Ala. 626. The other cases cited were under the influence of statutes, which, like our own prior to the code of 1852, rendered void, not only gambling contracts, but judgments founded thereon. If the supposed common-law principle contended for ever obtained anywhere, the repeal of the act of 1812, and of the statute rendering gambling judgments void, showed very clearly a legislative intention that it should not obtain here.

It is next insisted that the statutes of New York authorize the opening of such judgments, without showing an excuse for not defending at law; and that under the constitution and laws of the United States which give a judgment or decree of one state the same legal effect in other states which it has in the state where rendered, we are required to take judicial notice of the statutes of the state where rendered which affect the conclusiveness of the judgment. The plausible argument is, that as the supreme court of the United States may revise our judgments, denying rights claimed under the constitution and laws aforesaid, and, in doing so, will look into the local laws of the state where the judg-

ment was ⁵²⁸ rendered, so should this court; that, as said by the supreme court of Pennsylvania, holding to this view: "It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that, in questions of this sort, we should take notice of the local laws of a sister state in the same manner the supreme court of the United States would in a writ of error to our judgment": *Ohio v. Hinchman*, 27 Pa. St. 479. Mr. Freeman, in annotating *State v. Twitty*, 11 Am. Dec. 779, after quoting the Pennsylvania case, cites, as supporting the doctrine, *Paine v. Schenectady Ins. Co.*, 11 R. L. 411; *Butcher v. Bank of Brownsville*, 2 Kan. 70; 83 Am. Dec. 446; *Dodge v. Coffin*, 15 Kan. 277, and *Rae v. Hulbert*, 17 Ill. 572, and adds: "It was laid down as a general rule in *Carpenter v. Dexter*, 8 Wall. 513, that where one state recognizes an act done under the laws of another, it will, so far as necessary, take judicial cognizance of those laws. This principle, which seems to be obvious, covers the case just cited. Certainly, a court cannot give effect to a judgment, or recognize it as a judgment, without taking notice of the law under which it was obtained." There are decisions of other states the other way; for instance, *Pelton v. Platner*, 13 Ohio, 209, 42 Am. Dec. 197, and *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536. To these latter must be added our own adjudications: *Hinson v. Wall*, 20 Ala. 298; *Kohn v. Haas*, 95 Ala. 478.

But whatever may be the better rule, the solution of the question may be dispensed with in this cause. Assuming that we will take judicial notice of the statute of New York, and taking that statute as it is reproduced upon the brief, we find it to be, that all promises, agreements, notes, bills, bonds, or other contracts, judgments, mortgages, or other securities, or other conveyances whatsoever, made, in whole or in part, on a gaming consideration, or in consideration of any wager, are void, and money paid thereon may be recovered. It cannot be denied, under this statute declaring judgments, as well as contracts, void, that in any legal proceeding in the state of New York seeking to enforce a judgment rendered in that state upon a contract founded upon a wager, or any right dependent upon that judgment, or, in any legal proceeding there, assailing ⁵²⁹ the judgment on account of the wager, either directly or collaterally, the judgment would be annulled upon averment and proof of the nature of the consideration. If that nature appeared upon the record, the judgment would be void on its face. Not so appearing, however, it would,

necessarily, be voidable only by allegation and proof. The judgment, upon its face, in such case, would be valid. These, we think, are the necessary effects of such a judgment, influenced by such statute, and upon them the appellees rely; and under the constitution and laws of the United States, before referred to, these effects must be accorded to the judgment in any state of the union where it may come in controversy. The same defenses could have been made against the New York judgment in the state of Georgia that could have been made in New York. After the recovery in New York, as the bill expressly avers and puts in issue, the plaintiffs therein sued the defendant, upon that judgment, in the proper law court of the county of the defendant's residence, in the state of Georgia, having jurisdiction of the subject matter, and acquiring jurisdiction of the person, by personal service. The record not disclosing the gambling nature of its consideration, the judgment, as we have said, was valid on its face. There was no statute or law of the state of Georgia brought before us declaring void judgments based upon wagers. What, then, was the defendant's duty, when thus sued in Georgia, if he desired to avail himself of the invalidity of the judgment sued upon, under the laws of New York? It was, unquestionably, to plead and prove the nature of the consideration of the judgment sued upon. He failed to make this defense; or, making it, the issue was decided against him, and judgment was rendered for the plaintiffs. The gambling act of Georgia (assuming that we will take notice of it under the constitution and laws of the United States) rendering only contracts, and not judgments, void, that recovery was conclusive of the validity of the consideration of the New York judgment sued upon; as much so as if the gambling contract itself had been the cause of action in the Georgia court. Under the constitution and laws of the United States, we must give this judgment the same effect as would be given it in Georgia, where rendered. Thus, inquiry into the validity of the ⁵³⁰ consideration is forever foreclosed by the last-named recovery.

It is insisted that, as matter of fact, the indebtedness, which formed the basis of these recoveries, was other and different from that secured by the mortgage; that payments made by the defendant should be applied by the court to that part of the indebtedness which was secured by the mortgage. The note and mortgage were executed June 26, 1885. The cotton speculations, as agreed to at that time, were thereafter continued until December 28, 1885. There were two remittances made by Hatcher to complainants: one November 7, 1885, \$3,000, and the other Decem-

ber 11, 1885, \$4,442.63. These were the only payments made after the mortgage, except the current profits of speculations, which were passed to Hatcher's credit, and which were largely overbalanced by the current losses, which were charged to him. Thus, on July 8th, 9th, 10th, 11th, and 23d there were aggregate losses of \$20,398.27, against profits, July 15th and 29th, aggregating \$12,087.76—net loss, \$8,310.51. On October 9th, 14th, 20th, 21st, aggregate losses, \$6,770.78, with no profits. On December 28th, losses, \$6,301.34, with no profits—total net losses, after the mortgage was executed, \$21,382.63. On June 15th, there was a payment of \$2,503.75 on estimated losses on contracts then existing, but not closed until July. After adding the balance of losses, estimated as having accrued when the mortgage was given, and adjusting interest and certain return commissions, and deducting the two payments of November 7th and December 11th, there was due complainants December 31, 1885, \$17,461.10. We have carefully examined the evidence, and have not the slightest doubt that the November payment was for margins or reimbursement on current dealings, with no thought or intent on the part of either that it was to reduce or impair the mortgage security; and as to the payment of December 11th of \$4,442.63, it is too plain for serious controversy that, as Peet and Ellis positively swear, it was paid expressly to cover the purchase of 5,000 bales of cotton which was made on December 7th. Hatcher agreed to remit \$5,000, to induce and cover that purchase, but when he forwarded his check from Columbus, Georgia, on the 9th, it called for, net, only \$4,442.63; and ⁵³¹ Ellis, acknowledging its receipt on the 11th, called upon him to remit the balance of the \$5,000, as agreed, which he never did. It is true Hatcher, in his deposition, makes the statement that upon a proposition made by Ellis, "as per letters attached dated October 27, November 16, and December 11, 1885, agreeing if I would pay the firm five thousand dollars on the note, that he would get his firm to carry five thousand bales of futures a quarter of a cent without margin, and that I did pay \$4,449.30 upon same, which has never been credited on the note as per letters attached." But when the letters referred to are examined, it is seen that he is mistaken. The letter of October 27th from Ellis contained, among other things, a proposition to Hatcher that if he would pay his note due November 4th (for \$10,000), he would get the firm to carry 5,000 bales for him without calling for margin of a quarter of a cent. The letter of November 16th from Ellis inquires: "Why don't you adopt my suggestion about the 5,000 b. c.,

pay up your note (\$10,000), and buy some cotton?" Hatcher attaches no correspondence showing any proposition at all relating to a payment of \$5000 on the note, or otherwise. There was evidently some other arrangement, afterward made, for the payment of \$5,000, for the reason that Ellis, in acknowledging receipt of the check for \$4,443.63 net, on December 11th, writes: "We enclose credit note for proceeds, \$4,443.63, and await further remittance of \$557.37 to complete the \$5,000 as per your agreement." Hatcher does not explain this. Peet and Ellis explain it substantially as we have above stated. Besides, we are satisfied from the testimony of Hatcher himself, as well as all the witnesses who testify upon the subject, that the intention of the parties was that the mortgage should cover, as far as it went, all net arrearages to Peet & Co., which might develop while the speculations were going on.

The decree heretofore rendered in this cause is adhered to, and the application for rehearing overruled.

Reversed and rendered.

EVIDENCE — PRESUMPTION. — THE COMMON LAW of one state is presumed to be the same as that of another state where the action is brought: *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126; 38 Am. St. Rep. 163, and note; and this presumption extends to its statutory law as well as to its common law: *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348; 52 Am. St. Rep. 94. To rebut this presumption the laws of another state must be alleged and proven: *Gist v. Western Union Tel. Co.*, 45 S. O. 344; 55 Am. St. Rep. 763.

CONTRACTS—VALIDITY OF—LEX LOCI CONTRACTUS.—The general rule is, that a contract valid where made is valid everywhere: Note to *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 763. But this rule is subject to the qualification that no state or nation is bound to enforce contracts made elsewhere which violate its public policy or positive legislation: *Gist v. Western Union Tel. Co.*, 45 S. O. 344; 55 Am. St. Rep. 763, and extended note.

CONTRACTS DEALING IN FUTURES—VALIDITY OF.—Contracts dealing in futures are void as gambling contracts, unless there is a bona fide intention that the article contracted for shall be actually delivered and received in kind, at the time appointed in the contract: *Gist v. Western Union Tel. Co.*, 45 S. O. 344; 55 Am. St. Rep. 763, and note; *Lester v. Buel*, 49 Ohio St. 240; 34 Am. St. Rep. 556, and note.

CONTRACTS DEALING IN FUTURES—RIGHTS OF BROKERS.—A broker may negotiate a contract for the sale of goods to be delivered in the future, without being privy to an illegal intent of the principals rendering it void; and, being innocent, he has a meritorious ground for the recovery of compensation for services and advances: *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and extended note. See, also, note to *Peters v. Grim*, 149 Pa. St. 163; 34 Am. St. Rep. 599.

JUDGMENTS—RES JUDICATA—CONSIDERATION.—A judgment is conclusive on all defenses which could have been presented by the exercise of due diligence. Therefore, a judgment cannot be

collaterally avoided by showing that it was based upon a note supported by an illegal consideration: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 801, and note; *Gould v. Sternburg*, 128 Ill. 510; 15 Am. St. Rep. 138. See extended note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 554.

JUDGMENTS OF OTHER STATES—CONCLUSIVENESS.— Judgments in personam of sister states are placed on the same footing as domestic judgments, and entitled to the same credit and effect, when sought to be enforced in the different states as they, by law or usage, have in the particular states wherein they were rendered: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202. See, also, *Parker v. Stoughton Mill Co.*, 91 Wis. 174; 51 Am. St. Rep. 881.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

BUCK v. ROSS.

[68 CONNECTICUT, 29.]

CORPORATIONS—CAPITAL STOCK AS A TRUST FUND.—

The capital stock of a corporation is now regarded in equity as a trust fund for the payment of debts. Creditors have a lien upon it which is prior in point of right to any claim which the stockholders as such can have; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund, or in any way to place it beyond the reach of creditors.

CORPORATIONS—WHAT IS A WITHDRAWING OF ASSETS.—If a stockholder in a corporation which is known by him to be insolvent, sells his stock to the company, at its par value, and receives for it a note and mortgage, executed and delivered directly to him by the buyer, who is a debtor of the company upon notes secured by mortgage, and whose mortgage indebtedness to it is discharged in equal amount, the transaction is a withdrawing of the assets of the corporation, and such stockholder is liable for the amount of the secured notes so withdrawn, in a suit by the trustee of the insolvent corporation.

Action to recover the value of certain assets of an insolvent manufacturing company, alleged to have been transferred to the defendant in exchange for his stock, and in fraud of the creditors of the company. There was a judgment for the plaintiff, and the defendant appealed.

Charles E. Perkins and George W. Meloney, for the appellant

Elliot B. Sumner and Charles E. Searls, for the appellee.

29 ANDREWS, C. J. The plaintiff is the trustee in insolvency of the W. G. & A. R. Morrison Company, a corporation legally organized pursuant to the laws of this state, and located at Windham. That corporation was declared on the **30** twenty-eighth day of February, 1894, to be insolvent, by the court of

probate for the district of Windham, and the plaintiff was appointed the trustee. The defendant had been a stockholder in that corporation, owning forty shares of its stock of the par value of one hundred dollars each.

The complaint alleges that said corporation was on the twenty-ninth day of July, 1889, insolvent, and thereafter continued to be so insolvent until the date it was so declared by the court of probate; and that "the defendant, on the fourteenth day of June, 1890, . . . well knowing the insolvency of said company, with the purpose and design of escaping financial loss and evading liability as a stockholder of said company, and in fraud of the then existing and future creditors of said company, unlawfully transferred and surrendered to said company said forty shares of the capital stock of the said company, and received in exchange therefor from said company, four thousand dollars in good and valuable notes and securities of said company, whereby the defendant unlawfully took from the capital of said company the sum of four thousand dollars, which he still retains." It is also alleged that the estate of said corporation is deeply insolvent, that said stock now in the hands of the plaintiff is wholly worthless, and that the amount so illegally withdrawn by the defendant is needed to pay the claims of creditors proved against the said insolvent estate. The plaintiff claimed to recover the value of said shares with interest.

The superior court found, in substance, that the averments of the complaint were true, and rendered judgment for the plaintiff. As to the transaction between the defendant and the said corporation on the fourteenth day of June, 1890, this appears: Prior to that day the said corporation had sold to one A. G. Turner, a large amount of silk manufacturing machinery, and had taken his notes therefor aggregating in the whole more than forty thousand dollars. These notes were absolutely secured by said machinery. One of these notes for the sum of two thousand five hundred dollars had been sold by the said corporation to the defendant. On said day the defendant reconveyed said two thousand five hundred dollar ⁸¹ note to the corporation, transferred to it the said forty shares of its capital stock, and gave in cash three thousand three hundred and eighty-four dollars, and received from the said corporation ten thousand dollars of said Turner's notes. The corporation surrendered to Turner ten thousand dollars of his said notes which were secured upon said machinery, and, in lieu thereof, Turner gave his notes for the same amount directly to the defendant, and secured these by a mortgage of

other property. These notes, so secured, were, and are, perfectly good.

In *Crandall v. Lincoln*, 52 Conn. 73, 94, 52 Am. Rep. 560, this court said: "The stock of a corporation is its only basis of credit. Unlike a partnership, its members generally are not individually liable for its debts. The character, reputation, and credit of its promoters do not attach to the corporation itself, except to a limited extent. Hence it is of vital importance that the law should rigidly guard and protect the capital stock. Otherwise, especially in these days when so large a portion of the business of the country is carried on by corporations, confidence, on which the prosperity of the country largely depends, would be seriously impaired. Hence it is that in equity the capital stock of a corporation is now regarded as a trust fund for the payment of debts. The creditors have a lien upon it, which is prior in point of right to any claim which the stockholders as such can have upon it; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund, or in any way to place it beyond the reach of creditors": Citing *Wood v. Dummer*, 3 Mason, 308. This is the settled law. In *Cook on Stockholders*, section 312, it is said: "The objection usually made to allowing a corporation to purchase its own stock is that thereby the corporation funds are expended and no property is received by the corporation except the right to resell. . . . The better rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock, or if its actual assets at that time are less than the capital stock, such purchase may be impeached and set aside, and the vendor of the stock rendered liable thereon at the instance of a ³² corporate creditor": *Morawetz on Corporations*, sec. 781; *Webster v. Upton*, 91 U. S. 65, 67; *Hightower v. Thornton*, 8 Ga. 486, 499; 52 Am. Dec. 412.

The appellant does not dispute this rule of law. He only attempts to extricate this case from that rule. His claim is, that as the property on which Turner gave a mortgage to secure the notes he had given to the defendant was property which had never belonged to the corporation, therefore the defendant had taken nothing from the fund from which the creditors of the corporation were to be paid, and consequently ought not to be required to pay back anything. That claim is wholly inadmissible in this court. The finding of the superior court settles the facts adversely to such claim. It is found that by the said transaction and sale the defendant obtained from the corporation,

in exchange for his forty shares of stock, valuable assets of the company; and that the assets thus obtained were of the value of four thousand dollars. That finding is conclusive, unless inconsistent with the subordinate facts set out. Here the finding is fully supported by the facts detailed in it. The Turner notes, held by the said corporation and secured upon the machinery, were perfectly good. The Turner notes which the defendant obtained, secured upon other property, were no better. The Turner notes were the real thing which the defendant took out of the assets of the corporation. The security given for the notes, whether before or after the 14th of June, 1890, was only an incident. There is no subtlety of words which can make the incident displace the real thing, or make a shadow more important than the substance.

There is no error.

In this opinion the other judges concurred.

What is a Withdrawing of the Assets of Corporations.*

Scope of Note.—The principal case, and *In re Brockway Mfg. Co.*, 89 Me. 121, 56 Am. St. Rep. 401, are the only ones we have noticed which expressly define what constitutes a withdrawal of the assets of a corporation; but, generally speaking, it is evident that any act or means whereby corporate assets are put beyond the reach of any person entitled thereto may, for want of a better term, be denominated a "withdrawing" of them from the legitimate purposes for which they exist. The form of withdrawal seems to be immaterial: See Thompson on Corporations, sec. 6527, under the subhead of Fraudulent Diversions of the Property of the Corporation. It may be done by a fraudulent sale, mortgage, assignment, preference, gift, or some other device or scheme to prevent creditors and others from receiving what is due them. We shall, therefore, attempt to show, in this note, what acts and means constitute a diversion of corporate assets from the lawful and legitimate purposes to which they should be applied.

General Principles.—In broad terms, the assets of a corporation are regarded, in equity, as a trust fund, and the directors as trustees. They have no power or right to use or appropriate the funds of the corporation to themselves, or to waste, destroy, give away, or misapply them: *Ellis v. Ward*, 137 Ill. 509; whether the corporation be solvent or insolvent: *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291. A corporation cannot, by its directors, sell or dispose of its assets to the prejudice of creditors and stockholders, under such circumstances, on such terms, and at such prices as indicate, upon the face

* REFERENCES TO MONOGRAPHIC NOTES.

- Assets of corporations as a trust fund: 42 Am. St. Rep. 767-771.
Power of corporation to purchase its own capital stock: 33 Am. St. Rep. 339-347.
Sale by corporation of all its assets, and effect thereof: 99 Am. Dec. 333-338.
When stockholders may maintain suits against officers and agents of corporations to call them to account or to set aside their acts: 41 Am. Dec. 367-370.

of the transaction, that they are being squandered recklessly or fraudulently in disregard of the trust committed to them: *Fogg v. Blair*, 139 U. S. 118. A corporation holds its property as the trustee of its stockholders: *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590; *Rabe v. Dunlap*, 51 N. J. Eq. 40; and they, like any other cestui que trust, have a right to have the trust property honestly managed and preserved from waste and misappropriation. They have a right to have the property of the corporation applied and used exclusively for the purposes specified in its charter, and any attempt by its managers to appropriate it to any other purpose is a violation of the rights of the stockholders: *Rabe v. Dunlap*, 51 N. J. Eq. 40. As the assets of a corporation, as between itself and its creditors, constitute a trust fund for the payment of its debts, these assets cannot be lawfully distributed among shareholders, or, a fortiori, be diverted to mere volunteers, while corporate debts remain unpaid: *Vance v. McNabb etc. Co.*, 92 Tenn. 47. If a majority of the stockholders combine to manage the business of a corporation in such a way as to divert all the profits of the enterprise from their legitimate destination, and to appropriate them to their own use, and have, in part, executed their plan, a proper case is presented for the intervention of the court to make a division of the assets where the circumstances render any change in the personnel of the management impracticable: *Fougeray v. Cord*, 50 N. J. Eq. 185. A trustee, who has committed a breach of trust by deliberately extracting and appropriating, to his own use, a part of the trust fund, cannot cure the breach and demand the further custody of such fund by simply restoring it: *Fougeray v. Cord*, 50 N. J. Eq. 185. A corporation may buy and sell property as an individual: *Reynolds v. Commissioners*, 5 Ohio, 204; but a director of a corporation cannot barter the assets of his company for personal gain: *Guild v. Parker*, 43 N. J. L. 430. It will be presumed that the manager of a corporation has power to sell its assets within the scope of his authority, in the absence of proof that he does not possess such authority: *National Bank v. Goolsby*, Tex. Civ. App., Jan., 1896; but general authority to the managers of a corporation, such as the president and cashier of a bank, giving them entire control of all financial matters of the corporation, unrestricted by any by-laws or rules of the board of directors or stockholders, confers no power upon them to use the property of the corporation in the private business or for the individual benefit of one of themselves: *Rhodes v. Webb*, 24 Minn. 292. The misapplication of corporate funds may be enjoined by a stockholder: *Hill v. Glasgow R. R. Co.*, 41 Fed. Rep. 610; but the directors of a corporation are not liable for assets lost through mere mismanagement: *Kraft-Holmes Grocery Co. v. Crow*, 36 Mo. App. 288. A court will not ordinarily interfere with the control of a corporation by its directors and a majority of its stockholders. It will not interfere, although the directors have acted unwisely and not for the best interests of the corporation they represent. To justify the interference of the court with the management of a corporation on the application of a minority of the stockholders, it must be shown that the action of the governing body complained of has been so clearly against the interests of the minority of the stockholders as to amount to a wan-

ten and fraudulent destruction of the rights of such minority, and that such action is a clear, substantial and flagrant violation of their rights: *Hart v. Ogdensburg etc. R. R. Co.*, 89 Hun, 316. Directors are not liable for moneys of the corporation paid out in good faith, though paid out wrongfully: *In re Kingston etc. Co.* [1896], 2 Ch. 279. Compare *Fox v. Hale etc. Min. Co.*, 108 Cal. 369, showing that directors of a corporation are liable for loss and damage to it caused by an abuse of their trust. Courts of equity, however, do not interfere with the action of such officers as a corporation has placed in charge of its affairs, unless it exceeds their discretion or amounts to aggravated misconduct equivalent to actual or constructive fraud: *Cicotte v. Anciaux*, 53 Mich. 227. So long as honesty and good faith concur, the acts of the officers of a corporation are valid and conclude the company: *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; but they are personally liable if they suffer the corporate funds or property to be wasted or lost by gross negligence and inattention to the duties of their trust; and an action at law may be maintained against them jointly and severally for the amount of such losses: *Horn etc. Min. Co. v. Ryan*, 42 Minn. 196. Courts will not allow corporations to escape responsibility by means of any disguise, and will not, therefore, allow the obligations to the community, under which a railroad is placed by its charter, to be evaded by any transfer of its rights and powers to another company: *New York etc. R. R. Co. v. Winans*, 17 How. 80.

Capital Stock—Trust Fund and its Pursuit.—The governing body, or directors of a corporation, hold its capital stock as a trust fund, in order that it may be preserved and administered, primarily, for the benefit of creditors, and secondarily for the benefit of the stockholders. It must not, however, be understood from the use of the phrase "trust fund," which is convenient for the purpose of expressing a certain general idea, that there is a specific lien, or a direct trust. It is used, in the cases, to express the idea that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders: *Corey v. Wadsworth*, 99 Ala. 68; 42 Am. St. Rep. 29; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; 54 Am. St. Rep. 31; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 383; *Hospes v. Northwestern etc. Car Co.*, 48 Minn. 174; 31 Am. St. Rep. 637. The capital of a corporation is its own property, which it may use and dispose of, if not prohibited by its charter, the same as a natural person. It is not held in trust for creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts, and that, as in the case of a natural person, any disposition of it in fraud of creditors is void: *Hospes v. Northwestern etc. Car Co.*, 48 Minn. 174; 31 Am. St. Rep. 637. If a corporation becomes insolvent, the equitable interest of the stockholders in the property and their conditional liability to creditors, place the property, as held in *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 383, in a condition of trust, first for creditors, and then for stockholders; but this "is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either

creditor or stockholder." This "trust fund" doctrine, commonly called the "American doctrine," is fully explained in the following late, clear, and well-considered cases: *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; 54 Am. St. Rep. 31; *Hospes v. Northwestern etc. Car Co.*, 48 Minn. 174; 31 Am. St. Rep. 637; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371; *Gottlieb v. Miller*, 154 Ill. 44. 51; *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615, and the monographic note to *Conover v. Hall*, 45 Am. St. Rep. 826-835.

In the sense, therefore, above explained, not only the capital stock of a corporation, but unpaid subscriptions to capital stock, as well as all the other property and assets of a corporation, constitute a trust fund for the benefit of creditors and stockholders, which cannot be given away or disposed of, without consideration, or in fraud of creditors and stockholders; and creditors of the corporation have the right of priority of payment over any stockholder: *In re Brockway Mfg. Co.*, 89 Me. 121; 56 Am. St. Rep. 401; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371; *Clark v. Bever*, 139 U. S. 96; *Fogg v. Blair*, 139 U. S. 118; *Sawyer v. Hoag*, 17 Wall. 610, 620; *New Albany v. Burke*, 11 Wall. 96, 106; *Mumma v. Potomac Co.*, 8 Pet. 280; *Childs v. N. B. Carlstein Co.*, 76 Fed. Rep. 86; *Ames v. Union Pac. Ry. Co.*, 74 Fed. Rep. 335; *South Bend Toy Mfg. Co. v. Pierre Fire etc. Ins. Co.*, 4 S. Dak. 173; *Richardson v. Green*, 133 U. S. 30, 45; *Hawkins v. Glenn*, 131 U. S. 319; *Scovill v. Thayer*, 105 U. S. 143, 154; *County of Morgan v. Allen*, 103 U. S. 498; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Ellis v. Ward*, 137 Ill. 509; *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291; *Vance v. McNabb etc. Co.*, 92 Tenn. 47; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133; affirming 53 Ill. App. 82; *Fear v. Bartlett*, 81 Md. 435; *Burch v. Taylor*, 1 Wash. 245; *Stutz v. Handley*, 41 Fed. Rep. 531; *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615.

Capital stock of a corporation is assets: *Peninsular Sav. Bank v. Black Flag etc. Co.*, 105 Mich. 535. It is a fund set apart for the payment of its debts. "It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation": *Sanger v. Upton*, 91 U. S. 56, 60, per Mr. Justice Swayne. Other cases support the same doctrine: See *Upton v. Tribilcock*, 91 U. S. 45; *County of Morgan v. Allen*, 103 U. S. 498, 508; *Richardson*

v. Green, 133 U. S. 30, 45; *Peters v. Bain*, 133 U. S. 670, 691; *Hastings v. Drew*, 50 How. Pr. 254; *Hospes v. Northwestern etc. Car Co.*, 48 Minn. 174; 31 Am. St. Rep. 637; *In re Brockway Mfg. Co.*, 89 Me. 121; 56 Am. St. Rep. 401. Any device, therefore, by which the members of a corporation seek to avoid liability for the full value of their stock, such as an agreement that the stock shall be regarded as "fully paid up," when it is not so, in fact, is void as to creditors of the corporation: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133; *Peninsular Sav. Bank v. Black Flag etc. Co.*, 105 Mich. 535. Thus, if the subscribers to the stock of an incorporated company pay twenty per cent on their shares, and enter into an agreement with the company that no further assessments shall be made thereon, and certificates for full, paid shares are issued to them, the agreement is, in equity, void as to creditors, where the company is adjudged a bankrupt, and it becomes necessary to assess the unpaid stock for the purpose of meeting the claims of creditors: *Scovill v. Thayer*, 105 U. S. 143. The rights of creditors of a corporation cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith: *Sawyer v. Hoag*, 17 Wall. 610. The public has no means of knowing about private contracts made between a corporation and its stockholders. Creditors, therefore, have the right to presume that the stock subscribed has been, or will be, paid up, and if it is not, a court of equity will, at their instance, require it to be paid: *Scovill v. Thayer*, 105 U. S. 143, 154. "When the interest of the public or of strangers is to be affected by any transaction between the stockholders owning the corporation, and the corporation itself, 'such transaction should be subject to a rigid scrutiny, and, if found to be infected with anything unfair toward such third person calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.' So, when the interest of creditors require, those who hold shares of stock in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares in full, unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint": *Clark v. Bever*, 139 U. S. 96, 112, per Mr. Justice Harlan. See, also, *Fogg v. Blair*, 139 U. S. 118.

An increase or decrease of the capital stock of a corporation, unless authorized by its charter, or by statute, cannot affect the rights of creditors existing before the change is made, as the corporation has no right to make such change except in the way specified: *Handley v. Stutz*, 139 U. S. 417, 428; *Grangers' etc. Ins. Co. v. Kamper*, 73 Ala. 325; *Sutherland v. Olcott*, 95 N. Y. 93; *Laredo Imp. Co. v. Stevenson*, 66 Fed. Rep. 633; *Railway Co. v. Allerton*, 18 Wall, 233; *Ross-Meehan etc. Foundry Co. v. Southern etc. Co.*, 72 Fed. Rep. 957. The direct result of such action is to affect corporate assets, and, in case of a decrease, it is a withdrawal of assets of the corporation. Corporate stock may be paid for in labor or property as well as in money: *Liebke v. Knapp*, 79 Mo. 22; 49 Am. Rep. 212; *Peninsular*

Sav. Bank v. Black Flag etc. Co., 105 Mich. 535; but it must be of such value as to be the money's worth; if property, of the value of the amount of the par value of the stock; and if labor, it must be reasonably of the face value of the stock. If property is conveyed to a corporation in payment of subscriptions for stock, it may be at a valuation agreed upon between the parties to the transaction, where such valuation is made in good faith and in the fair exercise of judgment and discretion honestly exercised: **Gilkie etc. Co. v. Dawson etc. Co.**, 46 Neb. 333; **Turner v. Bailey**, 12 Wash. 634; **Northwestern etc. Life Ins. Co. v. Cotton Exchange etc. Co.**, 70 Fed. Rep. 155; **Woolfolk v. January**, 131 Mo. 620; **Hastings Malting Co. v. Iron Range Brewing Co.**, Minn., June, 1896. Unless entire good faith was exercised in valuing property taken by the corporation for stock, the stockholders must respond to the creditors of an insolvent corporation for the par value, less the actual value of the property taken: **Coleman v. Howe**, 154 Ill. 458; 45 Am. St. Rep. 133; **Hastings Malting Co. v. Iron Range Brewing Co.**, Minn., June, 1896; **Peninsular Sav. Bank v. Black Flag etc. Co.**, 105 Mich. 535; **Farmers' Bank v. Gallaher**, 43 Mo. App. 482. If the property taken was worthless, shadowy, and unsubstantial in its nature, courts will hold that there has been no payment at all and the stockholders will be liable on such fraudulently obtained stock for unpaid subscriptions: **Salt Lake Hardware Co. v. Tintic Milling Co.**, Utah, May, 1896. So a "gross and obvious overvaluation of property" taken in payment for stock "would be strong evidence of fraud" in an action by a creditor to enforce the personal liability of a stockholder: **Peninsular Sav. Bank v. Black Flag etc. Co.**, 105 Mich. 535; **Gilkie etc. Co. v. Dawson etc. Co.**, 46 Neb. 333, 349; **Lloyd v. Preston**, 146 U. S. 630. If property of well-known value is taken by a corporation in payment for stock subscriptions at a highly exaggerated estimate, a strong presumption of bad faith arises, which will be conclusive unless rebutted: **Coleman v. Howe**, 154 Ill. 458; 45 Am. St. Rep. 133. Thus, the issuance of stock to the amount of three hundred thousand dollars for property well understood to be worth not over seventy-five thousand dollars is fraudulent on its face, and, in case the corporation becomes insolvent, the stockholders must respond to creditors for the difference: **Coleman v. Howe**, 154 Ill. 458; 45 Am. St. Rep. 133. The courts will not allow the assets of a corporation to be thus practically withdrawn, and frittered away. A receiving of property, by a corporation, in payment of stock subscriptions, is, however, presumed valid until impeached by appropriate pleadings and proof: **Shields v. Clifton Hill Land Co.**, 94 Tenn. 123; 45 Am. St. Rep. 700. As to what pleadings are insufficient, in such cases, see **Jones v. Whitworth**, 94 Tenn. 602.

A corporation may buy property and pay for it in stock: **Shannon v. Stevenson**, 173 Pa. St. 419; and its act in paying out its entire capital stock for property purchased may, or may not, be fraudulent, according to the facts of the case: **Knowles v. Duffy**, 40 Hun, 485. Business corporations cannot exchange their goods for their capital stock so as to reduce or retire the latter: **St. Louis Mfg. Co. v. Hilbert**, 24 Mo. App. 338. A corporation has the right, unless forbidden by statute, to acquire shares of its own capital stock: **Eggmann v.**

Blanke, 40 Mo. App. 318; Rollins v. Shaver etc. Carriage Co., 80 Iowa, 380; 20 Am. St. Rep. 427; New England Trust Co. v. Abbott, 162 Mass. 148; monographic note to Commercial Nat. Bank v. Burch, 33 Am. St. Rep. 339-347, on the power of a corporation to purchase its own capital stock. But the right of a corporation to buy in and cancel its own stock cannot be exercised in derogation of the rights of bona fide creditors. The money paid in by the corporation for its own stock is a trust fund in the hands of the stockseller, and may be pursued by corporate creditors when the purchase is to their injury: Note to Commercial Nat. Bank v. Burch, 33 Am. St. Rep. 344. Neither can the right of the corporation to so dispose of, or withdraw, its assets be exercised in fraud of the rights of dissenting stockholders. Thus in Lowe v. Pioneer Threshing Co., 70 Fed. Rep. 646, the stockholders of a corporation, by a majority vote, from which the minority dissented, authorized the directors to buy the stock of certain stockholders, and pay therefor in plant, machinery, etc., which constituted nearly all the assets and property of the corporation; but it was held that, while the corporation might buy its own stock, at least with its profits, and with the consent of the stockholders, the proposed action would be in fraud of the rights of the dissenting stockholders, and should be enjoined.

While stockholders have full benefit of the profits made by the corporation, they cannot take any portion of the corporate funds or assets until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. The agents of the company may be held liable by creditors for wasting, or otherwise withdrawing assets, which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds. For example, if the funds of a corporation are used by its treasurer to pay for its stock, purchased by him and other stockholders for themselves, with the consent of all the stockholders and directors, the treasurer thereby becomes responsible for the whole amount of the money so converted. So long as he holds the money in the treasury, it is there to answer for the debts of the corporation, if necessary, and it should be so applied so long as necessary for that purpose; but if he withdraws it, except as prescribed by law, he does so subject to the trust for the payment of corporate debts, where the money is needed for that purpose, and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act: *In re Brockway Mfg. Co.*, 89 Me. 121; 56 Am. St. Rep. 401.

Acts Affecting Stockholders.—As a stockholder's liability for unpaid stock is assets and a trust fund for the payment of creditors of the corporation (*Cushing v. Perot*, 175 Pa. St. 66; 52 Am. St. Rep. 835; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; *Shickle v. Watts*, 94 Mo. 410; *Stuart v. Hayden*, 72 Fed. Rep. 402), it is evident that to release a stockholder from his liability, without consideration, or not to enforce it, amounts, practically, to a "withdrawing" of the assets of the corporation. Any contract, therefore, between a corporation, or its agents, and a shareholder, limiting the latter's liability for stock, is void both as to creditors of the company and its as-

signee in bankruptcy: *Upton v. Tribilcock*, 91 U. S. 45. The liability of shareholders cannot be discharged by the company to the injury of creditors; as by allowing them to forfeit their stock upon paying thirty per cent on their shares: *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273. Any secret arrangement between the corporation and its shareholders whereby the responsibility of the latter is made less than it appears to be under the articles of incorporation is void as against creditors: *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797. No device will free one, who has purchased shares from a corporation for a percentage of their nominal value, from his obligation to pay creditors the residue: *Alling v. Wenzell*, 35 Ill. App. 246. As shown above, unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of creditors: *Farnsworth v. Robbins*, 36 Minn. 369; *Fogg v. Blair*, 139 U. S. 118; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; which cannot be given away or disposed of by the corporation, without consideration, or fraudulently, to the prejudice of creditors: *Fogg v. Blair*, 139 U. S. 118, 126. No by-law or resolution of the stockholders, as opposed to the rights of creditors, can authorize the release of the obligation of a solvent stockholder to pay for the stock taken by him, although the consideration of such release is the surrender of his stock: *Farnsworth v. Robbins*, 36 Minn. 369. An insolvent company's voluntary release of a stock subscription is a fraud upon its creditors, whether their claims arose before or after the stock was issued: *Carter v. Union Printing Co.*, 54 Ark. 576.

The willful destruction or diminution of any part of the trust funds of a corporation, or the diversion of the proceeds thereof, is a fraud upon creditors, and subjects its perpetrator to a suit by them, or their legal representative, for proper relief: *Stuart v. Hayden*, 72 Fed. Rep. 402. Any attempt to evade a stockholder's liability, either by issuing stock as fully paid when it is not, or by putting in property at a value grossly in excess of its real worth, or by gift, or by services, or by an agreement to render services, grossly incommensurate with their value, is void as to the public and creditors of the corporation: *Peninsular Sav. Bank v. Black Flag etc. Co.*, 105 Mich. 535, 538. A stockholder is liable for unpaid stock, whether he is a purchaser or an original subscriber: *Shickle v. Watts*, 94 Mo. 410. A subscriber for capital stock of a corporation does not, as such, sustain any direct trust relation to its creditors, but is simply and solely its debtor: *Turner v. Alabama Min. & Mfg. Co.*, 25 Ill. App. 144; *Mitchell v. Beckman*, 64 Cal. 117. He cannot escape liability for existing debts by transferring his stock: *Jackson v. Meek*, 87 Tenn. 69; 10 Am. St. Rep. 620; nor can a subscription to capital stock in a corporation be rescinded so as to affect the rights of its creditors while the corporation is insolvent: *Putnam v. New Albany*, 4 Biss. 365. Mere mismanagement of the affairs of the corporation does not release a stockholder from his obligation to pay for the stock subscribed by him: *Hards v. Platte Valley Imp. Co.*, 46 Neb. 709.

In advance of the final distribution of the estate of a corporation, where it has ceased to exist, the stockholders cannot, even unanimously, agree to a distribution or division of any part of the capital

stock of the corporation which the directors are forbidden to make: *Kohl v. Lillienthal*, 81 Cal. 378. A mutual benefit association cannot withdraw its reserve fund so as to deprive its members of the benefit and protection thereof: *McClure v. Levy*, 79 Hun, 285.

If the directors of a corporation waste and lose its property, the stockholders have an indirect remedy, through an action by the corporation, in its corporate capacity, to obtain redress for injuries to the common property by the recovery of damages: *Smith v. Hurd*, 12 Met. 371; 46 Am. Dec. 690. A stockholder in an incorporated bank may maintain a bill in equity against the corporation, the directors, and other stockholders, upon its being alleged that they have been guilty of fraudulent practices, in depreciating the value of the stock, suspending banking operations, refusing cash payments, and withholding dividends. In such a bill, the complainant may join individual stockholders with the corporation, and may have an accounting of the stock and funds, and a restoration of whatever may have been fraudulently withdrawn from the common stock: *Taylor v. Miami Exporting Co.*, 5 Ohio, 162; 22 Am. Dec. 785. So, a minority of the stockholders of a corporation may maintain a suit in equity against the directors, against the corporation, and against all others, whether individuals or corporations, assisting them or confederating with them to restrain such corporation and the directors thereof from doing acts which amount to a violation of charters, or to prevent any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, if the acts intended to be done create what, in law, is denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an implied violation of a corporate franchise, or the denial of a right growing out of it, for which there is no adequate remedy at law: *March v. Eastern R. R. Co.*, 40 N. H. 548; 77 Am. Dec. 732. Stockholders may also maintain a bill, to which the corporation is a party defendant, against the remaining stockholders who have a majority of the stock and constitute a majority of the directors, where the bill charges such directors with fraudulently combining to appropriate the funds of the corporation for their individual benefit, destroying the business and depreciating the stock, improperly withdrawing the funds of the corporation, concealing their amount and refusing to permit it to be charged on the books, or to permit suits to be brought for its recovery, and threatening to sell the corporation property for less than its value, and to waste and destroy it for their individual benefit, and praying for a disclosure and an account, the payment of whatever may be due to the corporation, and an injunction against selling or wasting its property: *Sears v. Hotchkiss*, 25 Conn. 171; 65 Am. Dec. 557. Every stockholder or member of a corporation is entitled to sue in equity to prevent any departure, from the chartered purposes of a corporation, by the action of the majority: *Ashton v. Dashaway Assn.*, 84 Cal. 61. As to when stockholders may maintain suits against officers and agents of corporations to call them to account,

or to set aside their acts, see monographic note upon that subject to *Hersey v. Veazie*, 41 Am. Dec. 367-370.

Other Forms of Withdrawal.—A benevolent association, incorporated to promote the cause of temperance, and not for pecuniary profit, is not authorized to divide any part of the corporate property or funds among its members; and an action to prevent or set aside such a plain misappropriation of the corporate funds may be maintained by any member of such association: *Ashton v. Dashaway Assn.*, 84 Cal. 61. If the stock and entire assets of an insurance company are transferred to another insurance company in which the policy holders reinsure their risks, and which company assumes the liabilities of the former company, and such absorption of one company by the other is unlawful, and results in great loss to policy holders and creditors of the former company, a court will hold, in an action by the receiver of the former company against the administrator of a director thereof, that the defendant's intestate and associate directors were liable to the full extent of the damage caused by such misapplication and waste of the corporate funds, and were not relieved from liability by the fact that the transactions in question were carried out under the advice of able and experienced counsel: *Pierson v. Cronk*, 26 Abb. N. C. 25. So, if an old corporation, being indebted, conveys all its property, upon a nominal or grossly inadequate consideration, without providing for its creditors, to a new company brought into existence through the agency of the officers of the old company, and for the sole purpose of such transfer, such disposition of the assets is fraudulent and void, as against creditors of the company: *Vance v. McNabb etc. Co.*, 92 Tenn. 47.

Any arrangement which has the effect of withdrawing the capital of an incorporated company, and turning it over to the stockholders, except as provided by law, is violative of a statute forbidding the trustees "to divide, withdraw, or in any way, pay to the stockholders, or any of them, any part of the capital stock of the company," and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit; and "capital stock," in such a statute, means the capital of the corporation on which it transacts business, whether it consists of money, property, or other valuable commodities: *Martin v. Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365. If stockholders in a corporation, about the time of its dissolution, take to themselves a steamboat, the property of the corporation, which they sell and dispose of to their own use, they are liable, pro rata, according to the stock held by them, to pay a creditor's claim which existed when they took the property: *Hastings v. Drew*, 50 How. Pr. 254.

In *Dillon v. Commercial Cable Co.*, 87 Hun, 444, the promoters of the corporation secured an agreement with it whereby eight hundred out of a total issue of one thousand shares of preferred stock were to be issued to them; and such eight hundred shares were to be entitled to fifteen per cent of the net profits of the corporation. These shares were subsequently canceled by consent of the promoters, but upon the express, though secret, arrangement made by the main promoter that the promoters should still have the same rights and advantages as if no cancellation had taken place. The capital

stock was subsequently increased from four millions to six millions of dollars, and later to ten millions, and sold to third persons. One of the promoters then brought an action to compel the issue to him of his portion of the preferred stock, but the court refused to enforce the "scheme" to the injury of innocent purchasers of the capital stock as increased.

The promoters of a bridge company, the only subscribers to its stock, agreed to assign to the complainant a certain interest therein. Two of the promoters, officers of the company, subsequently made, on its behalf, a contract with a construction company, whereby the latter company, in consideration of one million dollars in bonds of the bridge company and the entire one million five hundred thousand dollars of the bridge company's stock subscribed, agreed to construct the bridge, furnish money to acquire land for approaches, and return to the shareholders two hundred thousand dollars of the amount subscribed, the contract reciting that the one million five hundred thousand dollars of the bridge company's capital stock was used by the bridge company with the consent of the subscribers. At the same time, however, such two officers agreed with the construction company, in consideration of three hundred thousand dollars in the bridge company's bonds, and of six hundred thousand dollars in the bridge company's stock, to procure and convey title to said lands needed for right of way. The construction contract was reported by them to their board of directors, but nothing was said about the contract concerning the right of way. The two officers afterward procured the necessary lands, using only the bonds for that purpose, and made a substantial profit in the transaction, as they had expected to do. The complainant was a holder of stock in the construction company. It turned out that the two officers so arranged the contracts that they secured for their individual benefit six hundred thousand dollars of the stock, as an apparent profit of the right of way contract, when, in fairness, it should have been added to the two hundred thousand dollars returned to the original stock subscribers in the construction contract; and the court did not hesitate to hold that there was such a direct trust relation between the two officers, on the one hand, and the stock subscribers on the other, in the use of the stock to secure the erection of the bridge, that the former were directly accountable to the latter for the six hundred thousand dollars of stock thus improperly diverted to the individual benefit of the trustees: *Krohn v. Williamson*, 62 Fed. Rep. 869.

A railroad company, having purchased a majority of the stock of a canal company, elected for the latter a board of directors in their own interest; and then, with the assent of such board, appropriated the entire property, including the canal, of the canal company as a railroad track, paying a price agreed on between the directors of the two companies, which was far below the value of the property. It was held that the shareholders and creditors of the canal company could not, after the road had been completed, reclaim the property or enjoin its use; but could compel the railroad company to pay them the difference between the value of the property and the price which the railroad company paid for it: *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95.

The directors of a corporation act in a fiduciary capacity, and are trustees of the stockholders: *Farmers' etc. Bank v. Downey*, 53 Cal. 466; 31 Am. Rep. 62; *Holder v. Lafayette etc. Ry. Co.*, 71 Ill. 106; 22 Am. Rep. 89. Courts of equity will not, therefore, permit them, in the exercise of their duties as directors, to make a profit for themselves to the exclusion of the other stockholders. They cannot thus withdraw, or appropriate, assets of the corporation in which the other stockholders have the right to participate: *Farmers' etc. Bank v. Downey*, 53 Cal. 466; 31 Am. Rep. 62; *Schetter v. Southern Or. Co.*, 19 Or. 192. A director of a corporation cannot deal with the corporate property for his own benefit, or use it for his individual purpose: *Hoffman v. Relchert*, 31 Ill. App. 558; *Schetter v. Southern Or. Co.*, 19 Or. 192. Directors of a corporation have no right to withdraw corporate assets by voting themselves a salary, unless this is authorized in the by-laws of the corporation, or otherwise: *Cheaney v. Lafayette etc. Ry. Co.*, 68 Ill. 570; 18 Am. Rep. 584; *Holder v. Lafayette etc. Ry. Co.*, 71 Ill. 106; 22 Am. Rep. 89; *Kelsey v. Sargent*, 40 Hun, 150; *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235; *Fougeray v. Cord*, 50 N. J. Eq. 185; *In re Newman* [1895], 1 Ch. 674. It is a fraud for them to vote extravagant compensation to themselves: *Fougeray v. Cord*, 50 N. J. Eq. 185. If the secretary and treasurer of a corporation fraudulently appropriates to his own use, under the guise of salary, large sums of money belonging to the corporation, he is liable for interest on the amount of the assets so withdrawn from the corporation and appropriated: *Wayne Pike Co. v. Hammons*, 129 Ind. 368; and, if the directors of a corporation apply its funds to discharge their own indebtedness, or wrongfully to pay an outgoing president a salary for past services not agreed to be paid until after their performance, they will be liable to the creditors of the company for the amount of the funds thus withdrawn and misapplied: *Ellis v. Ward*, 137 Ill. 509. Company assets cannot be withdrawn for the purpose of making presents: *In re Newman* [1895], 1 Ch. 674. The executive committee of a company have no right to vote money to themselves, in addition to their regular compensation, for their services as promoters and originators of the company, or in consideration of the members retiring from such committee; and the grant of large sums for such purposes constitutes a good ground for the appointment of a receiver to recover back such moneys for the benefit of the company: *Blatchford v. Ross*, 54 Barb. 42; 5 Abb. Pr. N. S., 434; 37 How. Pr. 110. Allowances made by the directors of a corporation, in their own favor, are voidable at the election of the corporation, or at the election of a minority of the stockholders, if the corporation refuses to avoid them, without regard to whether they were fair and honest or not: *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303. The secretary of a mining company has no authority, by virtue of his office, to make an assignment of the promissory notes of the company: *Blood v. Marcuse*, 38 Cal. 590; 99 Am. Dec. 435. Neither can the treasurer of a corporation, by virtue of his office, assign the accounts of the corporation: *Juillard v. Walker*, 54 Ill. App. 517.

The directors of a corporation cannot withdraw corporate assets

from creditors by allowing the foreclosure of a mortgage, and then bidding in the property themselves: *Cahill v. People's Slaughter House etc. Co.*, 47 La. Ann. 1483. The ordinary and usual powers of directors do not authorize them to lease the corporate property for nine hundred and ninety-nine years: *Metropolitan Elevated R. R. Co. v. Manhattan Elevated R. R. Co.*, 11 Daly, 373, 470-479; 14 Abb. N. C. 103, 234-244. A corporation, which is in debt, cannot transfer its entire property by lease, so as to withdraw the application of it, at its full value, from the satisfaction of company debts. If such a transfer is made, there are circumstances under which a court of equity will decree the payment of a judgment debt of the lessor by the lessee; and if the lessee of a railroad receives money to be expended on it, but misappropriates the money by spending it on other property, he cannot afterward deprive a creditor of the lessor of an equitable right growing out of the misappropriation, by spending an equal amount of his own money on the leased property: *Chicago etc. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276.

As the directors of a corporation hold to stockholders the relation of trustee and cestui que trust, such directors cannot purchase the property of the corporation which they represent, and such a sale is voidable as a matter of law, without proof of fraud or unfair dealing, at the option of the cestui que trust: *Crescent City Brewing Co. v. Flanner*, 44 La. Ann. 22. A director of a corporation cannot act in the capacity of buyer from the company and at the same time as its agent in making the sale: *Crymble v. Mulvaney*, 21 Colo. 203. Corporations and their officers cannot divert or withdraw corporate property from the payment of debts; and if the diversion or withdrawal charged is a sale of the corporate property to one of the directors taking part in the transaction as both buyer and seller, the directors taking part in the sale will be answerable to creditors for what is lost where the sale was not made in good faith, or did not produce the full value of the property: *Wilkinson v. Bauerle*, 41 N. J. Eq. 635. Directors of a corporation commit a fraud, if they sell and convey land of the corporation for one-tenth of its value, for the purpose of defrauding a portion of the stockholders: *Woodroof v. Howes*, 88 Cal. 184. The case of *Du Puy v. Transportation etc. Co.*, 82 Md. 408, presents a case of "bold and unblushing fraud" in juggling with the assets of corporations. There the promoters of a corporation, by misrepresentations as to its assets and income, and as to the names of its directors, induced a sale of shares of stock, the purchasers believing that they were buying from the company. Soon afterward, the directors passed a resolution, ordering the affairs of the corporation to be wound up, and the corporate assets and property to be sold and disposed of, and the proceeds to be distributed according to law to those entitled thereto. In pursuance of this resolution, a deed of trust was executed. The trustee in this deed released the chief promoter from his obligation to transfer certain valuable property to the company in consideration of the latter's releasing the company from its obligation to issue shares of stock subscribed for by him. Apparently, the company was not insolvent, and the trustee reported to the court a fictitious sale of the remaining as-

sets, which was ratified. As the real purpose of the "enterprising and speculative" promoters was to get all the money they could, and then dismantle the company of whatever assets it had, and then wind it up, the deed of trust was declared void, and the sale made by the trustee a sham. It was, therefore, ordered that a receiver be appointed to recover the assets of the corporation so withdrawn.

A corporation may, however, turn out its assets to secure the payment of money borrowed: *Clark v. Titcomb*, 42 Barb. 122; and the fact that the president of a corporation receives, as part of the consideration for the sale of its property, a note, the proceeds of which, when paid, he uses to pay a debt of the corporation, for which he is personally liable, is not such a withdrawal or appropriation of its funds as amounts to a fraud upon other creditors: *Parsons v. Hatton-Snowden Co.*, 58 Ill. App. 272.

Assignment for Benefit of Creditors — Dissolution. — A corporation may assign its assets for the benefit of creditors, if done in good faith: *Ringo v. Biscoe*, 18 Ark. 563; *Hopkins v. Gallatin Turnpike Co.*, 4 Humph. 402; *Descombes v. Wood*, 91 Mo. 196; 60 Am. Rep. 239; *Hutchinson v. Green*, 91 Mo. 367; *Vanderpoel v. Gorman*, 140 N. Y. 563; 37 Am. St. Rep. 601; but an assignment for the benefit of particular creditors is a fraudulent conveyance, and a sufficient foundation for insolvency proceedings against the corporation: *Steel Edge etc. Co. v. Manchester Sav. Bank*, 163 Mass. 252.

A disposal of all the property of a corporation does not end or dissolve it: *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; and the directors after dissolution continue to be the trustees of the creditors and stockholders for certain purposes: *Clark v. San Francisco*, 53 Cal. 306. Where they conduct its business and receive moneys belonging to it after the expiration of the term for which it was incorporated, they will be held to an account, in a court of equity, on the dissolution and final liquidation of the affairs of the corporation: *Mason v. Pewabic Min. Co.*, 133 U. S. 50. And, after the filing of a bill for dissolution, and the service of summons, the corporation has no power to make a valid sale of its assets and to prefer creditors, for the law contemplates that the assets of the corporation shall then be distributed pro rata among creditors, where there is not enough to pay all in full: *Bailey v. Snyder*, 61 Ill. App. 472.

Insolvency — Preferring Creditors. — A corporation is insolvent, if its assets are insufficient to pay its debts, and it has ceased to do business, or has taken, or is about to take, a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its financial embarrassment is such that early suspension and failure must ensue: *Corey v. Wadsworth*, 99 Ala. 68, 78; 42 Am. St. Rep. 29. Insolvency means a general inability to pay obligations as they become due in the regular course of business: *French v. Andrews*, 81 Hun, 272; *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605; *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756. But, a corporation, though insolvent, may, where it has possession and control of its property, and in the absence of fraud or statutory restriction, prefer a bona fide creditor by a deed of trust on its property, or by a mortgage, sale, assignment, or

otherwise: Waggoner-Gates etc. Co. v. Ziegler-Zalss etc. Co., 128 Mo. 473; Sells v. Rosedale Grocery etc. Co., 72 Miss. 590; Alberger v. Bank, 123 Mo. 313; Gottlieb v. Miller, 154 Ill. 44; Warren v. First Nat. Bank, 149 Ill. 9; O'Donnell v. Illinois Steel Co., 53 Ill. App. 314; French v. Andrews, 81 Hun, 272; Julliard v. Walker, 54 Ill. App. 517; Rollins v. Shaver Wagon etc. Co., 80 Iowa, 380; 20 Am. St. Rep. 427; Sabin v. Columbia Fuel Co., 25 Or. 15; 42 Am. St. Rep. 756; Ringo v. Biscoe, 13 Ark. 563; Gould v. Little Rock etc. Ry. Co., 52 Fed. Rep. 680; Blair v. Illinois Steel Co., 159 Ill. 350; West v. Hanson Produce Co., 6 Colo. App. 467; Illinois Steel Co. v. O'Donnell, 156 Ill. 624; 47 Am. St. Rep. 245; Johnson Co. v. Miller, 174 Pa. St. 605; 52 Am. St. Rep. 833; Pyles v. Furniture Co., 30 W. Va. 123; Meyer v. Folding Chair Co., 130 Mo. 188; Varnum v. Hart, 119 N. Y. 101; Hawkins v. Glenn, 131 U. S. 319; J. W. Butler Paper Co. v. Robbins, 151 Ill. 588. Contra, Conover v. Hull, 10 Wash. 673; 45 Am. St. Rep. 810; Adams etc. Co. v. Deyette, 5 S. Dak. 418; 49 Am. St. Rep. 887; Rouse v. Merchants' Nat. Bank, 46 Ohio St. 496; 15 Am. St. Rep. 644; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Tex. 143; Floraheim etc. Co. v. Wettermark, 10 Tex. Civ. App. 102.

In other words, the mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors: Alberger v. National Bank, 123 Mo. 313; Warren v. First Nat. Bank, 149 Ill. 9; O'Donnell v. Illinois Steel Co., 53 Ill. App. 314; Meyer v. Folding Chair Co., 130 Mo. 188; O'Bear Jewelry Co. v. Volfer, 106 Ala. 205; 54 Am. St. Rep. 31. The doctrine that the entire property of an insolvent corporation constitutes a trust fund which must be administered by the directors for the proportionate benefit of all creditors, without preference, can apply, if at all, only when that point is reached in the affairs of the corporation where its managers find themselves obliged to deal with its assets in view of a suspension. It does not apply where the corporation is, in good faith, engaged in its usual business, although it may, in fact, be insolvent: Sabin v. Columbia Fuel Co., 25 Or. 15, 31; 42 Am. St. Rep. 757, and monographic note thereto on assets of corporations as trust funds.

Some cases hold that even directors and other officers and shareholders of a corporation may be preferred as creditors, although the persons thus preferred may have voted for their own preferences: Warfield v. Marshall County Canning Co., 72 Iowa, 666; 2 Am. St. Rep. 263; Schufeldt v. Smith, 131 Mo. 280; 52 Am. St. Rep. 628; Brown v. Grand Rapids etc. Furniture Co., 58 Fed. Rep. 286; that directors may give preference to a relative: Blair v. Illinois Steel Co., 159 Ill. 350; that preference may be given to debts guaranteed by directors: Blair v. Illinois Steel Co., 159 Ill. 350; First Nat. Bank v. Dovetail etc. Co., 143 Ind. 534; Brown v. Grand Rapids etc. Furniture Co., 58 Fed. Rep. 286; and that preference may be given to claims of creditors not stockholders or directors, where they are secured by the indorsement of the directors and part of the stockholders: Henderson v. Indiana Trust Co., 143 Ind. 561; Waggoner-Gates etc. Co. v. Ziegler-Zalss etc. Co., 128 Mo. 473; Brown v. Grand Rapids etc. Co., 58 Fed. Rep. 286. But the prevailing rule is, that the

property of an insolvent corporation is a trust fund in such a sense as to preclude the directors and officers of the corporation from dealing with it in such a manner as to secure preferences for themselves, and that such a preference is fraudulent and void as to unsecured creditors. They cannot use up the assets of the corporation in the payment of their own claims to the exclusion of other creditors: *Warren v. First Nat. Bank*, 149 Ill. 9; *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291; *O'Donnell v. Illinois Steel Co.*, 53 Ill. App. 314; *Olney v. Conanicut Land Co.*, 16 R. I. 597; 27 Am. St. Rep. 767; *Howe etc. Co. v. Sanford etc. Co.*, 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7; *Goodyear Rubber Co. v. George D. Scott Co.*, 96 Ala. 439; partly overruled in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; 54 Am. St. Rep. 31; *Corey v. Wadsworth*, 99 Ala. 68; 42 Am. St. Rep. 29; *Williams v. Jones*, 23 Mo. App. 132; *McNeill v. Lacey*, 33 Ill. App. 310; *Roseboom v. Whittaker*, 38 Ill. App. 442; *Bradley v. Farwell*, 1 Holmes, 433; *Adams v. Kehlor Milling Co.*, 35 Fed. Rep. 433; 36 Fed. Rep. 212; *Smith v. Putnam*, 61 N. H. 632; *Ingwersen v. Edgecomb*, 42 Neb. 740; *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229; *Northwestern etc. Ins. Co. v. Cotton Exchange Co.*, 70 Fed. Rep. 155; *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605. Nor can a preference be granted to the estate of a deceased director and president of the corporation: *Adams v. Kehlor Milling Co.*, 35 Fed. Rep. 433; 36 Fed. Rep. 212.

An unauthorized transfer of corporate property by a director and managing officer of an insolvent corporation, to discharge a debt of the corporation, the payment of which the officer has guaranteed, can have no other effect than to place the property in trust for the equal benefit of all the creditors of the corporation: *Goodyear Rubber Co. v. George D. Scott Co.*, 96 Ala. 439. Compare *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; 54 Am. St. Rep. 31. So, a judgment note given by an insolvent corporation to secure an account against it, assigned by its directors to a third person having knowledge of the facts, is a withdrawal and appropriation of the assets of the corporation to the use of such directors in preference over other creditors, and, therefore, invalid: *Gottlieb v. Miller*, 154 Ill. 44.

The assets of an insolvent corporation, including moneys due from a shareholder on his subscription to its capital stock, constitute a trust fund for the payment of its creditors; that is, the equitable interest of stockholders in the property of an insolvent corporation, and their conditional liability to creditors place the property "in a condition of trust," first for creditors, and then for stockholders; but "it is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such; for the direct benefit of either creditor or stockholder": *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 383. The doctrine means "that the property must first be appropriated to the payment of the debts of the company, before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated

to pay that indebtedness. Such a doctrine has no existence": *Fogg v. Blair*, 133 U. S. 534, 541, per Mr. Justice Field. Hence, the property of an insolvent corporation "is, doubtless, a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders": *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 381, per Mr. Justice Brewer; *Childs v. N. B. Carlstein Co.*, 76 Fed. Rep. 86; *Ames v. Union Pac. Ry. Co.*, 74 Fed. Rep. 335; *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605; *In re Brockway Mfg. Co.*, 89 Me. 121; 56 Am. St. Rep. 121; *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; 49 Am. St. Rep. 943; *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615; but we apprehend that it is only when a court, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an insolvent corporation that its assets may be properly said to be a trust fund for its creditors, as "it is never understood that there is a specific lien or a direct trust": *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 385; *Worthen v. Griffith*, 59 Ark. 562; 43 Am. St. Rep. 50; *Richardson v. Green*, 133 U. S. 30, 44.

As the assets of a corporation are a trust fund for the benefit of creditors, the directors of an insolvent corporation, being trustees for the creditors, cannot give away or sacrifice the property, even with the consent of the stockholders: *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605; and the receivers of property of an insolvent corporation, in their hands for administration, cannot lawfully withdraw or divert its income or its property from its creditors and stockholders for the benefit of the creditors or stockholders of another corporation: *Ames v. Union Pac. Ry. Co.*, 74 Fed. Rep. 335.

As the assets of an insolvent company, including the moneys due from a shareholder on his subscription to its capital stock, constitute a fund for the payment of its creditors, he cannot, to their prejudice, be released from his liability by any arrangement between it and him which is not fair, and honest, and for a valuable consideration: *County of Morgan v. Allen*, 103 U. S. 498, 508. Unless there was good faith in valuing property taken by an insolvent corporation for stock, the shareholders must respond to the creditors for the par value, less the actual value of the property taken: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133; affirming 53 Ill. App. 82.

The property of a public corporation cannot be sold by it or its creditors piecemeal so as to stop its operations or defeat the object of its charter: *Johnson Co. v. Miller*, 174 Pa. St. 605; 52 Am. St. Rep. 833. A transfer of property by an insolvent corporation, ultra vires, is void as against a nonassenting stockholder: *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336. A state law which has the effect of withdrawing and appropriating the assets of a state bank to pay the debts of the state, to the prejudice of billholders and creditors of the bank, violates the constitutional prohibition against a law which impairs the obligation of a contract, and is void: *Barings v. Dabney*, 19 Wall. 1; *Curran v. State*, 15 How. 304.

While an insolvent corporation may prefer creditors, its officers cannot so withdraw, manipulate, or juggle with its assets as to defraud creditors; and any conveyance of its property, without authority of law, in fraud of its creditors is void as to them: *Richardson v. Green*, 133 U. S. 30, 44. The knowledge of a preferred creditor of an insolvent corporation that the concern was insolvent when the preferment was made seems to taint such preferences with fraud: *Sweeny v. Sugar Refining Co.*, 30 W. Va. 446; 8 Am. St. Rep. 88; *Compton v. Schwabacher*, 15 Wash. 306; *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40; *Chicago etc. Bridge Co. v. Fowler*, 55 Kan. 17; *Mish v. Main*, 81 Md. 36.

A transfer of corporate assets, made in contemplation of insolvency, is void as to creditors: *National Broadway Bank v. Wessel Metal Co.*, 59 Hun, 470; and a sale of the assets of an insolvent corporation, made by its directors, for the purpose of hindering, delaying, or defrauding its creditors, is void as to them: *Ashhurst's Appeal*, 60 Pa. St. 290. A transfer by a corporation of all its assets, which has the effect of terminating its regular business, and which is made and accepted by the transferee for that purpose, is illegal as against creditors of the corporation: *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615; *Florsheim etc. Co. v. Wettermark*, 10 Tex. Civ. App. 102. If the president and directors of a corporation have indorsed its notes, and, after its insolvency, confess judgment in favor of the holders of such notes for the purpose of saving themselves from liability as indorsers, and the property of the corporation is levied upon and sold to satisfy such judgments, it amounts to a misapplication of corporate assets: *Sprague-Brimmer Mfg. Co. v. M. J. Murphy etc. Co.*, 26 Fed. Rep. 572. A sale of the entire property of an insolvent railroad company, under an arrangement whereby the entire purchase price is distributed among the stockholders, is fraudulent and void, as against creditors who are unsecured, if they are known by both parties to the sale to exist: *Chattanooga etc. R. R. Co. v. Evans*, 66 Fed. Rep. 809. A mortgage of all such solid assets of a corporation as would furnish "grounds of confidence" to creditors is, under some circumstances, void as to existing creditors, though it might be valid as to subsequent creditors: *Central Trust Co. v. East Tennessee Land Co.*, 71 Fed. Rep. 353. A corporation was engaged in the manufacture of bicycles, and the directors thereof made a sale of all the property of the corporation to its president, who gave to each director his personal notes, payable in bicycles, for the shares of stock held by the directors respectively, at the rate of twenty per cent of the par value. The defendant, one of the former directors, received under this arrangement, from the president, a number of bicycles which were made from material on hand at the time of the transfer. The hopeless insolvency of the corporation was known to the defendant at the time of the sale of the assets to the president, and the execution of his notes. Subsequently, the plaintiff was appointed receiver of the corporation, and sued in replevin to obtain the bicycles from the defendant. The transaction was held to be a mere contrivance to deprive creditors of the corporation of their rights. It was, there-

fore, considered that it was the duty of the receiver to avoid and nullify it, and the action of replevin was pronounced an appropriate remedy: *Mish v. Main*, 81 Md. 36. Thus, it is seen that while a corporation may prefer creditors, its power to sell, dispose of, and transfer its estate is not altogether without limitation: *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep. 496.

Pursuit of Assets, Withdrawn.— Upon general principles of law, a creditor of an insolvent corporation can pursue its assets into the hands of all other persons except bona fide creditors or purchasers: *Curran v. State*, 15 How. 304; *Mumma v. Potomac Co.*, 8 Pet. 280. Hence, if the assets of a corporation have been wrongfully withdrawn by its officers and disposed of without consideration, or fraudulently, they may be pursued by creditors: *Fogg v. Blair*, 139 U. S. 118; *Clark v. Bever*, 139 U. S. 96; *Wright v. Petrie*, 1 Smedes & M. Ch. 282; though it must be observed that the equitable right to follow and reclaim property wrongfully appropriated by another ceases when it is dissipated, and is no longer, in any way, apparent in the estate of such another: *Slater v. Oriental Mills*, 18 R. I. 352. A bill by the creditors of an insolvent corporation, alleging a fraudulent combination and collusion between the assignee and debtors of the institution to injure and defeat its creditors justifies the interposition of a court of equity: *Stocks v. Leonard*, 8 Ga. 511. The directors and managers of a corporation, who control it, are trustees for the stockholders, and they, as well as others who, with knowledge of the misappropriation of the effects of the corporation, aid them in withdrawing and diverting the corporate property, are liable to the parties injured: *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40.

A shareholder in a corporation who has transferred his stock to avoid liability to creditors is still liable: *National Bank v. Case*, 99 U. S. 628; *Visalla etc. R. R. Co. v. Hyde*, 110 Cal. 632; 52 Am. St. Rep. 136; *National Carriage Mfg. Co. v. Story etc. Commercial Co.*, 111 Cal. 531. Capital stock may be followed as a trust fund for the benefit of creditors into the hands of any person not a bona fide purchaser, and such person may be held as trustee to the extent of the trust fund in his hands: *Bruner v. Brown*, 139 Ind. 600, 603; *New Albany v. Burke*, 11 Wall. 96, 106; *Sawyer v. Hoag*, 17 Wall. 610, 620; *Clark v. Bever*, 139 U. S. 96; note to *Commercial Nat. Bank v. Burch*, 33 Am. St. Rep. 344. If a shareholder in a failing national bank transfers his shares therein for the purpose of escaping his individual liability, and is, for any reason, unable to respond as promptly and effectually as his ownership thereof, and liability thereunder, would require, he commits a fraud upon the creditors of the bank, renders his transfer voidable at their election, and leaves himself subject to the individual liability imposed by the ownership of the stock, if the creditors elect to pursue him: *Stuart v. Hayden*, 72 Fed. Rep. 402. If the capital stock and other property of a corporation is, upon its dissolution, divided among the stockholders, leaving any debt unpaid, every stockholder who receives his share of capital stock out of the corporate property, is liable to contribute, pro rata, to the discharge of such debt out of the prop-

erty or its proceeds in his hands: *Hastings v. Drew*, 50 How. Pr. 254. No secret agreement between a corporation and its stockholders will be allowed to stand in the way of a creditor who is seeking to enforce his rights: *Turner v. Alabama etc. Mfg. Co.*, 25 Ill. App. 144. If a corporation cancels a person's stock, through negligence, and issues certificates for it to a third party, the true owner may proceed against the corporation to obtain the replacement of his stock, or its value, without pursuing the purchaser or those who hold under him: *St. Romes v. Levee Steam etc. Co.*, 127 U. S. 614.

Officers and stockholders of an insolvent corporation cannot lawfully divide and distribute the capital and assets among themselves to the exclusion of creditors. If they do this, any excluded creditor is entitled to pursue such assets into the hands of any member of the corporation, or other person, who has taken them with full knowledge of the facts. If the property has passed out of their hands, they must account to the excluded creditors and contribute, pro rata, to the extent of the fund so withdrawn and misapplied: *Chicago etc. Bridge Co. v. Fowler*, 55 Kan. 17. Directors must account for profits they make out of the use of corporate assets: *Ward v. Davidson*, 89 Mo. 445; as for the sale of bonds: *Widrig v. Newport Street Ry. Co.*, 82 Ky. 511. Creditors of a corporation may pursue property transferred by it without consideration, and force the assignee thereof to account for it: *Wright v. Petrie*, 1 Smedes & M. Ch. 282. If those who have the full and absolute control of the affairs of an insolvent corporation wrongfully withdraw its assets and misappropriate them so as to put them beyond the reach of creditors, the latter may, though the claim of each is separate and distinct from those of all the others, unite in an equitable petition for the purpose of subjecting the wrongdoers to individual liability, because of such withdrawal and misappropriation, and obtain an accounting from them for the assets thus misappropriated: *Ellis v. Pullman*, 95 Ga. 445. A railroad company which has absorbed the property of a canal company, at far below its actual value, may be required to account for its additional value: *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95, cited supra.

If the property of a corporation has been fraudulently conveyed to a new company, without provision being made for creditors of the old company, they may follow the assets in the hands of the new company, if the rights of innocent purchasers have not intervened: *Vance v. McNabb etc. Co.*, 92 Tenn. 47. Although a stockholder in a corporation has a right to purchase the corporate property at public sale (*Price v. Holcomb*, 89 Iowa, 123), the law will not permit a director of an insolvent corporation to purchase all of its assets, or by the purchase of all its assets, render the corporation insolvent, at an execution sale to which he is not a party for a less consideration than its value, without requiring him to account for the property or its value. If he does so purchase the property, and refuses to account, he is chargeable with its value, and with the profits or interest therefrom as a trust fund for the benefit of the corporation, its creditors and shareholders; and if he bought the property for much less than its value, he must account for the difference:

Tobin Canning Co. v. Fraser, 81 Tex. 407. If the president of a company takes a deed to himself for a debt owed it by the grantor, and erects improvements on the property at the company's expense, afterward charging his own account with such debt and expenditures, a trust results to the company in such property: **Palmetto Lumber Co. v. Risley**, 25 S. C. 309. So, a sole stockholder in a corporation cannot secure the transfer to himself of all the property of the corporation so as to deprive a creditor of the corporation of the payment of his debt: **Angle v. Chicago etc. Ry. Co.**, 151 U. S. 1.

The transfer, by an insolvent corporation, of all its property to the mortgagee thereof is not such a preference over unsecured creditors as to constitute a fraudulent conveyance: **Klosterman v. Mason County etc. R. R. Co.**, 8 Wash. 281; but a general creditor may invoke the aid of equity to set aside a preference invalid on account of the hopeless insolvency of the corporation, and to compel the proper distribution of the corporate assets; and, if there is danger of a waste or improper disposition of such assets he may have an injunction: **Kankakee Woolen Mill Co. v. Kampe**, 38 Mo. App. 229. While creditors may accept preferences, if given in good faith, they cannot do so, in consideration of promises, express or implied, to further the plans of the debtor to hinder, delay, or defraud other creditors: **Butler Paper Co. v. Robbins**, 151 Ill. 588, 632. As said by Mr. Justice Baker, in the case last cited: "The law favors the diligent and active creditor, but it warns him that he can enter into no bargain or plan, the object of which is not the collection of his own debt solely, but in part the defeat of some one else equally worthy with himself." Hence, if the president of a private corporation holds a controlling share of the stock, and, being empowered to borrow money, sells his wife's stock to the company, as her agent, and gives her judgment notes payable on demand, upon which judgment is confessed in her favor, and under which all the corporate property is sold, such sale will be set aside upon a bill filed by the stockholders and creditors, where the proof shows that the president's object in the transaction was to break down the company and to transfer such property fraudulently to his wife, and that he had conspired with the secretary to "wreck" the corporation: **J. W. Butler Paper Co. v. Robbins**, 151 Ill. 588. One who permits his judgment claim against an insolvent corporation to become blended with a debt due to a director of it occupies no better position than the director, and it will be postponed in favor of a second judgment, even though the creditor in whose name it was taken has a bona fide claim covered by part of such judgment: **Atwater v. American Exchange Nat. Bank**, 152 Ill. 605. A court of equity has ample power, upon a creditor's bill, to reach corporate assets in the hands of any person who is holding them without legal right, and to apply them in satisfaction of the claims of judgment creditors: **Adams v. Cross Wood Printing Co.**, 27 Ill. App. 813.

If the assets of an insolvent corporation are in process of being fraudulently withdrawn and misapplied, to the injury of creditors, who are without other adequate means of relief, it becomes the duty of the court to appoint a receiver: **Doe v. Northwest etc. Transporta-**

tion Co., 64 Fed. Rep. 928. So, where the officers of a corporation allow a fraudulent mortgage to be foreclosed for the purpose of "wiping out" its assets: *State v. Second Judicial District Court*, 15 Mont. 324; 48 Am. St. Rep. 682. Upon the appointment of a receiver of an insolvent corporation, the title to its property is, of course, divested by force of law: *Board of Freeholders v. State Bank*, 30 N. J. Eq. 311.

Equity has no power, at the instance of a stockholder, to take property from the assets of a corporation, on the ground that the corporation is not authorized to acquire and hold it, and to divide it among the stockholders: *Burden v. Burden*, 8 N. Y. App. Div. 160; and a creditor of a corporation cannot maintain a suit to reach assets withheld by it from the payment of debts, where it affirmatively appears that a receiver is in charge of the corporation, administering its effects: *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 534. The assets of an insolvent corporation cannot be followed, by its creditors, as a trust fund, in the hands of an attaching creditor: *White etc. Mfg. Co. v. Henry B. Pettes Imp. Co.*, 30 Fed. Rep. 834. Equity will not relieve a stockholder against the unauthorized acts of a corporation to which he has consented and in which he has participated: *Burden v. Burden*, 8 N. Y. App. Div. 160. A stockholder who has participated in an appropriation of assets and consented to a distribution thereof is estopped from claiming that they should be applied to the payment of corporate debts: *Bank of Fort Madison v. Alden*, 129 U. S. 372. A defendant cannot be required to account for corporate assets unless it is shown that he has withdrawn something from the funds of the company: *Christensen v. Illinois etc. Bridge Co.*, 52 Hun, 478; and, where a director is charged with "wrecking" a bank, there is no necessity for an accounting by him, unless it is shown that he has some property which belonged to the corporation: *Keeney v. Converse*, 99 Mich. 816.

FULLER v. METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK.

[68 CONNECTICUT, 55.]

NEW TRIAL.—WHEN INADMISSIBLE EVIDENCE IS RECEIVED, SUBJECT TO OBJECTION, AND AFTERWARD EXCLUDED, a new trial will ordinarily be granted, unless it fairly, and with reasonable certainty, appears upon the record that the party complaining could not have been harmed by the action of the court.

JUDGMENT—RES JUDICATA—IDENTICAL PARTIES—SAME CAPACITY.—A former judgment is not admissible as conclusive evidence of a material fact therein adjudicated, unless the parties are identical in the two cases, and also sue or defend in the same right or capacity.

JUDGMENT—RES JUDICATA—LIMITS OF DOCTRINE.—It is true that a fact once decided shall not be again disputed between the same parties; but the fact must be established by a final judgment; it must have been in issue under the pleadings, and must also have

been actually litigated and determined; it must be identical with the fact sought to be established in the second action; and the identical persons between whom the fact was adjudicated, in the same right or capacity, or their privies claiming under them, must be the parties to the second action.

JUDGMENT—RES JUDICATA—SUITS IN DIFFERENT CAPACITIES.—The doctrine of res judicata does not apply where the first suit is upon a cause of action arising between the parties in their individual capacity, and the second suit is brought by one of the parties in his capacity as assignee of a cause of action arising between the other party and a third party, which the plaintiff has purchased of such third person after his right thereon has become fixed, and since the judgment in the first action was rendered.

JUDGMENT—RES JUDICATA—SUIT BY ASSIGNEE—CLAIM ON POLICY OF LIFE INSURANCE.—If a party sues upon an insurance policy, and obtains judgment, and afterward sues the company upon like causes of action in favor of third persons, but which have been assigned to him since judgment in the first case was rendered, and the validity of certain receipts purporting to have been given to the defendant in full payment and discharge by the plaintiff's assignors is a material issue in the present action, the record of the judgment in the first suit is not conclusive evidence of the invalidity of such receipts, and is not admissible as such, for the assignee, in such a case, is not acting in the same capacity as when he prosecuted his own suit.

STATUTE AUTHORIZING ASSIGNEE TO SUE—CONSTRUCTION.—A statute authorizing the assignee of a chose in action to bring a suit in his own name, alleging the assignment, his equitable ownership in good faith, and the manner of acquiring such ownership, does not alter the relations of assignor and assignee; they remain unchanged.

JUDGMENT—RES JUDICATA—FACT NOT IN ISSUE IN FORMER ACTION.—If a party sues upon an insurance policy and obtains judgment, and afterward sues the company upon like causes of action in favor of third persons, but which have been assigned to him since judgment in the first case was rendered, and the validity of certain receipts purporting to have been given to the defendant in full payment and discharge by the plaintiff's assignors is a material issue in the present action, the record of an intervening injunction suit brought by the defendant against the plaintiff to prevent him from suing upon the claims assigned to him is not conclusive evidence of the invalidity of such receipts, and is not admissible as such, where it appears from the record in the injunction case that the validity of the receipts was not tried, and was not determined because it was not a fact in issue.

Suit by Austin B. Fuller, and wife, upon certain policies of life insurance, praying for a disclosure, an accounting and other equitable relief, and for one hundred thousand dollars damages. The defendant, in 1874, issued to the plaintiff, Harriett A. Fuller, a ten year life policy on the life of her husband, the plaintiff, Austin B. Fuller. The policy was issued upon the reserve dividend plan, and when Mrs. Fuller, after the expiration of the ten years from the date of the policy, became entitled to her "equitable proportion of the reserve dividend fund in cash," she refused the sum tendered by the company in payment of its debt, and,

in March, 1884, with her husband, filed a bill in equity, in the United States circuit court, for the southern district of New York, against the company, claiming an account and other relief. The bill of complaint alleged that the company authorized its agent to represent that the "reserve dividend plan" mentioned in the policy, was the plan explained in instructions to its agent, and known as the "Key to Reserve Dividend Plan"; that the agent so represented to the insured, and that the insured, relying on said representations, entered into the contract of insurance. There was an interlocutory decree, finding that the parties to the policy contracted with reference to the "reserve dividend plan," and directing the defendant to account. In May, 1889, the circuit court passed a final decree in favor of the plaintiffs. In September, 1889, the defendant sued out an injunction in a state court of Connecticut to restrain A. B. Fuller and Harriett A. Fuller from prosecuting against the company any claim growing out of assignments of policies obtained by the Fullers for that purpose, from persons whose claims under the policies had been adjusted with the company, and who had surrendered their policies to the company and given receipts in full discharge and satisfaction thereof. The opinion shows the answer made, and the final disposition of the injunction suit. The complaint in the present case contained forty-one counts. Each count contained material allegations of fact as to the alleged instructions to agents, the declarations of agents, and acceptance of the policies in reliance upon said declarations, which were substantially the same as those set up by the Fullers in the suit, on the policy issued to them, in the United States circuit court. Each count also set up fraud in obtaining receipts. The assignment of the insured to Harriett A. Fuller, of claims against the company, and her ownership thereof were alleged. The material allegations were put in issue by the answer, and there was a finding for the plaintiffs on the main issues of fact. The court construed the meaning of the language used in the "Key to the Reserve Dividend Plan," and ordered an accounting. The plaintiffs, upon the trial, offered in evidence the records, pleadings, and depositions of the case tried in the United States circuit court, as shown in the opinion, and for the purpose there stated. It appeared from the findings that the defendant claimed that the receipts given by the several policy holders to the defendant, were a bar to the action; that upon this claim the court ruled that one of the issues involved and passed upon in the injunction case, above described, was the question of the bar of these receipts to the maintenance of any action upon the

assignments sued upon, and that such issue was decided adversely to the company; that the parties and subject matter were the same in the injunction case as in this case; and that such decision precluded further contention on this point in this case. The court, after making this ruling, recited the facts as found by it, supporting the plaintiffs' claim that the receipts were obtained by fraud, and held that these facts were sufficient to show that the receipts were obtained by the fraud of the defendant. It clearly appeared, upon the whole record, that the defendant objected to the admission of the judgment in the injunction case as evidence of a former adjudication of this question between the parties, and excepted to the ruling of the court admitting the judgment; but the fact of the objection and exception was not stated in the findings, unless by inference. There was an interlocutory judgment, ordering a disclosure, and directing the defendant to account. From this judgment, the defendant, as authorized by statute, appealed.

Henry C. Robinson, Henry Stoddard, and Goodwin Stoddard, for the appellant.

John W. Alling, Talcott H. Russell, E. P. Arvine, and L. A. Fuller, for the appellees.

⁶³ HAMERSLEY, J. In affirmance of a salutary principle in the conduct of trials, section 1064 of the General Statutes provides that whenever evidence offered upon the trial of any civil action is objected to as inadmissible, it shall be the duty of the court, if either party shall request a decision, to then pass upon such objection and admit or reject the testimony. Upon the trial of this case, the plaintiffs offered in evidence the records, pleadings, and depositions in a former action in the United States circuit court, as evidence and conclusive evidence of facts material in the present case; the defendant objected to this evidence as inadmissible; the trial court received and heard the evidence subject to objection; substantially at the close of the plaintiffs' case the defendant asked that the evidence so received be excluded, and insisted that its objection to the evidence as inadmissible be then finally disposed of; the court refused to then pass upon such objection, and when the case was decided, some months after the trial, filed its ruling excluding the evidence. In this the court erred, and the error is one which entitles the defendant to a new trial, if it appear that he was injured thereby. When inadmissible evidence is received subject to objection and afterward excluded, a party may be injured, either by the influence such evidence may have had, even unconsciously, on the

mind of the judge, or by the confusion and embarrassment which the uncertainty as to what has and has not been proved, may subject counsel in the trial of their cause: *Jacques v. Bridgeport etc. R. R. Co.*, 41 Conn. 61, 66; 19 Am. Rep. 483. And "in such cases the question is, Does it fairly and with reasonable certainty appear upon the record that the party complaining could not have been harmed by the action of the court? Unless it does so appear a new trial will ordinarily be granted": *Peck v. Pierce*, 63 Conn. 310, 319. It is impossible to examine the rulings of the trial court, from the first admission of the evidence in question to its final exclusion, without deeming it probable that the embarrassment ⁶⁴ caused by the errors complained of was a material injury to the defendant in the trial of its case. A new trial, therefore, should be granted.

Counsel for the plaintiffs, in their ingenious and able brief, maintain that the court erred in the final exclusion of the evidence; that the judgment excluded was admissible as *res judicata*, and conclusive as to the main question at issue, and that therefore the defendant was not injured by the error complained of. We think the court did not err in excluding the judgment; that the *res judicata* established between the parties to the action tried in the circuit court does not apply to the parties in this action.

The term "*res judicata*" is used with different meanings in connection with different conditions, and not always with discrimination; perhaps an exact discrimination is not always practicable in the present state of the law on this subject. The two most important applications of the principle are where it is invoked in respect to a cause of action once finally determined by a judgment, and where it is invoked in respect to the conclusiveness of a fact, contested between the parties to an action and determined by the judgment in that action, upon the same parties when agitating their controversies in another suit upon a different cause of action. There is an evident distinction in these cases, not only as to the effect of a judgment, but as to the grounds on which the principle producing the effect is based. This distinction is drawn with great clearness in the opinion of Justice Field in *Cromwell v. County of Sac*, 94 U. S. 351, 357. In the former case, the judgment is produced as conclusive evidence that no cause of action exists; either the cause of action has been satisfied and merged in the judgment, or its nonexistence has been judicially determined and forever settled by the judgment; and the controlling principle depends primarily on

the legal effect of a judgment on the cause of action determined—the judgment is not treated merely as an estoppel to the proof of any fact involved in the trial of the cause of action alleged, but is rather held to be conclusive evidence that the cause of action alleged does not now exist, or never ⁶⁵ had an existence. In the latter case, the judgment is produced as evidence of some material fact in the cause of action on trial, the truth of which fact both parties are estopped from denying. In such case, the controlling principle depends upon the effect of a judgment in giving indefinite life and irrebuttable probative force to any fact once judicially found to be true. It is with this latter principle alone that we are now concerned, and it must be borne in mind that the principle does not relate to the finality of a judgment in disposing of a cause of action, but to the vitality of a judgment in preserving for evidential purposes a fact once found. As stated by Baldwin, J., in 1810, the rule is, “that a fact once decided shall not be again disputed between the same parties”: *Church v. Leavenworth*, 4 Day, 274, 281. This principle is now settled beyond controversy: *Sargent v. New Haven Steamboat Co.*, 65 Conn. 116, 126. But its limits in all directions are not so well settled. The very nature of the principle calls for narrow limits in its application. Within certain limits public policy that regards unnecessary litigation as an evil, that looks upon the reagitation by parties of controversies once submitted by them to a final adjudication as contrary to equity and good conscience, supports the application of the principle as wise and equitable; but the same public policy might regard its application beyond those limits as dangerous and unjust. Among the recognized limits are the following: The fact must be established by a final judgment; it must have been in issue under the pleadings and must also have been actually litigated and determined; it must be identical with the fact sought to be established in the second action; the identical persons between whom the fact was adjudicated in the same right or capacity, or their privies claiming under them, must be the parties to the second action.

In the present case, the defendant claims that the fact which the judgment was offered to prove has not been established by a final judgment, and that the fact claimed to be so established is not identical with the fact now sought to be proved. We do not discuss these claims, because we ⁶⁶ are satisfied that the identical persons between whom the facts at issue in the former action were adjudicated in the same right and capacity are not the parties in the present action. The precise question is this: When A'

and B have, in their individual right and capacity, litigated a fact in issue in the trial of a cause of action arising from the breach by B of a non-negotiable contract between them, is a fact found to be true by the adjudication of that action, *res judicata* in a later trial of a different cause of action arising from the breach by B of a different contract between him and C, brought by A in his capacity as an assignee of C, subsequent to such breach? Such use of an adjudicated fact does not come within the limits to the application of this principle as generally stated. No authority has been cited holding a fact to be *res judicata* under such circumstances. The case of *Flint v. Bodge*, 10 Allen, 128, might be used as indicating some support to the plaintiff's claim, but the opinion of the court does not refer to the present question, and it evidently was not considered. The opinion of the supreme court in *Collins v. Hydorn*, 62 Hun, 286, 288, was reversed in the court of appeals, 135 N. Y. 820, and the opinion of the appellate court, which is the last statement of the law in New York upon that subject, seems expressly to state that for the purpose of the application of this principle of *res judicata*, the assignee of a chose in action, in prosecuting the right assigned, is not acting in the same capacity as when he prosecuted a different chose in action to which he was an original party. *Curtis v. Bradley*, 65 Conn. 99, 115, 48 Am. St. Rep. 177, which was also cited, has no application. In that case, Curtis, Bradley, and one Plumb were parties to a verbal agreement under which Plumb was to build a house on land Bradley had purchased from Curtis; as the work progressed Curtis was to pay Plumb for his services and for all the labor and materials that went into the construction of the house, and when the house was completed and occupied, Bradley was to pay the money expended for construction. Bradley accepted and occupied the house and refused to pay. Curtis sought to enforce the contract through a mechanic's lien filed in the name of Plumb; failing in this, ⁶⁷ because the court found that Bradley's promise of payment was not to Plumb, he brought suit under the same contract against Bradley to recover the same money; in this suit the judgment in the former suit was offered in evidence and admitted, for the purpose of showing that Bradley was estopped from claiming that his contract was made with Plumb; its admission was objected to, on the ground the record was that of a suit between different parties. The admission of the judgment was sustained by this court, because it appeared from the appeal record that Curtis in his individual right was "the actual plaintiff in the former ac-

tion," under the rule recognized in Buckingham's Appeal from Probate, 60 Conn. 143. The opinion referred to the fact that, after the commencement of the action, Curtis, having taken an assignment from Plumb, had been substituted for Plumb as plaintiff, in connection with the unfounded claim that it was necessary that Curtis should have been a party to the record in the former action, as well as the party in interest who actually brought and conducted the suit. The question now before us was not involved nor considered.

The fact that the recognized general statement of the limits of the application of this rule of *res judicata* seems to exclude cases where the first suit is upon a cause of action arising between parties in their individual capacity, and the second suit is brought by one of the parties in his capacity as assignee of a cause of action arising between the other party and a third party, and that it has never in this state been extended to such cases—and, so far as we are advised, has never been extended to such cases by courts of last resort in other jurisdictions—is significant that such extension is not supported by authority. We think it cannot be supported on principle.

As stated above, the rule which gives an indefinite life, a continued and conclusive probative force, to an adjudicated fact in future litigation of other and different causes of action, is based on considerations of public policy, and must be confined within the limits where those considerations are ^{as} operative. When confined to the identical persons who were parties to the first action, in the same capacity in which they were parties, the considerations of public policy are clear, and the rule should be applied in the broad spirit that governs the application of a rule so founded. But when these limitations are wholly removed, the rule is no longer supported by such considerations; on the contrary, it is clearly opposed to them. It is certainly not in the interest of peace and honesty that every adjudicated fact should thereafter remain an irrebuttable witness to be employed in all future litigation by whoever may need its services. Such unlimited application of the rule would promote litigation and encourage dishonesty. So, in a less degree, the considerations of public policy which support the rule within its proper limits, do not apply where the evidential capacity of the adjudicated fact is made the subject of trade, so that a person possessing a cause of action in the prosecution of which the fact cannot be used as a witness may secure the benefit of its services by a trade with some other person; and for this reason the conclusiveness of a

fact adjudicated between two persons contesting in their own right ought not to be extended to future actions in which one of the parties prosecutes a cause of action belonging to a third party, in which he is interested only by virtue of an assignment made subsequent to the judgment in the first action.

The possible and probable consequence of such an extension of the rule is illustrated by the present case. A recovers judgment against B in a cause of action which has arisen between them; a fact therein adjudicated may be conclusive on the merits of another cause of action which has arisen between B and C. To induce C to put his cause of action in litigation, A offers him the benefit of the adjudicated fact which is conclusive on B as against A, but not as against C, and promises C one-half the net proceeds of the litigation to be conducted solely at the expense of A, if C will assign his claim to him upon such consideration. Surely such a transaction violates public policy in various ways. It promotes litigation, it erects a technical bar against proving the truth, ⁶⁹ it tends to bad faith. This rule of *res judicata* exists, because within its proper limits it tends to put an end to the litigation of obstinate litigants, because, as between them, in equity and good conscience, the fact adjudicated ought to be conclusive; an extension of these limits, so that the probable consequences will be the opposite, cannot be justified on the considerations of public policy that support the rule.

In stating this conclusion, we do not intend to pass upon the limits of this rule of *res judicata* in other respects; the considerations of public policy on which the rule rests may justify some apparent extension of those limits, but they do not justify an extension which makes a fact adjudicated in an action between two persons litigating a cause of action which has arisen between them in their individual capacity *res judicata* in subsequent actions brought by one as assignee of a chose in action between the other and a third person, which the plaintiff has purchased of such third person after his right thereon has become fixed, and since the judgment in the first action was rendered. The statute authorizing such assignee to bring a suit in his own name alleging the assignment, his equitable ownership in good faith, and the manner of acquiring such ownership, does not alter the relations of assignor and assignee; they remain unchanged: *Beach v. Fairbanks*, 52 Conn. 167; *Saugatuck etc. Co. v. Westport*, 39 Conn. 337, 349.

The principle which seeks to prevent multiplicity of actions is not—as was suggested by counsel for plaintiffs—involved in this

discussion, nor is there any ground for claiming the admissibility of this judgment as a sort of judgment in rem binding on all the world, or as evidence of reputation, or of the fixed meaning of a term of art. The cases cited by the plaintiff do not apply to the present conditions. The judgment in the United States circuit court being inadmissible as *res judicata*, the exemplified copy of the judgment appearing in the record of the injunction case could not be used for such purpose.

The court below also erred in admitting the record in the injunction case as conclusive evidence of the invalidity of the ⁷⁰ receipts in full. The finding does not clearly show that this evidence was objected to; but as the same question is distinctly raised by the ruling of the court that the judgment in the injunction case was conclusive on the question of the invalidity of the receipts, and as the question is likely to arise in the same form if a new trial is had, we think it should be decided now. In the action for injunction, the present defendant sought to enjoin A. B. Fuller and wife from bringing actions on the policies of insurance set up in the present suit, on the theory that upon the facts alleged the assignments to them of the claims under said policies were against public policy and void. The answer contained a first defense which was a general denial, and a second defense alleging that the receipts referred to in the complaint were obtained by fraud; counterclaims were also filed, each counterclaim being, in effect, an action on a separate policy which had been assigned to the Fullers. By order of court, the case was tried on the first defense alone. The court held that, upon the facts alleged, the plaintiff had no right to the remedy sought, refused to render judgment for the defendants on the first defense, and to admit them to prosecute their counterclaims in that action, and dismissed the complaint for want of equity.

It is clear that nothing could have been adjudicated in this case except the facts in issue under the first defense. Counsel for the present plaintiffs claim that the complaint should be construed as alleging the validity of the receipts as a material fact; that the first defense contains a denial of that fact, and therefore the judgment is conclusive evidence of the invalidity of the receipts. Aside from other considerations, it is an insuperable objection to this result that the record itself shows that the claim that the complaint should be so construed was ruled upon by the trial court and denied, and that the validity of the receipts was not tried and was not determined, because it was not a fact in issue.

There is no other alleged error in the rulings of the court during the trial clearly presented by the finding and likely to occur in the same form upon a retrial of sufficient importance to call for consideration.

⁷¹ The main claims of error in the conclusions of the court upon the facts found relate to the construction given to the language of the book entitled "Key to the Reserve Dividend Plan," and to the conclusion of fraud in obtaining the receipts. The first question is embarrassed by the finding that the contracts of insurance were, in fact, made upon an agreement in each case that certain selected passages in said book contained the accepted definition of the "reserve dividend plan" specified in the policy; and the other question depends almost wholly upon the language of the finding in the statement of facts. These questions have been argued elaborately and with great ability. We regret that it is not practicable to express some opinion that may be useful upon a retrial. But inasmuch as a new trial must be granted, and we cannot assume that upon a retrial the facts proved will be the same, or that the finding of facts which may come again before us will present the questions in the same manner, it is apparent that an expression of opinion on the questions as presented by this finding may not be applicable to the facts established on the new trial, and may operate unfairly on the parties in preparing and trying their cause, and raising the precise issues of law that should determine their rights. We therefore refrain from indicating any opinion on these questions.

A new trial is granted.

In this opinion the other judges concurred.

JUDGMENT—RES JUDICATA—IDENTICAL PARTIES—SAME CAPACITY.—A party sought to be bound by a former judgment must have been a party to both actions, and he must have been a party to both in the same capacity or character: *State v. Branch*, 134 Mo. 592; 56 Am. St. Rep. 533; note to *Benz v. Hines*, 89 Am. Dec. 598. As a general rule a judgment for or against a person in one capacity is not a bar to a suit by or against him in another capacity: Note to *Stockton etc. Loan Assn. v. Chalmers*, 7 Am. St. Rep. 175. To make matter *res judicata*, there must be identity of the subject matter of the suit, of the cause of action, of the parties, and of the quality in the persons for or against whom the claim is made: *Benz v. Hines*, 3 Kan. 390; 89 Am. Dec. 594; *Slocumb v. De Lizardi*, 21 La. Ann. 355; 99 Am. Dec. 740.

JUDGMENT—RES JUDICATA.—Facts not in issue are not concluded by a judgment: See monographic note to *Lea v. Lea*, 96 Am. Dec. 779, on what facts are not *res judicata*, though apparently found by the court: Note to *King v. Chase*, 41 Am. Dec. 682. A judgment of dismissal is not *res judicata*: Note to *Welgley v. Coffman*, 27 Am. St. Rep. 672. Compare monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 562-572, on the proof of *res judicata*.

DENNIS v. DENNIS.

[68 CONNECTICUT, 188.]

DEFINITIONS.—"HABITUAL INTEMPERANCE" IS A CONDITION; and when any person gets into that condition, he is said to be "habitually intemperate."

MARRIAGE AND DIVORCE—"HABITUAL INTEMPERANCE"—DIVORCE.—A wife is not entitled to a divorce upon the ground of her husband's "habitual intemperance," though he, about once in three weeks, for a period of two years, becomes intoxicated, during the evening, to such an extent that he does not go, as usual, to his work on the next morning, where this does not occasion any trouble between him and his employer, and where such intoxication is not so gross or long continued as to produce want or suffering in the defendant's family.

DEFINITIONS.—"CONNIVANCE," in the law of divorce, is the corrupt consenting of a married party to that conduct of the other of which complaint is afterward made. It may be the passive permitting of an act, or the active procurement of it.

MARRIAGE AND DIVORCE.—CONNIVANCE AT ACT FOR DIVORCE bars the right of divorce, because no injury is received; for what a person has consented to, he cannot set up as an injury.

MARRIAGE AND DIVORCE—ADULTERY BROUGHT ABOUT BY CONNIVANCE AS GROUND FOR DIVORCE.—If a husband's act of adultery, relied upon by his wife as a ground for divorce, was brought about by her connivance and procurement, the divorce sought by her will be refused. A finding that the act was so brought by her, acting through her attorneys or agents, is not erroneous, as a matter of law, although she did not specifically direct, or have actual personal knowledge of, the doings of her general agents, in her behalf, to entrap her husband into such an act with a lewd woman employed by them for that purpose.

MARRIAGE AND DIVORCE—DISCRETION OF COURTS HAVING DIVORCE JURISDICTION.—To discover and defeat any attempt to use the forms of the law of divorce for immoral, vindictive, or fraudulent purposes is a proper exercise of the legal discretion vested in all courts having divorce jurisdiction.

Suit for a divorce brought by a wife against her husband on the grounds that the defendant had, for more than two years, been habitually intemperate, and that he had committed adultery. There was a judgment for the defendant, and the plaintiff appealed, urging that the court erred in deciding upon the facts found that the defendant was not habitually intemperate; that it erred in ruling that the facts found constituted in law connivance on the part of the plaintiff, and that she was barred thereby from obtaining a divorce for the adultery of the defendant; and that it erred in ruling that upon the facts found the court could, as an act of discretion, refuse to grant the plaintiff a divorce for the defendant's act of adultery proved.

Donald G. Perkins and William Belcher, for the appellant.

Augustus Brandegee and George C. Morgan, for the appellee.

¹⁹² ANDREWS, C. J. Habitual intemperance as a cause for which a divorce might be granted was first named in this state by a statute enacted in 1843, where it was coupled with intolerable cruelty. Precisely what constitutes habitual intemperance within the meaning of that statute it is not easy to define. It may, however, be safely assumed that the purpose of the act was not primarily to promote temperance or to reform the offender, but to preserve the peace, comfort, safety, happiness, and prosperity of the nonoffending party, and of the family of which they are together the members and parents. In a note upon this statute left by the late Chief Justice Church, he said: "The habitual use of intoxicating liquor, though producing excitement, will not justify a divorce. The habit must be so gross as to produce suffering or want in the family to a degree which cannot be reasonably borne." We are not aware that any court in this state has attempted to define these words. The expression is one of those terms which, like the expression "intolerable cruelty," often arise in the law and which cannot well be defined in advance. They must be applied by the trier to cases as they arise, by inclusion or exclusion, and the existence of the condition in question decided as a matter of fact. The language of the statutes in other states by which the use of spirituous liquors is made a cause for divorce is so divergent as to afford but little aid in the construction of our own. In California it has been held that a fixed habit of drinking to excess, to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, is such "habitual intemperance" as is made a ground of divorce: *Mahone v. Mahone*, 19 Cal. 626; 81 Am. Dec. 91. "Habitual intemperance" is a condition; and when any person gets into that condition he is said to be "habitually intemperate." These latter words are frequently used in ¹⁹³ policies of insurance, and in various cases arising on such policies these words have been the subject of judicial discussion. In the case of *Northwestern Life Ins. Co. v. Muskegon Bank*, 122 U. S. 501-505, the supreme court of the United States, by Justice Miller, said: "The whole case turned, so far as the jury was concerned, upon the true definition of the words 'habitually intemperate.' . . . We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, and as the observation and experience of one man on that subject is as good as another of equal capacity and opportunities, their true meaning and signification would seem to be a question addressed

rather to the jury than to the court. While there may be on the one hand, such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or, on the other hand, such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them." The case of Insurance Co. v. Foley, 105 U. S. 350, was on a policy of this kind. The court below had instructed the jury that if the habits of the insured "in the usual, ordinary, and every-day routine of his life were temperate," he was not intemperate within the meaning of the policy, although he had "had an attack of delirium tremens resulting from an exceptional indulgence," and this instruction was sustained.

The finding in this case shows that the defendant "about once in three weeks became intoxicated, during the evening, to such an extent that the next morning he did not go as usual to his work at the store where he was employed as a clerk," and had continued to do so for a period of two years. While this condition of the defendant very likely caused annoyance and vexation to the plaintiff, and possibly grief and humiliation, it does not appear to have occasioned any loss of position to the defendant or any trouble between him and his ¹⁸⁹⁴ employer, nor does it appear to have been so gross or so long continued as to have produced want or suffering in the family. We fail to see, in this case, that the superior court committed any error in law in this respect.

The trial court held that the act of adultery proved was one brought about by the connivance and procurement of the plaintiff, acting through her attorneys or agents. The appellant strenuously insists that this finding is not supported by the evidence. Connivance is the corrupt consenting of a married party to that conduct of the other of which afterward complaint is made. It bars the right of divorce because no injury is received; for what a person has consented to, he cannot set up as an injury. Connivance is a thing of the intent resting in the mind. It is the consenting. But the connivance may be the passive permitting of the adultery or other misconduct, as well as the active procuring of its commission. If the mind consents, that is connivance: *Ross v. Ross*, L. R. 1 Pro. & D. 734; *Pierce v. Pierce*, 8 Pick. 299; 15 Am. Dec. 210.

The connivance of the plaintiff is established as a fact upon evidence, to the admission of which no objection was made, and we suppose this to be a conclusion which this court cannot revise. The argument of the appellant is founded on that part of the finding which says that "the plaintiff did not give to her said attorney, or to any of the detectives employed by him, any direct or specific authority or direction, as distinguished from the general authority hereinbefore set out, to employ said woman for the purposes for which she was employed, or to employ any woman for such purpose, and the plaintiff had no actual personal knowledge that the woman found with her husband was one employed by her agents in the manner in which or for the purposes for which she was employed." The argument is, that this finding is inconsistent with the conclusion to which the court came, because it shows, as she claims, that her mind never consented to the adultery of her husband. This argument cannot be maintained in view of the other facts of the case. Connivance can usually be proven only by proving facts from which, with their circumstances, it may be inferred. From ¹⁹⁵ the finding before us, it appears that the plaintiff had suspected her husband of infidelity, although she did not suspect any particular woman. She was desirous of obtaining a divorce. She consulted her attorney in Boston, who advised her to employ detectives to watch her husband. She authorized that attorney to employ such detectives for that purpose as he saw fit, to procure such evidence as in his judgment was necessary, giving him full authority in the premises. Detectives were employed by him and sent from Boston to New London. Among other things done by this attorney and the detectives he hired, a lewd woman was employed to lure the defendant by her wiles into an act of adultery, or into a compromising situation from which the inference of adultery would be drawn, so arranged that his discovery would be made. This lewd woman came to New London, commenced her practices on the defendant, succeeded in attracting his attention and in drawing him into the precise sort of an act for which she was employed. During the progress of her efforts the plaintiff was informed by the detectives that her husband had been seen with a woman at night in the streets of the city, and, on the night arranged for the discovery, she went with the detectives to the room where the defendant and the lewd woman were together. There was sufficient to justify the superior court in finding that the plaintiff must have known that the movements of this lewd woman were in some way governed by the detectives who she knew had been

employed by her attorney, and who gave her the information which they did by which she was enabled to confront her husband while in that woman's company. Soon thereafter the plaintiff caused her petition for a divorce to be brought, praying for a divorce based on the act she had so discovered. Her conduct then and ever since might well be deemed to cast a reflex light on her knowledge of the purposes for which the detectives were employed, and her consent to the artifices which they practiced. These are the facts and circumstances from which the trial court held that the plaintiff was barred of all right to have a divorce for the acts of adultery she had proved. In the light of the authorities we have cited, we think the decision ¹⁹⁶ of the court on this part of the case should not be disturbed: *Morrison v. Morrison*, 136 Mass. 310; *Myers v. Myers*, 41 Barb. 114; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Austin v. Austin*, 10 Conn. 221; *Cairns v. Cairns*, 109 Mass. 408; *Masten v. Masten*, 15 N. H. 159; *Gower v. Gower*, L. R. 2 Pro. & D. 428. In this last case, it was held that "if a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution [of the marriage] on the ground of such adultery, although he may not have directed or authorized his agent to bring it about." The petitioner admitted that he had employed one Williams to watch the respondent and to obtain evidence of her adultery, but denied that he had ever instigated Williams to induce her to commit adultery, or sanctioned his taking any steps with that view. The evidence showed that the act of adultery on which the petitioner relied, had been brought about by the contrivance of Williams. In deciding the case, the judge ordinary said: "I think it quite possible that he [the petitioner] did not tell Williams to do what Williams appears to have done; but, at the same time, he never warned him not to do what a man of his class and character would be likely to do. The very first thing which would occur to such a man, if evidence were not forthcoming, would be to make an occasion which should furnish that evidence. In that point of view, the petitioner is responsible for the act of his agent. But I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this court for an act of adultery brought about by his own agent." Other cases supporting the same doctrine are *Williamson v. Williamson*, L. R. 7 Pro. & D. 76; *Hawkins v. Hawkins*, L. R. 10 Pro. & D. 177; *Heyes v. Heyes*, L. R. 13 Pro. & D. 11.

The state makes itself a party to all marriages, in that it requires the marriage contract to be entered into before officers designated by itself, and with certain formalities which it has prescribed. The state does this, not alone that children may be born and properly reared, but that the parties to ¹⁸⁷ the marriage may themselves be the better citizens; it being in accordance with the experience of all mankind that human beings are happier and are better citizens and better disposed toward the state when married and surrounded by the ties of a family and with children than when they remain unmarried. The state desires good citizens. It regulates divorce procedure in its own interest. A divorce cannot be had except in that court which the state authorizes, and for those causes only, and with those formalities, which it has by statute prescribed. As the state favors marriages for the reasons stated, so the state does not favor divorces; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together. The state allows divorces, not as a punishment to the offending party nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted: Seeley's Appeal, 56 Conn. 202, 206.

The forms of the law of divorce should never be allowed to minister to the caprices of fickle-minded persons, or to the revenges of the disappointed or vindictive; and least of all to the passions of the incontinent. Nor under any circumstances should they be used in fraud of the statute allowing divorces, nor of the court. To the end that any and all attempts to use the forms of the law of divorce for any of the purposes indicated shall be discovered and defeated, all courts possessing divorce jurisdiction are vested with a discretion. A wise discretion should always be exercised in administering the law of divorce, lest its spirit be disobeyed by a too narrow adherence to its letter. "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discovered, it is the duty of the court to follow it. Judicial power is never exercised ¹⁸⁸ for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words,

to the will of the law": Marshall, C. J., in *Osborn v. United States Bank*, 9 Wheat. 738, 866.

There is no error.

In this opinion the other judges concurred.

DIVORCE—HABITUAL INTEMPERANCE.—If one has a habit of drinking to excess in such a degree as to render him incapable of attending to his business during the principal portion of the time usually devoted to business, it amounts to "habitual intemperance," within the meaning of the divorce law: *Mahone v. Mahone*, 19 Cal. 626; 81 Am. Dec. 91; but occasional intoxication is not habitual intoxication: *McBee v. McBee*, 22 Or. 329; 29 Am. St. Rep. 613, and note. Compare *Rude v. Nasa*, 79 Wis. 321; 24 Am. St. Rep. 717; note to *Union Mut. Life Ins. Co. v. Belf*, 38 Am. Rep. 616, as to definitions of habitual intemperance.

DIVORCE—ADULTERY—CONNIVANCE.—Mere passive connivance is as much a bar to plaintiff's suit for a divorce as active conspiracy. Corrupt consent will be presumed from passive as well as active encouragement of the offense, and conduct amounting, in substance, to an estoppel: Note to *Robbins v. Robbins*, 54 Am. Rep. 482. If the conduct of a husband indicates an intent to have his wife transgress, or to let her do so undisturbed, this constitutes a "connivance," and will act as a bar to his suit for divorce: Note to *Wilson v. Wilson*, 26 Am. St. Rep. 240. A divorce will be denied, even on the ground of adultery, if the wrongful act was caused by the complainant: *Pierce v. Pierce*, 8 Pick. 299; 15 Am. Dec. 210, and monographic note thereto on the misconduct of the plaintiff as a defense in divorce.

KIMBERLY'S APPEAL.

[68 CONNECTICUT, 423.]

WITNESSES—EXAMINATION OF NONEXPERTS AS TO MENTAL CONDITION OF TESTATOR.—After a nonexpert witness, upon the contest of a will, has, without objection, testified to his acquaintance with the testator, giving the details and particulars, and has then, without objection, given his opinion, founded upon such recited facts, that the testator was of sound mind, it does prejudice the contestant of the will to afterward ask the witness, on direct examination, if he ever observed anything in the appearance, conduct, or conversation of the testator to indicate any unsoundness of mind, for there is full opportunity, on cross-examination, to elicit how much in each answer is matter of fact, and how much is matter of opinion as to what would indicate mental weakness.

WILLS—TESTAMENTARY CAPACITY—INSTRUCTION AS TO INSANE DELUSION—QUESTIONS OF LAW.—Whether testamentary capacity exists in any given case is always matter of law for the court to determine. It is, therefore, the province of the court, where testamentary capacity is attacked on the ground that the testator had an "insane delusion," to instruct the jury what constitutes such a delusion.

WILLS—TESTAMENTARY CAPACITY—CORRECT INSTRUCTION AS TO "INSANE DELUSION."—To instruct the jury, in a case where testamentary capacity is attacked on the ground that the testator had an "insane delusion," that "an insane delusion is a

false belief for which there is no reasonable foundation, and which would be incredible, under the given circumstances, to the same person, if of sound mind and concerning which the mind of the decedent was not open to permanent correction through evidence or argument"; that "a false belief is not necessarily an insane delusion"; and that it is only where "false beliefs are such as a reasonable man would not, under the circumstances, entertain that they become insane delusions," is as accurate as could reasonably be expected, or justly required, especially where the jury has been elsewhere fully, clearly, and correctly charged upon the subject of testamentary capacity.

APPEAL.—WHAT IS NOT A SPECIFIC ASSIGNMENT OF ERROR.—A rule of court requiring specific assignments of error is violated by an assignment of error to the effect that the charge of the trial court, taken as a whole, was not a full and fair presentation of appellant's claims, or of the questions of law involved, as this is a mere general assignment of alleged error.

Appeal by Augustus H. Kimberly and wife from an order sustaining a will.

William C. Case and William H. Ely, for the appellants.

Samuel Fessenden and Henry Stoddard, for the appellees.

430 FENN, J. This is an appeal to the superior court from an order and decree of the court of probate for the district of New Haven, approving an instrument purporting to be the last will and testament of Frederick H. Hoadley, of said New Haven. The case was tried to a jury, and the will was sustained.

The only claim made upon the trial by the appellants related to the testamentary capacity of the testator, and was that he was of unsound mind on November 2, 1893, the time said instrument was executed. The five reasons assigned in the appeal to this court present three questions. The first relates to rulings upon evidence; the second to portions of **431** the charge to the jury; and the third presents, or was intended to present, objections to the charge taken as a whole. We will consider these matters in the above order.

Upon the trial, the contestants claimed and offered evidence to prove that the deceased, who, at the time of his death, February 25, 1895, was a bachelor about forty-nine years of age, a graduate of Yale, and by profession a physician, was a man endowed by nature with more than ordinary mental powers which he had improved by education and travel; that at some time about 1878 or 1879 he began to make use of morphine or other kindred drug; that as the result of such use he, in the course of time, so undermined his physical and mental powers that, long before said will was made, he became of unsound mind, and so continued to his death; that his mental impairment was indicated in

part and characterized by insane delusions which he entertained concerning his sister, Mrs. Kimberly, the contestant, who was the only surviving member of his immediate family, and for whom he had previously had a strong affection, and respecting her conduct toward and treatment of him and others; that these delusions controlled his relations to his sister during his later years, and led him, without cause, to harbor toward her feelings of hostility and dislike, so that he was wholly alienated from her, and to make the will he did, ignoring her.

The proponents, on the other hand, claimed and offered evidence to prove that the testator, although upon occasions a user of morphine, was never a morphine habitué, and that he never did, as the result of its use, permanently impair, to any noticeable degree, at least, either his physical health or mental powers; that he remained through life possessed of a strong, vigorous, and well-balanced mind; that he harbored no delusions touching his sister, and that the long estrangement between them (which was conceded) was not the consequence of insane imaginings or insane delusions, but of causes which were real, substantial, and sufficient.

The contestants, as a part of their case and as tending to establish their said claim, offered evidence to show that the testator during the latter years of his life was careless and ⁴³² even slovenly in his dress and personal appearance, whereas he had formerly been scrupulously neat and particular; that his countenance was unnaturally pallid, his eyes glassy, his speech hesitating and incoherent, the muscles of face and hands nervous and twitching, and that he had a tendency to drowsiness, and even to fall asleep, in conversation.

All these things the proponents denied and offered evidence to disprove. Among their witnesses for this purpose were Samuel T. Dutton, Mrs. Lena Neilson, Theodore S. Palmer, Mrs. Emily Sands, Mrs. J. K. Thacher, and Mrs. C. H. Merriam. These witnesses, in answer to questions by appellees' counsel, testified to their acquaintance with the testator, the duration of such acquaintance, the occasions upon which they had met him, the opportunities which they had had of observing him, his appearance, conduct, and conversation upon such occasions, and to the facts within their knowledge which formed the foundation of the opinions afterward expressed by them; and then, in further response to inquiries from counsel for the appellees, and without objection, testified that in their opinion the testator was of sound mind. Questions were thereupon asked of these witnesses by

counsel for the appellees, and against the objection of the appellants that the questions were immaterial and irrelevant, as follows: Of Samuel T. Dutton: "State whether or not during this period you observed any indication of mental weakness?" Of Mrs. Lena Neilson: "Will you state whether you ever observed in his appearance or manner or conduct any thing which indicated mental unsoundness?" Of Theodore S. Palmer: "Was there anything in his looks, talk, conversation, address, or anything about him that indicated any aberration of intellect in any way?" Of Mrs. Emily Sands: "Did you ever at any time see anything to indicate that he was not of perfectly sound mind?" Of Mrs. J. K. Thacher: "Was there anything in his apparel, his deportment, or conduct, or conversation, that indicated any unsoundness of mind?" Of Mrs. C. H. Merriam: "During the entire period that you knew him, I should like to have you tell the jury whether there was ever any occasion when he showed to you ⁴³³ any incoherence in his conversation, anything that attracted your attention, indicating that he was either mentally unbalanced, or incompetent in any respect mentally?" To all of these questions the several witnesses answered in the negative. Counsel for the appellants duly excepted in each case.

The action of the superior court in admitting these questions was, we think, justified by what is held in *Shanley's Appeal*, 62 Conn. 825, 830. It is there said, concerning "mental unsoundness beginning at a certain time and indicated by certain changes in the appearance and conduct of the testatrix," that "as bearing upon this complex question, acquaintance with Mrs. Shanley before and after 1874, opportunities to see her after that date and to observe what changes there were in her conduct and appearance, to state them if there were any, and if there were none to so state—were facts of the highest significance." But it is claimed by the appellants that the questions here asked confessedly called for the opinions of witnesses upon facts which were not given, and could not be given; that such witnesses were all nonexpert, and that what their standard of sanity was, or whether they had any standard, or any correct idea whatever of what constitutes insanity, does not and cannot be made to appear. But it must be borne in mind that all these witnesses had, and without objection, testified to their acquaintance with the testator, embracing the details and particulars, as hereinbefore stated, and had then given their opinions, founded upon such recited facts, that the testator was of sound mind. That thus far the testimony was admissible no question has been made, or exists. The stand-

ard or idea of each witness as to sanity or insanity had sufficiently appeared to furnish a basis for that expression of opinion. And now, concerning these further questions, the same foundation supports them, and the very reason upon which the exception to the general rule, by virtue of which exception such opinion evidence from nonexpert witnesses is received at all, applies with peculiar force; namely, "that the nature of the subject matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time":⁴³⁴ *Sydleman v. Beckwith*, 43 Conn. 9; *Shanley's Appeal*, 62 Conn. 325. The asking of these questions, calling for simply a bald affirmative or negative reply, with full opportunity existing for cross-examination to elicit how much in the answer was matter of fact and how much opinion as to what would indicate mental unsoundness, could not, we think, have tended improperly to the prejudice of the contestants, and did assist in presenting to the jury the most correct possible reproduction of the subject matter "as it appeared to the witness at the time."

Coming now to the charge: The appellants requested the court to say that "if the jury are satisfied that the testator had become estranged from his sister, and hostile to her by reason of false beliefs in regard to her conduct and feeling toward him, which feeling of hostility remained with him and influenced him in excluding her from his will, in favor of strangers, then the will is invalid."

The proponents requested the court to charge that "speaking generally, and as applied to this case, an insane delusion is a false belief for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction through evidence or argument."

The court refused to charge as requested by the contestants, and did charge as requested by the proponents, adding: "A false belief, you should bear in mind, is not necessarily an insane delusion. False beliefs are common to men. It is only when these false beliefs are such as a reasonable man would not, under the circumstances, entertain, that they become insane delusions."

The request made by the appellants was manifestly incomplete and incorrect, for the reason indicated by the court in the last quotation. The issue here was insanity, not mistake. That, or false belief, was of no relevance or import except as evidence tending to show insane delusion. But "false belief is not neces-

sarily an insane delusion"; and since it is not, a charge that if entertained and acted upon it is sufficient to ⁴³⁵ render a will invalid for want of testamentary capacity would be erroneous.

But in reference to the charge given, the appellants insist: 1. "That it was outside the province of the court to give the jury any definition of the term 'insane delusion'"; 2. "That the definition which the court did give is incorrect."

To the first of these claims we cannot accede. The standard or test to be applied in reaching the decision as to whether testamentary capacity existed in any given case, is always matter of law, and for the court to determine. It has been stated, as matter of law, by this court in many cases. Thus in *Comstock v. Hadlyme etc. Soc.*, 8 Conn. 254, 264, 20 Am. Dec. 100, the charge to the jury was: "If the deviser knew what she was about, knew the consequences of what she was doing—if she had sufficient capacity to make any contract—she might make a valid will." Concerning such charge this court said: "There may be some difficulty in fixing a standard. The question for the jury was, whether the deviser had a sound and disposing mind. Although the charge may not add much to what would occur to the minds of discreet men, on that subject, yet if no improper direction has been given, I think there should be no new trial": *Kinne v. Kinne*, 9 Conn. 101, 102; 21 Am. Dec. 732; *Dunham's Appeal*, 27 Conn. 192; *St. Leger's Appeal*, 34 Conn. 434, 448, 449; 91 Am. Dec. 735; *Richmond's Appeal*, 59 Conn. 226, 244, 245; 21 Am. St. Rep. 85. That delusion on some subjects is not per se incompetency, was held in *Dunham's Appeal*, 27 Conn. 192, as matter of law. What is delusion, and when it would constitute incompetency, is manifestly equally a matter of law: *Hale v. Hills*, 8 Conn. 39, 43, where it is held that the right use of reason, and not knowledge of what a person is doing, is the test of competency. In *Mills' Appeal*, 44 Conn. 484, 486, it is said: "One form of mental incapacity is insanity; and a prominent and the most usual symptom of insanity is delusion." Courts constantly use the expression. In *Dunham's Appeal*, 27 Conn. 201, the language is: "The trite subject of insane delusion." What is meant by the expression used by the courts is surely for the courts to say, and courts ⁴³⁶ in other jurisdictions, as well as standard legal writers, have often said. Thus in *Taylor v. Trich*, 165 Pa. St. 586, 601, 44 Am. St. Rep. 679, decided in 1895, the definition given in *Redfield on Wills*, 67, is approved; namely, that delusion is "a creature purely of the imagination such as no sane man could believe." In *Haines v. Hayden*, 95 Mich. 332, 354, 35

Am. St. Rep. 566, decided in 1893, the following language of the trial court in the charge to the jury was approved: "A person persistently believing supposed facts which have no real existence, against all evidence and probability, and conducting himself upon an assumption of their existence, is, so far as such facts are concerned, under an insane delusion."

But the principal question on this branch of the case remains: Was the definition which the court gave correct? Were the instructions on this subject, taken as a whole, what the law requires that they should be—accurate, appropriate, sufficient—calculated to lead, guide, and direct the jury in their deliberations and to their conclusions? The appellants most earnestly insist that the definition made and the instructions given were incorrect, and calculated to mislead and to prejudice their, the appellants', case. It is said first, that the term "insane delusion," in the sense in which it bears upon questions involving testamentary capacity, is not susceptible of precise definition. This is doubtless true to the extent to which the same statement would be accurate if made concerning many other terms, expressions, and things, which, nevertheless, courts are constantly called upon to, and do, give instructions upon and definitions of; such as "reasonable care," "reasonable doubt," and even of the term "testamentary capacity" itself, and what constitutes it, either in general, or as applied to a particular case. Of course, in giving such instructions where "precise" definitions are impossible, only such an approach to precision as is possible is required. What that is concerning one term—"reasonable doubt"—which equally illustrates it as to other expressions, appears fully in an extended note to the case of *Burt v. State*, at page 566 of volume 48 of the American State Reports, where a very great number of cases upon the subject ⁴³⁷ are referred to. It is also well illustrated as to "testamentary capacity" and "dementia," by the language used by the late Chief Justice Seymour in a charge to a jury, reported in the appendix of 39 Conn. 591, 595, quoted, approved, and applied in *Richmond's Appeal*, 59 Conn. 242, 243; 21 Am. St. Rep. 85: "If the prisoner's perception of consequences and effects was only such as is common to children of tender years, he ought to be acquitted." Concerning this kind of definition by analogy and illustration (which surely has precedent in the sacred scriptures, and "confirmation strong as proof of holy writ"), we said in *Richmond's Appeal*, 59 Conn. 242, 243, 21 Am. St. Rep. 85: "It may be correct, as the appellees claim, that there is no such thing as an average child, and that the mind and memory

of a child is incapable of perfect measurement. This is true of almost any standard. It would be true of the standard which the law prescribes for the determination of reasonable care and prudence. It is nevertheless true that such a comparison carries with it, to an ordinary apprehension, a greater approximation to certainty than any general and abstract statement."

Viewed in the light of the above considerations, we think the language of the charge of the trial court of which the appellants complain is not justly open to the criticism made upon it; that the statements that "an insane delusion is a false belief for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction through evidence or arguments," and that it is only where "false beliefs are such as a reasonable man would not under the circumstances entertain, that they become insane delusions," are as accurate as in the nature of things and of language could reasonably be expected or justly required. We think that, standing alone, these instructions could not have prejudiced the appellants, and that when taken, as they should be, in connection with other portions of the charge upon the subject of capacity, the law bearing upon that part of the case was fully, clearly, and unexceptionably presented ⁴³⁸ to the jury. The court, in addition to the language above quoted, further said, among other things, not detached from but in connection with and as part of the statement from which the appellants quote the language to which they object: "From what has been said, it will be seen that a person may be of testamentary capacity though he be at the time physically weak, and suffering from disease, and his memory be affected thereby. He may be competent to make a will, though he has not mental capacity sufficient for the management or transaction of business generally, and though he is not mentally capable of making and digesting all the parts of a contract. He may be capable of making a will although his mental powers have not their original vigor, and his intellectual faculties have lost some of their strength. But, while this is true, and it does not follow necessarily from the proved existence of these conditions that a testator is not of sound mind, as the law understands that term, yet these conditions, facts, and phenomena are matters to be considered and weighed, and may be very significant and important as showing, or tending to show, by themselves or in connection with other testimony, mental unsoundness or incapacity.

"In this connection I ought to add some more specific observations concerning the relations of insanity, or kindred states, to testamentary capacity. It goes without saying, of course, that one who is insane or imbecile cannot make a valid will; and that a will which is the product of insane delusions entertained by the testator cannot stand. The law, however, recognizes, what are matters of common knowledge, that insanity, mental aberration, and mental incapacity, assume quite different phases in different persons, or under different conditions; that not infrequently it is a permanent or incurable condition; as, for instance, in the case of imbeciles and confirmed lunatics; that in other instances it is a temporary and transient state of mind, produced by sickness, injury, the use of intoxicants, noxious drugs, and other causes, apparent or unapparent; that sometimes the individual has alternating periods of mental soundness and unsoundness, the periods of unsoundness being more or less frequent, and more or less ⁴²⁰ lengthy; that sometimes a person generally insane has lucid intervals, when the mind becomes clear, and there is a temporary reversion to mental capacity. The rule is, that when the mind is sound, when the insane or impaired condition has passed away, when the person is enjoying a lucid interval, the power to make a will exists, assuming, of course, that in other respects the testator has the degree of mental capacity which I have described to you.

"One who is not insane generally may have insane delusions or hallucinations; he may have a delusion, or delusions, as to one or more subjects, and be sane and wholly rational as to others. Such delusions entertained by a testator might be such as not to affect in any way his capacity to make a will, or to transact ordinary business and the affairs of life. They might be such that they would in no way influence the testamentary act, or have any bearing upon, or affect, the provisions of the will attempted to be made. In such case, if the testator possessed testamentary capacity in all other respects, the will would be valid, notwithstanding the existence of the delusions.

"On the other hand, if the insane delusion or delusions entertained were such that they would in any way enter into or affect the testator's act in making his will, or in any way influence its provisions so that the instrument would be in any respect the product of the insane delusion or delusions, and not of the testator's sound mind, the will thus produced would not be a good will.

"But after all has been said upon this subject, there is no rule,

I fancy, more clear, more intelligible, more easy of practicable application to all manner of cases, and no explanation more enlightening than is contained in the simple test I first gave to you, to wit, that one who, at the very time he undertakes to make a will, is possessed of sufficient intelligence and memory to fairly and rationally know and comprehend the effect of what he is doing, the nature and condition of his property, who are or should be the natural objects of his bounty, and his relations to them, the manner in which he wishes to distribute his estate among, or withhold it from ⁴⁴⁰ them, and the scope and bearing of the will he is making, has testamentary capacity, that is, the power to make a will.

“So, gentlemen, if Dr. Hoadley, at the time he sat down to execute the instrument before you, possessed this degree and kind of mental capacity, he was competent to make a will, and he was thus competent no matter what his mental condition may have been at times previous or times subsequent. His mental conditions both before and after, the character of any attacks of mental unsoundness, their durations or frequency, the nearness of any to the date of the will, the appearance of his recoveries, the existence of any insane delusions, and all such facts, are to be considered in so far as they may throw light on his then condition, and they may be important subjects for consideration; and they are to be considered in the light of any presumption of a continuance or recurrence of insane conditions which may reasonably be drawn from the case and its history. But the ultimate, the controlling question is as to his condition when he executed this instrument which purports to be his will, at that very time and none other. So where the claim is made of incapacity or mental unsoundness arising from the existence of insane delusions, the question is, Did the delusion or delusions exist with the testator at the very time of the execution of the will, and, thus existing, affect or influence his action so that the will was the product of them, and therefore different from what it would otherwise have been?”

The appellants' final reason of appeal is thus stated: “The court further erred in its presentation of the case to the jury in the following particular, because the charge of the court, taken as a whole, is not a full and fair presentation of their claims made on the trial of the cause, nor of the questions of law involved therein.”

Concerning this “reason,” the proponents say, and truly, that it is in violation of the rules of this court, being a mere general

assignment of alleged error which does not purport to review any specific action of, or question made in, or decided by, the court below. But, notwithstanding this, we have carefully examined the charge in the light of the real ⁴⁴¹ criticism made upon it by the appellants, as defined and shown in their brief, and the oral arguments in its support, which is that it is partial and strongly argumentative for the appellees. But we cannot think this is so. On the other hand, it has impressed us as singularly able and entirely fair. We detect nothing to indicate that the court did not do full and equal justice to the claims of both parties, and certainly nothing to show that it exceeded the limits of its power, as declared by this court in such cases as *First Baptist Church v. Rouse*, 21 Conn. 167; *Morehouse v. Remson*, 59 Conn. 392; *Setchel v. Keigwin*, 57 Conn. 473, 478; *State v. Rome*, 64 Conn. 329; *State v. Smith*, 65 Conn. 283.

There is no error.

In this opinion the other judges concurred.

WITNESSES — EXAMINATION OF NONEXPERTS AS TO MENTAL CONDITION OF TESTATOR.—If a witness has had such a long and intimate acquaintance with a testator as to enable him to form a correct judgment as to the testator's mental condition, he may give his opinion that the testator is of sound mind, provided he also states the facts upon which such opinion is based: *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349; *Rambler v. Tryon*, 7 Serg. & R. 90; 10 Am. Dec. 444; *Pidcock v. Potter*, 68 Pa. St. 342; 8 Am. Rep. 181, and extended note thereto; but his examination must be limited to his own conclusions from the specific facts he discloses: *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681.

WILLS—INSANE DELUSIONS—QUESTION OF LAW.—A will is invalidated by a delusion, when it is the result of the delusion, but not otherwise: *Notes to In re Cline's Will*, 41 Am. St. Rep. 854; *Haines v. Hayden*, 35 Am. St. Rep. 579. A delusion sufficient to avoid a will is a creation purely of the imagination such as no sane man could believe—a belief in the existence of something that does not exist: *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679; but if there were facts or circumstances which would reasonably lead the testator to entertain a belief he possessed, such belief is not an insane delusion: *In re Cline's Will*, 24 Or. 175; 41 Am. St. Rep. 851. A man may be of sound mind in regard to his dealings in general while he is under an insane delusion, and whenever it appears that his will was the direct offspring of his partial insanity or monomania, which was the cause of the disposition made by him of his property, and that, without it, such disposition would not have been made, it should be disregarded: *Thomas v. Carter*, 170 Pa. St. 272; 50 Am. St. Rep. 770. Mental capacity to make a will, or what, in any case, shall be the standard of legal capacity, is a question of law: *Hall v. Perry*, 87 Me. 569; 47 Am. St. Rep. 352.

APPEAL—SPECIFIC ASSIGNMENT OF ERROR.—An appellate court will decline to consider an uncertain and indefinite assignment

of error. An assignment of error should specify the particular error complained of: *National Fertilizer Co. v. Holland*, 107 Ala. 412; 54 Am. St. Rep. 101, and note; *Tousey v. Roberts*, 114 N. Y. 312; 11 Am. St. Rep. 655. An exception to the entire charge of the court as set out in the record, without specifying the errors therein, or the grounds of exception, is too indefinite, and cannot be considered: *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503.

FREEMAN'S APPEAL.

[68 CONNECTICUT, 533.]

STATUTES AS TO CONTRACTS OF MARRIED WOMEN—RETROSPECTIVE OPERATION.—A statute changing the rule that a married woman cannot make any contract as surety or guarantor for her husband does not enlarge the rights of women married before the passage of the act, and the disability still applies to them, unless it is removed in the manner indicated by such statute.

HUSBAND AND WIFE—STATUS CREATED BY COVERTURE.—Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in, or with, regard to the rest of the community, no one belonging to such class can vary, by any contract, the rights and liabilities incident to this status. Coverture creates such a status, and a married woman's rights and liabilities cannot, therefore, be varied or changed by any contract she may make.

AGENCY—CONFLICT OF LAWS—DELIVERY OF INSTRUMENT IN ANOTHER STATE.—It is the law of this state which must determine the authority of an agent, as well as the validity of an obligation which the agent, as such, seeks to impose upon his principal by the delivery, in another state, of an instrument signed by his principal in this state. If the agent has no power to deliver it here, he has no power to deliver it there.

HUSBAND AND WIFE—CONTRACTS OF MARRIED WOMEN—CONFLICT OF LAWS.—Contracts which coverture prevents a woman from making herself she cannot make through the interposition of an agent. Hence, if a woman, married and domiciled in this state, has no legal capacity here to make a contract as surety or guarantor for her husband, she cannot become a guarantor or surety for her husband's debt in another state, by acting through the interposition of an agent, whom she appoints, in this state, to execute such a contract, or to deliver it after it has been signed by her.

Appeal from the action of commissioners in allowing a claim of twenty-eight thousand and seventy dollars against the estate of an insolvent debtor. It appeared that H. Drusilla Mitchell was a resident of Bristol, state of Connecticut, and had always resided there. She married George H. Mitchell, in that place, in 1857, and they continued to reside there until his death in 1896. Mrs. Mitchell resided there afterward. George H. Mitchell was a member of the mercantile firm of Morse, Mitchell & Williams, located at Chicago, where the other two partners lived. On February 20, 1891, the firm was indebted to the First National Bank

of Chicago upon notes aggregating over twenty thousand dollars, and the bank agreed to extend further credit to the firm in consideration of a written guaranty to it, in the sum of thirty thousand dollars, to be signed by the firm, by its individual members, and by Mrs. Mitchell. The firm and its individual members did sign the guaranty. George H. Mitchell then took the paper and procured his wife's signature, after which he mailed the instrument to Morse, his partner at Chicago, who there delivered it to the bank. This paper was prepared by the bank, was dated at Chicago, and was signed by Mrs. Mitchell at her residence in Connecticut. The bank continued to extend credit to Morse, Mitchell & Williams, until the firm became insolvent and made an assignment for the benefit of its creditors on July 30, 1893. The firm then owed the bank sixteen thousand five hundred dollars, on unpaid notes, and was an indorser on sundry notes of third parties, all payable at Chicago. On December 26, 1893, the bank prepared an order from Mrs. Mitchell on the executor of her father's will, directing him to pay over to the bank whatever might be coming to her as part of the estate in his hands. This paper was sent by the bank to George H. Mitchell, at his residence in Connecticut, for the purpose of procuring his wife's signature. It was dated at Chicago, and was signed by Mrs. Mitchell at her home in Bristol. On January 23, 1894, George H. Mitchell transmitted the paper to the bank at Chicago, after having procured the executor's written acceptance of the order and agreement to comply with its terms. The bank acknowledged the receipt of the order, which assigned all of Mrs. Mitchell's right, title, and interest in the undistributed estate of her late father, as security upon her guaranty of certain notes made or indorsed by Morse, Mitchell & Williams, of Chicago, amounting to twenty-six thousand dollars, more or less; and agreed to surrender and reassign so much of said security as should not be applied upon the indebtedness to the bank. This receipt, and the agreement therein contained, was never delivered by George H. Mitchell to his wife, or its existence made known to her until after his death. Mrs. Mitchell was adjudged an insolvent debtor in 1896, and Edward A. Freeman was appointed the trustee in insolvency. The bank's claim was presented to the commissioners on her insolvent estate, and was allowed by them at the sum of twenty-eight thousand and seventy dollars and thirty cents, and they found the security to be equal in value to said amount. The trustee appealed from the doings of the commissioners to the superior court, and the case was reserved for the consideration and advice of the supreme court.

William C. Case and Percy S. Bryant, for the claimant.

Theodore M. Maltbie and Frank L. Hungerford, for the estate.

⁵³⁸ BALDWIN, J. Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this state until his death. Her marriage gave her, under the laws of the state then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a juridical point of view, was merged in that of her husband. Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority: 1 Swift's Digest, 30. If she assumed to make such a contract, it was absolutely void.

These personal disabilities the common law imposed partly for the protection of the husband, and partly for that of the wife. To preserve what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognized as the established policy of the state: Jackson v. Hubbard, 36 Conn. 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband: Kilbourn v. Brown, 56 Conn. 149. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married: Gen. Stats., sec. 2796.

Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general ⁵³⁹ position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status: Anson's Principles of Contract, 328. If he could, his private agreements would outweigh the law of the land. Jus publicum privatorum pactis mutari non potest.

Coverture constitutes such a status, and one of its incidents in this state, at the time of Mrs. Mitchell's marriage, was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute, unless both husband and wife have executed for public record a written contract, by which both accede to the provisions of the statute of that year and accept the rights which it offers to them: Gen. Stats., sec. 2798. No such contract was ever executed by Mrs. Mitchell.

The claim in favor of the First National Bank of Chicago

which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing dated in Illinois but signed in this state. The creditor had agreed, in Illinois, with the firm to forbear suit if she and they (as a firm and individually) would become parties to such a paper; and, after they had signed it there, had given it to her husband, in Illinois, to take to her, in this state, for execution. He procured her signature, and then mailed the instrument to one of his partners at Chicago, by whom it was there delivered to the bank. The agreement of forbearance had been conditioned on the execution of the guaranty by the firm, its individual members, and Mrs. Mitchell. It was her credit only that was to give it value. Its execution by the others gave the bank nothing which it did not have, as fully, before. It did not become complete until it received her signature. It did not then become operative as a security, until it had been delivered to the creditor.

Her husband cannot be deemed to have acted in procuring Mrs. Mitchell's signature, as the agent of the bank. No ⁵⁴⁰ finding to that effect was made by the trial court, and no such agency is implied from the circumstances of the transaction. He had a direct interest in obtaining the desired extension of credit. He was a principal in the obligation. He sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented anyone but himself, it was his copartners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority, as her agent, to make or procure such a delivery at some subsequent time.

If, therefore, the guaranty, so far as concerns her obligation upon it, was ever delivered, it was delivered, and so first took effect, in Chicago. But its delivery there could not affect her, unless it was made by her or by her authorized agent. Morse, the partner, who actually handed it to the bank, stood in no better position than her husband, whether regarded as the servant of the latter, or as a partner with him. In either case, the agency, by virtue of which the delivery was made, was created, if at all, in Connecticut.

But to create an agency is to enter into a contractual relation. Mrs. Mitchell had no capacity to make any contract whereby her legal position in respect to all or any of the other members of the community would be varied. It would have varied it in respect

to her husband, could she have constituted him her agent to put her, by the delivery of an instrument of guaranty, in the situation of a surety for his debt to a third party. He therefore derived no authority from her to make the delivery to the bank, and, as to her, the instrument never was delivered.

It is true that the guaranty, if a binding contract, was a contract made in Illinois. It might also be assumed, so far as concerns the law of this case (although this is a point as to which we express no opinion), that it was one to be performed in Illinois, and that as to the principals in the transaction it was fully an Illinois contract, and to be governed by the law of Illinois, as respects any question as to its validity. By that law, a married woman was free to enter into ⁵⁴¹ such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, Was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority; and by the laws of Connecticut, where she assumed to give such authority, she could not give it: *Cooper v. Cooper*, L. R. 13 App. Cas. 88, 99, 100; *Story on Conflict of Laws*, secs. 64, 65, 66 a, 136; *Dicey on Conflict of Laws*, c. 18, rule 123.

Had Mrs. Mitchell been within the state of Illinois when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that state as to subject her to its laws in respect to acts done within its jurisdiction. But as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law of Connecticut which must determine as to the authority of the agent, and so as to the validity of the obligation which he, as such, undertook to impose upon her by the delivery in Chicago of the paper signed by her in Bristol.

The order drawn by Mrs. Mitchell on the executor of her father's will, directing him to pay over to the bank whatever might otherwise be coming to her as part of the estate in his hands, though dated at Chicago, was brought to her in behalf of the bank in Connecticut, signed and given back to the agent of the bank in Connecticut, accepted by the executor in Connecticut, and then mailed in Connecticut by its agent to the bank at Chicago. The whole transaction, therefore, was completed here. The order became operative, if at all, to transfer her interest in

her father's estate, when the executor had notice of it, and agreed to comply with it by handing his written acceptance to the agent of the bank. That Mr. Mitchell was acting in that capacity seems clear from the finding that the bank, after the firm had become insolvent ⁵⁴² and made an assignment for the benefit of its creditors, prepared the paper and sent it to him, to procure her signature to it. No assignment which she could make would benefit the firm. If its result was to satisfy the claim of the bank, she would be subrogated to its place, and their creditors would receive no greater dividend. The order, also, was for the payment of a share in the estate of a deceased citizen of Connecticut, in course of settlement in its courts. Under these circumstances, its validity must be determined by the laws of Connecticut, and being dependent on the contractual act of a married woman, not for the benefit of herself, her family, or her estate, it was void.

There have been cases not differing essentially in principle from that at bar, in which courts, to whose opinions great consideration is due, have come to conclusions varying from those which we have reached. The leading one is *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241. There a guaranty by a married woman of such debts as her husband might thereafter contract was signed in Massachusetts, delivered there by her to him, and by him there mailed to the other party, in Maine. The court held that the contract became complete when the guaranty was received and acted upon by the latter, and not before; and enforced it as one made and to be performed in Maine, where married women then had power to enter into such agreements. No reference was made to the fact (which may, perhaps, have been immaterial under the laws of Massachusetts), that the delivery was made by the husband, acting as the agent of the wife—a fact which, in our view under the common law of Connecticut, is of controlling importance.

Engagements which coverture prevents a woman from making herself, she cannot make through the interposition of an agent, whom she assumes to constitute as such in the state of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a state to lend the aid of its courts to enforce a security which rests on a transgression of its own law by ⁵⁴³ one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the

bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery.

The superior court is advised to disallow all and every part of the claim of the First National Bank.

In this opinion the other judges concurred.

STATUTES—RETROSPECTIVE OPERATION.—If a statute is not explicitly retrospective, the court will not, by construction, give it a retrospective operation: *Williams v. Johnson*, 30 Md. 500; 96 Am. Dec. 613, and note; *Lane's Appeal*, 57 Conn. 182; 14 Am. St. Rep. 94. In other words, a statute must not be given a retroactive effect, unless its language expressly requires it: Note to *Lane's Appeal*, 14 Am. St. Rep. 100.

HUSBAND AND WIFE—CONTRACTS—CONFLICT OF LAWS. Under the common law, a wife's contracts are, as a general rule, void and cannot be enforced against her in a court of law. She can, as a rule, make no contract, in the absence of a positive law authorizing it: *Stevens v. Parish*, 29 Ind. 260; 95 Am. Dec. 636, and note; *Dobbin v. Hubbard*, 17 Ark. 189; 65 Am. Dec. 425. The common-law disability of a feme covert to make a contract exists in North Carolina except in cases provided for by statute: *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473. At common law, a wife cannot appoint another to act in her stead, for she is incapable of acting for herself: *Welsbrod v. Chicago etc. Ry. Co.*, 18 Wis. 35; 86 Am. Dec. 743. A married woman cannot encumber her separate estate for the debt of another: *Hartman v. Ogborn*, 54 Pa. St. 120; 93 Am. Dec. 679. A married woman's estate is not liable on her contracts of suretyship, whether she signs as a surety for her husband or others: *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503, and monographic note thereto, showing when the separate estate of a married woman is chargeable with her debts and contracts: *Yale v. Dederer*, 22 N. Y. 450; 78 Am. Dec. 216, and monographic note thereto on a married woman's power to contract and bind her separate estate therefor. A contract is deemed executed at that place only where the final or last act of consent is given: See monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 45, on the place of the contract. If a contract is made by a feme covert in one state, where it is valid against her, and suit thereon is brought in another state, where she has her domicile and where the contract is void because of her coverture, it will not be enforced in the courts of the latter state: *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473. Compare *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, and monographic note to *Ruhe v. Buck*, 46 Am. St. Rep. 457, on asserting against a married woman a liability to which she is subject in the state where it was created, but not in the state where she is sued.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CARR v. BRENNAN.

[166 ILLINOIS, 108.]

CONVEYANCE, POSSESSION AS NOTICE OF UNRECORDED.—The actual, open, and visible possession of real property is constructive notice to a purchaser thereof of whatever rights the possessor has therein. This remains true though he acquired title by a deed not recorded, was in possession of the property before the deed was made, and had an interest therein independent of it entitling him to be in possession thereof, as where the property belonged to his wife, from whom he received a conveyance which was lost before being recorded, and he continued in possession after her death.

PLEADINGS.—A CONVEYANCE FROM A WIFE to her husband cannot be assailed on the ground that the conveyance was for the homestead, if the pleadings do not present this question.

A. F. Butters and Tranor & Brown, for the appellant.

Duncan, Haskins & Panneck, for the appellees.

¹⁰⁰ **WILKIN, J.** John and Ellen Brennan were husband and wife, residing in the city of La Salle, La Salle county, Illinois. The wife held the title to certain real estate, consisting of lots in the city and farm lands in that vicinity. In the month ¹¹⁰ of March, 1893, being in failing health, she deeded this property to her husband, John Brennan, and died on December 5th following. The deed was never recorded, but was lost or destroyed. Ellen Brennan left her surviving two children, a son, and a daughter, Mary Ann, her only heirs. The daughter had married prior to the death of her mother, and her name was then Cannon. On July 5, 1894, she went to the city of Ottawa, and there conveyed to appellant, Robert Carr, an undivided half interest in the said real estate, and he, on the 11th of that month, filed a bill

in the circuit court of that county for a partition of the lands between the son and himself as the owners of the lands, and for the assignment of the dower of John Brennan. Brennan having answered that bill, filed a cross-bill, setting up the conveyance by the wife, Ellen Brennan, to himself, in March, 1893, and alleging that Robert Carr took his deed from Mary Ann Cannon chargeable with notice of that conveyance, and claiming title to the premises in fee. The circuit court, upon a hearing on the bill, cross-bill, answers, and replications, found in favor of the complainant in the cross-bill, John Brennan, and decreed accordingly. From that decree this appeal is prosecuted.

The evidence clearly establishes the fact of the execution and delivery of the deed from Ellen Brennan to her husband, and also that that deed was either lost or destroyed without the fault of the grantee. There is some evidence tending to prove that although the legal title to the property had been in the wife, the husband was at least the equitable part owner thereof. It also appears that at the time of the death of Ellen Brennan, Mary Ann Cannon came to the home of her father and mother and remained there until the date of her going to Ottawa (July 5th) and making the conveyance to appellant, Carr, and facts appear in evidence from which it might be inferred that she destroyed the deed. Whether, however, John Brennan was in any sense the equitable owner of ¹¹¹ the property, and whether Mary Ann Cannon had anything to do with the loss or destruction of the deed, are facts of no controlling importance in the decision of the case. Neither do we attach any great importance to the fact that the circumstances under which appellant claims to have purchased the interest of Mary Ann Cannon are more or less calculated to throw suspicion upon the bona fides of the transaction. The evidence is full and clear to the effect that from the making and delivery of the deed, in March, 1893, to the bringing of this action, John Brennan was in the open, adverse, and exclusive possession of all the property. This fact, with the proof of the execution and delivery of the deed, together with the loss or destruction thereof, fully sustained the decree of the circuit court upon the cross-bill.

It was said in *Coari v. Olsen*, 91 Ill. 273, 280: "But although other courts have held the doctrine of notice by possession as subject to being materially modified by circumstances, this court has uniformly held that actual occupancy is equal to the record of the deed or other instrument under which the occupant claims, and a purchaser is bound to inquire by what right or title he

holds. The purchaser takes the premises subject to that title or interest, whatever it may be": Citing a large number of previous decisions of the court. An attempt is made in the argument of counsel to distinguish and take the case out of this rule, upon the ground that the possession of the husband, as is said, was the same before the making and delivery of the deed as afterward. In other words, the contention seems to be that possession, to take the place and answer the same purpose as the recording of a deed, must be possession taken under the unrecorded conveyance, and not a mere continuation of a present possession. This contention is not supported by the decisions in Illinois, but, on the contrary, it was said in *Coari v. Olsen*, 91 Ill. 280: "So far, at least, as the facts of the present case are concerned, we adhere to the common-law ¹¹² rule, that where a tenant changes his character by agreeing to purchase, his possession amounts to notice of his equitable title as purchaser": Citing authorities.

In *Farmers' Nat. Bank v. Sperling*, 118 Ill. 273, Theodore F. and Abraham B. Sperling purchased certain real estate, taking the title to themselves jointly, which was duly recorded. Subsequently, Abraham B. rented his undivided interest to Theodore F., who paid rent for such interest until 1877, when he purchased the undivided interest of Abraham B., taking a deed therefor, which he failed to have placed upon record. The Farmers' National Bank subsequently obtained a judgment against Abraham B. and levied an execution upon the real estate, and it was sold and bid in by the bank, its certificate of purchase being duly recorded. On bill by Theodore F. Sperling, claiming to be the sole owner of the premises at the time of the execution sale, that certificate of purchase was set aside. On appeal to this court, that decree was affirmed. One of the grounds of reversal urged being that the possession of Theodore F., under the circumstances, was not constructive notice that he was sole owner of the property, the court, in passing upon the point, said: "This court has held, in opposition to the rule quoted by counsel for appellant from Wade's Law of Notice, sections 297, 298, and *Emmons v. Murray*, 16 N. H. 386, that the actual open and visible possession of real estate is constructive notice to persons purchasing it of whatever rights the possessor then has in the land. In *Coari v. Olsen*, 91 Ill. 273, we held, in obedience to what we understood to be the common law and upon the faith of authorities therein referred to, that where a tenant changes his character by agreeing to purchase, his possession amounts to notice of his

equitable title as purchaser. In *Haworth v. Taylor*, 108 Ill. 275, we held that the possession of a tenant is constructive notice of the actual title of the landlord at that time, although that title was acquired subsequent to the time the landlord ¹¹⁸ leased to the tenant. It was there said: 'As at the date of the lease Taylor was not the owner of the land, but acquired title subsequently, on November 13, 1865, it is contended that the notice from the tenant's occupancy was notice only of Taylor's (the landlord's) rights at the time of the making of the lease, and not of his rights at the time of Haworth's deed—December 26, 1866. We do not concur in this view, although the authority cited (*Emmons v. Murray*, 16 N. H. 398) lends somewhat of countenance to it. We regard the doctrine, as derived from the decisions of this court, to be, that where one purchases land of which another is at the time in the actual, open, and visible possession, such possession is constructive notice to the purchaser of all rights whatever of the possessor in the land at the time of the purchase.' " Here, the possession of the grantee, John Brennan, had the same effect to charge appellant, Robert Carr, with notice of the deed as though it had been recorded.

Something is said in the argument about the conveyance from the wife to the husband being illegal and void as to one piece of the property conveyed, upon the ground that it was at the time the homestead, the contention being that a conveyance of the homestead by a husband or wife to the other, not joined in by the other, is void. In the first place, we do not think the evidence sufficiently establishes the fact that the property conveyed was at the time occupied as a homestead; and, in the second place, no issue as to the validity of the conveyance upon any such ground is made by the pleadings. It is not claimed in the original bill, nor in the answer to the cross-bill, that the deed from the wife to the husband was ineffectual to convey any part of the property because it was a homestead.

We think the decree of the circuit court was fully authorized by the evidence, and it will accordingly be affirmed.

CONVEYANCE—NOTICE OF UNRECORDED POSSESSION.—Possession of land necessary to impart notice of title thereto must be adverse, exclusive, open, unequivocal, and notorious, and must be inconsistent with the claim of any other person. The possession of a farm by a woman claiming title under an unrecorded deed from her son in law is insufficient to impart notice of title thereto when the grantor, residing on the farm when the conveyance was executed, continues to do so, and to exercise some authority over it: *Elliott v. Lane*, 82 Iowa, 484; 31 Am. St. Rep. 504, and note. See, also, note to *Anthony v. Wheeler*, 17 Am. St. Rep. 281; *Springfield Homestead Assn. v. Roll*, 137 Ill. 205; 31 Am. St. Rep. 358, and note.

FREIE v. No. 4 FIDELITY BUILDING AND SAVINGS UNION.

[166 ILLINOIS, 123.]

THE STATUTES OF ANOTHER STATE, WHEN IN ISSUE, AND PROPERLY ADMITTED IN EVIDENCE.—If, in a complaint to foreclose a mortgage, the plaintiff is alleged to be a corporation, organized, existing, and doing business pursuant to the statutes of another state, the statute under which it was organized is admissible in evidence.

USURY.—A BUILDING AND LOAN ASSOCIATION organized under the laws of the state of Indiana, and by them entitled to exact premiums and fines in addition to legal interest, may, upon principles of comity, exercise the same powers within another state, if not inconsistent with its laws or public policy; and such powers are not deemed so inconsistent, if their exercise is permitted to similar corporations organized within the state.

Woodle & Arnold, for the plaintiffs in error.

Whitney & Upton, for the defendant in error.

¹²⁹ **CARTWRIGHT, J.** Defendant in error filed its bill to foreclose a mortgage given to it by plaintiffs in error, J. Henry Freie and Caroline Freie, his wife. The bill alleged that said J. Henry Freie, one of complainant's members and stockholders, borrowed from it three thousand dollars on thirty-six shares of its stock, giving his note for said sum and securing it by the mortgage. The defendants by their answer admitted every material averment of fact, but set up as a defense that the note and mortgage were usurious, because they provided for a premium at seven per cent per annum and for fines, in addition to interest at six per cent. The cause was referred to a special master to take and report the evidence, with his conclusions. The parties stipulated before him that in case there should be a decree of foreclosure the solicitor's fee provided for by the mortgage should be allowed at one hundred dollars. The special master took the evidence, and reported the same, with his conclusion that there was due complainant three thousand and thirteen dollars and eight cents, and he recommended a decree of foreclosure for that amount, with said solicitor's fee so agreed upon, and costs. Exceptions ¹³⁰ to the report were overruled and a decree was entered, which has been affirmed by the appellate court.

It is first complained that the statute of the state of Indiana, under which complainant was organized, was improperly admitted in evidence. The ground of the objection made here is, that the statute was not sufficiently pleaded to be admissible. The abstract does not show that any objection was made to the intro-

duction of the statute when it was offered, and for that reason it should not now be entertained. But we think that the statute was not subject to the objection sought to be made. The bill alleged that complainant was a corporation organized, existing, and doing business pursuant to this statute. We deem it proper to admit in evidence the statute which was pleaded as complainant's charter, for the purpose of showing the nature and extent of its corporate powers.

The other claim made is, that the contract was usurious. It is conceded that this objection could not be successfully made, as against a corporation of the same character as complainant, if organized under the laws of this state, as has been repeatedly held by this court: *Holmes v. Smythe*, 100 Ill. 413; *Freeman v. Ottawa Building etc. Assn.*, 114 Ill. 182; *Winget v. Quincy Building etc. Assn.*, 128 Ill. 67. But it is insisted that a foreign corporation organized as a building and loan association cannot contract for premiums and fines, in addition to interest, without violating the statutes against usury. The rule as to foreign corporations is, that such a corporation created in another state may, upon the principle of comity, exercise within this state the powers conferred by its charter, if not inconsistent with the public laws or policy of this state: *Stevens v. Pratt*, 101 Ill. 206; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375; 56 Am. Rep. 776; *Barnes v. Suddard*, 117 Ill. 237. By the statute of Indiana, under which complainant was organized, it had power to enter into the contract in this case, and it was not contrary to the laws or policy of this state which permit the organization of like corporations with ¹⁸¹ the same powers. The complainant, as a foreign corporation doing business here, is subjected by our statutes to the same penalties and restrictions as domestic corporations of like character, but there is no restriction imposed upon domestic corporations of the same character as complainant which would render this contract usurious. It is therefore not subject to the defense of usury which was interposed.

The judgment of the appellate court will be affirmed.

EVIDENCE—STATUTES OF ANOTHER STATE—ADMISSIBILITY OF.—Since judicial notice cannot be taken of the statutes of another state, averments of such statutes, or of their construction, in a complaint, must be accepted as true upon a demurrer thereto: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; 55 Am. St. Rep. 414. Such statutes, printed in compiled form by authority of a statute thereof, are admissible in evidence without further proof, though published by a private person under authority of such statute: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194.

USURY—CONFLICT OF LAWS.—The general rule is, that where an obligation is made in one state, but was to be performed in another, the parties are at liberty to regard it as a contract of either state, and to stipulate for any rate of interest allowable in either: *Pioneer Sav. etc. Co. v. Cannon*, 96 Tenn. 599; 54 Am. St. Rep. 858, and note; extended note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 171; *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194, and note. A note void, because of usury, by the laws of the state wherein it is made and payable, is also void in another state in which the maker resided at the time he signed it, though by the laws of the latter state it would not be usurious if executed therein: *McGarry v. Nicklin*, 110 Ala. 559; 55 Am. St. Rep. 49.

BRUSCHKE v. WRIGHT.

[166 ILLINOIS, 183.]

JUDICIAL SALES.—AN ASSIGNEE OF A CERTIFICATE OF PURCHASE issued upon a judicial sale is subject to all equities existing against his assignor and relating to the property sold, whether he had notice thereof or not.

PURCHASERS, INNOCENT, WHO ARE NOT ENTITLED TO PROTECTION AS.—To entitle one to protection as an innocent purchaser he must have the legal title.

JUDICIAL SALES—TERMS UPON WHICH MAY BE SET ASIDE IN EQUITY.—If an agreement is made to purchase the property of minors for a sum specified, and the mode stipulated for carrying out the agreement is that the purchaser will bid off the property at a foreclosure sale about to be had, paying the amount necessary to satisfy the judgment, and will afterward pay the guardian an additional sum, sufficient, with that already paid at the sale, to make the whole sum agreed to be paid, and such purchaser procures another person to make the bid, who, to secure money with which to pay the sum bid, assigns the certificate of sale to a stranger, who has no notice of any of the extrinsic facts, he is not entitled to hold the property as against the minors who have not been paid, nor are they entitled to have him pay the balance of the bid. Their rights are limited to having the sale set aside and a resale made, out of which the holder of the certificate shall be paid the sum which has been paid to him and applied to the satisfaction of the decree of foreclosure.

SUBROGATION.—A PURCHASER AT A JUDICIAL SALE or his grantee or assignee, in the event that it proves insufficient to convey the title to the property sold, is entitled to be subrogated to the rights of the judgment creditor to the extent that his bid has discharged a valid claim against the property sold.

JUDICIAL SALE—RESALE AND REDEMPTION.—If a judicial sale is set aside and a resale ordered, with a direction that out of its proceeds the purchaser at the former sale, or his assignee, be repaid the sum bid at such former sale, such resale must be made subject to the same right of redemption as the original sale.

Petition filed in a foreclosure suit praying that a certificate of sale theretofore issued be surrendered and canceled and a resale of the premises made, and that the purchaser at the former sale, and his assignee, be enjoined from taking out a deed. The

property directed to be sold belonged to certain minors, and was subject to a mortgage. A suit was brought to foreclose this mortgage, in which the minors and the administrator of their deceased parents were made parties defendant. A judgment was regularly entered in such action, foreclosing the mortgage and directing the premises to be sold by a master at public auction, and a sale thereof took place on March 2, 1893, at which one Arthur C. Gehr bid for the property the sum necessary to satisfy the judgment and costs, to wit, four thousand nine hundred and eighteen dollars and forty-three cents, and a certificate of purchase was issued to him dated on the day of the sale. This sale was brought about by certain negotiations for the sale of the property conducted by the minors and the administrator of the estate and one Cameron, by which the latter agreed to purchase the property and pay therefor the sum of ten thousand dollars. The mode of carrying out this agreement, as arranged between the parties, was that Cameron should bid at the foreclosure sale and pay in cash the amount necessary to satisfy the decree of sale, and the balance of the purchase price was to be paid on or before the expiration of the time of redemption from the foreclosure sale. Cameron procured Gehr to make the bid for the property, and thereafter, on the same day, an agreement in writing was entered into between Gehr and the guardian of the minors by which Gehr undertook to pay for the certificate of sale, and the balance of five thousand and eighty-one dollars and fifty-seven cents on or before the expiration of the time for redemption, if the property should not be redeemed from sale during the time allowed by law by any person entitled to effect such redemption. This agreement also stipulated that it "shall not impair or affect in any manner the lien that the legal holder of said certificate of sale may have on said premises, or his rights thereunder, according to the statutes of Illinois." On the day of the sale Gehr paid the master two hundred dollars. Afterward, on the 14th of March, he paid the balance of his bid, but he then, or before that time, sold and assigned his certificate of sale to James G. Wright, who furnished the money necessary to complete the whole ten thousand dollars to effect the purchase of the property. Wright, on buying the certificate of purchase, was informed that the property would probably be redeemed, and he purchased it as an investment, and in order to realize the interest allowed by law. In April, 1893, Cameron executed to Gehr a mortgage on the property to the amount of ten thousand dollars, included in which was other property owned by Cameron, but neither Gehr nor Cameron was able, at any time, to redeem the property.

from Wright, or to pay the balance agreed to be paid to the minors. Wright had no knowledge of the negotiations between Gehr and Cameron antecedent to his purchase, nor had he knowledge of any of the facts by which the minors now sought to avoid his sale. The circuit court granted the prayer of the petition, and thereupon the defendant Wright appealed to the appellate court. That court reversed the decree of the circuit court in some respects, and thereupon a writ of error was prosecuted to the supreme court.

A. C. Story, F. W. Story, and Herman Welk, for the plaintiffs in error.

Lee & Hay, for the defendant in error, Wright.

Matz & Fisher and George W. Cameron, for Robert Cameron.

¹⁸⁹ MAGRUDER, C. J. When the sale was made by the master, there was some arrangement or understanding between Gehr and the guardian of the minors, that Gehr, acting for Cameron, ¹⁹⁰ was to pay \$10,000 for the property in controversy. Under this arrangement or understanding, the minors were to receive the benefit of the difference between \$10,000 and what was necessary to pay off the amount due upon the mortgage upon the property and the costs and expenses of foreclosing that mortgage. It is the duty of a court of equity to secure for said minors, if possible, the benefit so to be derived from the arrangement made in their favor. In determining whether such a result can be accomplished, it will be necessary to consider in their order some of the contentions made by counsel.

1. It is claimed by counsel for plaintiffs in error, that the property was actually bid off for the sum of \$10,000. We do not think that this claim is sustained by the proofs. The master and Gehr both swear that it was struck off for \$4,918.43. The report of sale of the master recites that it was struck off and sold for that amount. Said report of sale was confirmed by the court, after the guardian ad litem of the minors, and the attorney of the guardian ad litem, and the attorney of the guardian of the minors, had all indorsed upon the report that it was "all right." The master had no power to sell the property, the sale being subject to redemption, upon any other terms than for cash. The decree required him to sell for cash. The arrangement, by which the amount due under the decree of foreclosure was to be paid in cash and the balance of the purchase money on or before the expiration of the time of redemption, was one which the master

had no power to make. The talk among the parties at the foreclosure sale, that \$10,000 was to be paid for the property, is erroneously interpreted by some of the witnesses, as amounting to a bid of \$10,000 made at the sale. But the arrangement for the purchase of the property at the sum of \$10,000 was entered into in writing between the guardian and Gehr, acting for Cameron, after the sale took place.

¹⁹¹ 2. It is further claimed by counsel for plaintiffs in error, that, as Gehr agreed to pay \$10,000 for the property in the manner stated in the contract between him and the guardian, it would be inequitable to allow him to take from the master a deed of the property upon the certificate of sale after having paid only \$4,918.43; and that Wright, being the assignee from Gehr of the certificate of sale, stands in no better position with reference to the rights of the plaintiffs in error than that occupied by Gehr, his assignor; and that Wright, when the certificate was assigned to him by Gehr, took it subject to all the equities, which existed in favor of the plaintiffs in error, while Gehr was the holder of the certificate. There is much force in this contention.

The evidence shows that Wright purchased the certificate in good faith, and without any actual notice of the equities of plaintiffs in error. He bought it as an investment, and paid his money for it; and the money which he so paid for it went to pay off the Troost mortgage, which was a valid encumbrance upon the property of the plaintiffs in error. But the doctrine is, that an innocent purchaser is one who has the legal title to the property, and has paid therefor a valuable consideration without notice of defects in the title. The purchaser of a certificate of sale does not take the legal title to the property, but has only an equitable title. His interest has been said to be "an incipient interest that may or may not ripen into an absolute estate." Inasmuch as the purchaser has not the legal title to the property bought, he, of course, assigns no legal title when he assigns the certificate. The assignee of such certificate is not regarded as being entitled to protection as an innocent purchaser, until he has obtained the legal title by a deed. Hence, we have held that the assignee of a certificate of sale, issued to a purchaser under a judicial judgment or decree, is chargeable with notice of all irregularities that may invalidate the sale; he acquires no greater equities ¹⁹² under the certificate than the purchaser, who is his assignor, has therein. He takes the certificate charged with all defenses which could be interposed against his assignor. The statute, which makes a certificate of sale assignable, provides that

"every person to whom the same shall be so assigned shall be entitled to the same benefits therefrom in every respect that the person therein named would have been if the same had not been assigned": 2 Starr & Curtis' Annotated Statutes, c. 77, sec. 29, p. 1403. We have held, in construing this statute, that an assignment of a certificate of sale places the assignee in the place of the assignor as respects the rights by virtue of the certificate, and that whatever equitable defenses could have been interposed against the certificate in the hands of the original purchaser can be interposed against an assignee from such purchaser: *Chytraus v. Smith*, 141 Ill. 231; *Roberts v. Clelland*, 82 Ill. 538; 16 Am. & Eng. Ency. of Law, 833, and cases cited. What then is the equity, which can be enforced against Wright, as assignee of the certificate, in favor of the plaintiffs in error? It cannot be said that Wright can be required to carry out the agreement made between Gehr and the guardian by paying the difference between \$10,000 and what he paid for the purchase of the certificate of sale. He was not a party to that contract, nor could it be enforced against him. Indeed, the petition does not ask for an enforcement or specific performance of the contract, but it asks that the sale, made by the master, be set aside, and that the property be resold. The plaintiffs in error are entitled to enforce against Wright the equity, which they would have been entitled to enforce against Gehr if he had remained the owner of the certificate, of having a resale of the property. This is true, because, if it had not been for the agreement of Gehr to purchase the property for \$10,000, they may have looked elsewhere for a purchaser for more than the amount due upon the mortgage. Again, the expectation of receiving the balance of ¹⁹³ the \$10,000, not bid at the sale by the master, from Gehr at the expiration of the time of redemption undoubtedly lulled them to sleep, and prevented their making any efforts to redeem the property from the master's sale. The proper relief to be awarded in such a case is a resale of the property: *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 116; *Mason v. Martin*, 4 Md. 124; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Campbell v. Johnston*, 1 Sand. Ch. 148.

3. The question then arises as to the terms upon which a resale should be made when the court orders the property to be re-advertised and sold again. It is contended by counsel for plaintiffs in error, and the circuit court so ordered in its decree, that the defendants, Cameron, Gehr, and Wright, or some one or more of them, should pay, within a time to be fixed, to said guardian, or the clerk of the court for the benefit of the minors, the

remainder of said sum of \$10,000 after taking out what was bid at the master's sale, and after taking out the deductions provided for in said contract between the guardian and Gehr, to wit, \$5081.57, or thereabouts; and that, in default of such payment, the property should be resold. The decree of the circuit court further orders that the master shall receive no bid for said premises of a less amount than said sum of \$5000, or thereabouts, with interest and costs; and that, out of said proceeds of sale, after paying costs, so much of the amount bid as is equal to the sum last mentioned should be paid to the guardian and that the surplus should be brought into court. In other words, the decree of the circuit court makes no provision for refunding to Wright the \$4918.43 which he paid for the certificate of sale; but the effect of the decree is to compel him to lose that amount, as the decree makes provision for a sale of the property to realize the balance of the \$10,000 over that amount, and no provision for realizing any part of the amount paid by Gehr at the sale, or paid by Wright for the assignment of the certificate. Such a result as this is wholly unjust, ¹⁸⁹⁴ and opposed to the principles of equity which are applicable to such cases.

It is one of the maxims of the court of chancery, that those, who seek equity, must do equity: *Bennitt v. Wilmington Star Min. Co.*, 119 Ill. 9. The plaintiffs in error come into a court of equity and invoke the aid of that court to set aside a master's sale, which, as they claim, has realized to them less than they are entitled to receive; and, before they can secure such aid, they must offer to do what is equitable in the premises. To refuse to refund the amount paid at the sale, which was used for the purpose of discharging a mortgage upon their property and relieving it from the lien of such mortgage, or to make any provision in the decree of sale for the payment of the amount so advanced by the purchaser out of the proceeds of said sale, would be inequitable.

In *Kinney v. Knoebel*, 51 Ill. 112, there was a sheriff's sale which was void and unauthorized, and the purchaser had notice of that fact; but the money he paid for the land went to pay the creditors of the estate, and left a surplus in the hands of the executor; we there held that as the purchase money which such purchaser paid at the sheriff's sale relieved the estate from all its indebtedness and gave a surplus to the executor for the benefit of the heirs, such heirs were bound to refund the money with interest as a condition to their redeeming the land.

In *Chambers v. Jones*, 72 Ill. 275, it was held, that, where infant defendants to a partition suit sought to set aside a sale of

their land made under a decree in such suit by a court having no jurisdiction of their persons, they should be required, as a condition to granting them the relief sought, to refund to such purchaser whatever of the purchase money paid by him may have come into their hands.

In *Wickiser v. Cook*, 85 Ill. 68, where a sale was set aside as being one which a court of equity could not sanction, it was held that the complainant, having come into a court of equity and asked to have the sale set aside, ¹⁸⁵ equity would require a return of the amount of money received upon the sale; and it was there said: "When she seeks equity she must do equity. It would not be equitable to restore to her the property and at the same time allow her to retain the consideration money which she received for the land. . . . This amount should have been returned, or the land ordered sold to satisfy the same, as a condition upon which the sale should be canceled." In *Brandon v. Brown*, 106 Ill. 519, we said: "We have repeatedly decided that when a minor disaffirms a judicial sale by bill in equity, he must return, or offer to return, what he has received, if it be in his power": See, also, *Smith v. Knoebel*, 82 Ill. 400; *Hamilton v. Wright*, 9 Clarke & F. 123; *Pearson v. Benson*, 28 Beav. 598; *Duncan v. Dodd*, 2 Paige, 99; 12 Am. & Eng. Ency. of Law, 235.

We regard the doctrine of subrogation as applicable to such a case as is here presented. Inasmuch as the money advanced by Wright was used for the purpose of paying off the mortgage upon the property, a court of equity will subrogate Wright to the rights of Troost, the original mortgagee, and regard the decree, which was in fact paid off by the proceeds of the master's sale, as subsisting for the purpose of being enforced for the benefit of Wright. The general doctrine is, that a purchaser at a foreclosure sale will be subrogated to the rights of the holder of the mortgage, which has been discharged with the purchase money, in the event that the sale is ineffectual to convey title to the property sold.

In *Brobst v. Brock*, 10 Wall. 519, it was held that an irregular judicial sale, made at the suit of the mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale the rights of the mortgagee as such.

In *Johnson v. Robertson*, 34 Md. 165, where a foreclosure decree was reversed on appeal and the property ordered to be sold again for the payment of the mortgage debt, ¹⁹⁶ it was held that the original purchaser, having paid the money which was applied to the payment of the mortgage debt, was entitled to be

subrogated to the rights of the mortgagee, and to have the mortgage treated as assigned to him.

So, where a purchaser at a sheriff's sale paid money on his bid which discharges the judgment, and the sheriff's deed turns out to be defective, he may be subrogated to the lien of the original judgment: *Jones v. Smith*, 55 Tex. 383; *Short v. Sears*, 93 Ind. 505; *Davis v. Gaines*, 104 U. S. 386.

So, also, in *Bonner v. Lessley*, 61 Miss. 392, it was held that a purchaser under a void trustee's sale, if the money paid by him is applied to the extinguishment of the trust debt, becomes the equitable assignee of the debt, and is subrogated to the rights of the original cestui que trust, and, as such, entitled to charge the land in equity with the debt.

The doctrine of subrogation, which is thus applied in behalf of the purchaser at a foreclosure sale, exists also in favor of the grantee of such purchaser: *Rogers v. Benton*, 39 Minn. 39; 12 Am. St. Rep. 613; *Richards v. Morton*, 18 Mich. 255; *Jordan v. Sayre*, 29 Fla. 100; *Bonner v. Lessley*, 61 Miss. 392.

In *Bishop v. O'Conner*, 69 Ill. 431, we held that a purchaser of land at an administrator's sale is not entitled in equity to be subrogated to the claims of the creditors which have been paid by the purchase money, where the title fails for want of jurisdiction in the court ordering the same over the person of the heir; but that was mainly on the ground that such claims against the estate are not regarded as a charge upon the real estate. In *Bishop v. O'Conner*, 69 Ill. 431, a distinction was drawn between a purchase at an administrator's sale, as shown by the facts therein, and those cases in which it is held that, where the purchase money at such a sale has been applied in removing an encumbrance upon the land of an estate, and the title fails, the purchaser may be subrogated to the lien so ¹⁹⁷ discharged by his payment. In *Chambers v. Jones*, 72 Ill. 275, the doctrine of *Bishop v. O'Conner*, 69 Ill. 431, was indorsed, and, while it was there held that the doctrine of caveat emptor applies to purchasers at judicial sales, so that on the failure of title such a purchaser has no right to relief as against the heirs, and cannot have a decree against the land itself for the purchase money, yet it was there said that, when the heirs are seeking relief against the purchaser, they will be decreed to refund the purchase money, upon the principle that he who seeks equity must do equity.

So in *Harts v. Brown*, 77 Ill. 226, where the directors of an incorporated company purchased the property of the company at a sale under a deed of trust, and the sale was held to be void

in part, yet, on bill by the original stockholders against the directors, and a new company formed by them, to set aside the sale, it was held that the directors, having paid the debts of the old company, were entitled in equity to be subrogated to the rights of the creditors whose debts they paid. Again, in *McHany v. Schenk*, 88 Ill. 357, it was held that a person, purchasing land at a sheriff's sale under execution, and thus satisfying the judgment, is entitled in equity either to the land or to realize the money so paid, with interest, from the sale; and if such sale is set aside for an informality, as selling the land en masse, he will be subrogated to the lien of the judgment and the rights of the judgment creditor under the same: See, also, *St. Louis etc. Min. Co. v. Sandoval etc. Min. Co.*, 116 Ill. 170; *Lagger v. Mutual Union Loan etc. Assn.*, 146 Ill. 283.

Hence, we are of the opinion that the decree of the circuit court was erroneous in not providing, that the amount paid by Wright for the certificate of sale should be repaid to him out of the proceeds of the resale of the property. We agree in the main with the judgment of the appellate court, which directs that, upon a resale, the defendant in error, Wright, should be refunded the amount paid by him, but we regard the judgment of that ¹⁸⁹³ court as erroneous in ordering the resale to be made without redemption. The statute provides that, "when any real estate is sold by virtue of an execution, judgment, or decree of foreclosure of mortgage, or enforcement of mechanic's lien, or vendor's lien, or for the payment of money, it shall be the duty of the sheriff, master in chancery, or other officer, instead of executing a deed for the premises sold, to give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor, or, if purchased by the person in whose favor the execution or decree is, the amount of his bid, the time when the purchaser will be entitled to a deed unless the premises shall be redeemed as provided in this act": 2 Starr & Curtis' Annotated Statutes, 1395. Here, the sale which is ordered to be made is to be made by an officer of the court, and is to be made "for the payment of money"; it therefore comes within the requirement of the statute, which makes the sale subject to the right of redemption. Such was the view taken by this court in the case of *Locey Coal Mines v. Chicago etc. Coal Co.*, 131 Ill. 9.

The judgment of the appellate court, and the decree of the circuit court, are accordingly reversed, and the cause is remanded to the circuit court, with directions that unless the defendant in error, Wright, be paid the amount paid by him for the certificate

of purchase, with lawful interest from the time of such purchase, within a short time to be fixed by the court, a decree be entered, requiring a resale of the premises by the master for cash; and that out of the proceeds of the sale there be paid: 1. The expenses; 2. The amount which the defendant in error, Wright, should receive as above stated; and 3. That the residue be paid to the guardian of said minors; and that, at such sale, the master receive no bid for an amount less than the sum to be paid defendant in error, together with the costs of such sale, including the master's fees and commissions.

Reversed and remanded.

PURCHASER—INNOCENT—WHO IS.—If a purchaser in any manner receives notice of prior adverse rights in and to the subject matter before he has fully acquired or perfected his own interest under the purchase, his position as bona fide purchaser is thereby destroyed, even though he may have paid a valuable consideration: *Arnold v. Hagerman*, 45 N. J. Eq. 712; 14 Am. St. Rep. 712, and note. See, also, *Riley v. Martinelli*, 97 Cal. 575; 33 Am. St. Rep. 209, and *Hudepohl v. Liberty Hill Water etc. Co.*, 94 Cal. 588; 28 Am. St. Rep. 149, and extended note to *Anthony v. Wheeler*, 17 Am. St. Rep. 281.

JUDICIAL SALES—WHEN SET ASIDE IN EQUITY.—In order that equity may set aside a judicial sale, there must be accident, surprise, mistake, or fraud in some fact or circumstance affecting the sale itself, and not resting on an irregularity of process or irregularity in its execution: *Gardner v. Mobile etc. R. R. Co.*, 102 Ala. 635; 48 Am. St. Rep. 84. See, also, *Weaver v. Nugent*, 72 Tex. 272; 18 Am. St. Rep. 792, and note.

JUDICIAL SALES—SUBROGATION—PURCHASER'S RIGHT TO.—Purchasers under a void judicial sale are entitled to be subrogated to the rights of the creditors whose claims were discharged by the proceeds of such sale: *Bond v. Montgomery*, 56 Ark. 563; 35 Am. St. Rep. 119, and note; *Hull v. Hull*, 35 W. Va. 155; 29 Am. St. Rep. 800. See, also, note to *Bailey v. Bailey*, 44 Am. St. Rep. 713, and extended note to *Perry v. Adams*, 2 Am. St. Rep. 826.

JUDICIAL SALE—TERMS OF RESALE.—If a judicial sale is set aside and a resale ordered, the resale must be subject to the same conditions as the first sale: *Shinn v. Roberts*, 1 Spenc. 485; 43 Am. Dec. 636; extended note to *Mount v. Brown*, 69 Am. Dec. 362.

HESTERBERG v. CLARK.

[106 ILLINOIS, 241.]

WILLS—EXECUTOR'S RIGHT TO APPEAL FROM ORDER DENYING OR REVOKING THE PROBATE OF.—If a will is set aside in a suit in which the executor is one of the defendants, he has the right to prosecute an appeal or writ of error.

WILLS—BURDEN OF PROOF IN SUITS TO SET ASIDE.—If, in a suit in chancery to set aside the probate of a will, the complainant offers the will and the certificate of all the subscribing witnesses in the probate court, and their testimony is there given, a prima facie case is made out in favor of the will, which the complainants must meet and overcome.

WILLS—CLAUSE ADDED WITHOUT PROPER ATTESTATION.—If, after a will has been properly executed and attested, the testator caused a further provision to be written therein in his presence and that of the subscribing witnesses, without any further signing on his part or attestation on theirs, this does not add anything to, nor does it revoke, a pre-existing will or any part thereof.

WILLS, INTERLINEATIONS AFTER EXECUTION.—An interlineation in a will after it has been duly executed and attested, though made in the presence of the testator and that of the witnesses to the will, there being no further signing by him nor attestation by them, has no effect whatever on the will.

Slate & Bollinger, for the plaintiff in error.

Charles Morrison and Turner & Holder, for the defendants in error.

243 CARTER, J. Defendants in error filed their bill in chancery in the circuit court of Monroe county to set aside the will, and the probate thereof, of Thomas Mathews, deceased. The bill alleged that the testator was of unsound mind and memory; that the execution of the will was procured by falsehood, misrepresentation, and undue influence of the devisees, and that it was not the will as made and executed by the testator as and for his last will, but was fraudulently presented as and for an instrument in writing which he had executed purporting to be his last will and testament.

The facts are briefly these: On February 18, 1895, the testator, desiring to make his will, sent for one Powderly, a school teacher, and Thomas J. Mathews, his grandson, and by the direction of the testator Powderly wrote the will when they were all together, and it was then and there signed by the testator, and, as witnesses, by Powderly and Thomas J. Mathews, as required by the statute. As executed the will contained eight paragraphs, dividing the testator's estate among his wife, Margaret, and his sons, Francis Mathews, Thomas Mathews, Jr., and Joseph Mathews, with legacies to each of his six daughters. There was also a paragraph numbered "lastly," appointing Henry Hesterberg

as executor. Two days after this will was executed the testator again sent for the two witnesses, and Powderly, at his request and in his presence and in the presence of the other witness, inserted in the instrument, after the eighth paragraph, the following:

“Ninth. In addition to what I have already bequeathed to my beloved wife, I give her all the wheat I have in the granary, excepting, however, enough to pay my taxes due in the year 1895.”

The will was not again signed by the testator or the witnesses, and no note or memorandum of the addition was indorsed on the will. Powderly testified that the ²⁴⁴ testator said “we should witness that he wanted to give his wife that much extra in addition to what he gave her beforehand,” but that he did not ask them to sign again. He died a few days thereafter. The plaintiff in error, Hesterberg, as executor, was made one of the defendants to the bill, and he alone has prosecuted this writ. He answered the bill, denying its allegations, but the other defendants, except the infants, suffered default.

When the cause came on for hearing, the defendants, who were the proponents of the will, offered no evidence, but the complainants introduced the original will and probate thereof, with the certificate of proof taken in the county court, and also examined the subscribing witnesses. The witness Powderly was the only one interrogated in the circuit court respecting the testator’s mental capacity. He testified: “His mind was as clear as my mind or your mind. He was as clear as any man was, in my mind.” On motion of the complainants, the court instructed the jury to find that the instrument was not the last will of said Thomas Mathews, deceased. The jury rendered their verdict accordingly, and a decree was entered in conformity therewith, and that the said will and probate thereof be set aside and held for naught.

The first contention of defendants in error is, that the principal defendants below, the widow and two sons, the chief beneficiaries, by their default admitted all the material allegations of the bill, and that the executor has no such interest in the litigation as would authorize him to appeal or prosecute a writ of error, and counsel cite *Shaw v. Moderwell*, 104 Ill. 64, and *Moyer v. Swygart*, 125 Ill. 262. These cases decide that the executor, if pursuing the personal interests of devisees by his appeals to the courts, must look to them for his costs if unsuccessful, and cannot charge the estate. As he was named executor by the will, he was interested in sustaining it. He was made defendant to the bill and issue had been ²⁴⁵ made on his answer, and we see no

reason why, subject to the contingency of having to pay the costs like other suitors, he would not have the right to bring the record here for review. It was his duty, under the statute, to cause the will to be proved and recorded: Administration Act, sec. 2. It has been set aside in a suit to which he had been made a defendant. He had the undoubted right to have the error, if any, corrected on appeal or writ of error.

Defendants in error contend that as the defendants below offered no evidence they failed to establish a *prima facie* case, and, therefore, the instruction of the court to the jury was proper. This contention is without force, for the reason that the complainants themselves furnished the proof which they now claim should have been made by the defendants below. By offering the evidence themselves they waived the advantage which they now seek to take. The complainants put in evidence the will and the certificate of the oaths of the witnesses in the probate court, besides the testimony of the subscribing witnesses, and thereby established a *prima facie* case for proponents of the will: *Holloway v. Galloway*, 51 Ill. 159; *Carpenter v. Calvert*, 83 Ill. 62; *Pendlay v. Eaton*, 130 Ill. 69.

The next contention of defendants in error is, that the decree should be sustained because the will was never legally executed, there having been no reattestation of the instrument, as it is claimed, after the insertion, by interlineation, of the ninth clause. Under the rule laid down by the authorities, the insertion of the ninth clause after the execution and attestation of the will did not work a revocation of the will or render it invalid as originally executed. In *Wolf v. Bollinger*, 62 Ill. 368, this court said: "The power to try and determine whether the writing produced be the will of the testator or not includes the power to adjudge upon the validity of any part of the instrument, as well as the whole. . . . It is the rule that a valid will, once existing, ²⁴⁶ must continue in force, unless revoked in the mode prescribed by statute. . . . It has been often determined, in the construction of similar statutes, that the mere acts named, of cancellation or obliteration, will not constitute a valid revocation, unless done with the intent to revoke. . . . It is believed to be the doctrine, as laid down in *Redfield on Wills*, 314, 325, 327, and well settled by the authorities, that when the testator makes an alteration in his will by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses or other form required by the statute, it is presumed that the erasure was intended to be dependent upon the

alteration going into effect as a substitute, and such alteration not being so made as to take effect, the will, therefore, stands, in legal force, the same as it did before, so far as it is legible after the attempted alteration."

It is very clear that the court below erred in giving the instruction in question to the jury and in entering the decree setting aside the will, for if it be conceded that the ninth clause interlined was invalid, the whole will was not, for that reason, revoked or rendered invalid. There was no intention on the part of the testator to revoke his will. He simply desired to make a slight alteration by interlining an additional bequest to his wife, which, if it fail for want of proper attestation, leaves the original will in full force: *Bringle v. McPherson*, 2 Brev. 270; 1 *Redfield on Wills*, 325, 326; *Wright v. Wright*, 5 Ind. 389; *Jackson v. Holloway*, 7 Johns, 394; *Greer v. McCrackin*, Peek, 301; 14 *Am. Dec.* 755; *In re Wilcox's Will*, 20 N. Y. Supp. 131; *Doane v. Hadlock*, 43 Me. 73; *Wheeler v. Bent*, 7 Pick. 61.

The ninth clause inserted in the will by interlineation cannot be sustained as a part of the will. It was not signed and attested with the formalities required by the statute. In this respect, while recognizing the force of the reasoning employed in the opinion, we cannot agree with the conclusion reached by the supreme court of ²⁴⁷ Indiana in *Wright v. Wright*, 5 Ind. 389, where a new provision was inserted in a will a few days after its execution—a case practically on all fours with this. It was there said: "But why should the bequest added on the 4th of March be deemed no part of the will? It was inserted by the same scrivener who wrote the original will, in the presence of the testator and by his express direction. The instrument was already signed by the testator. The witnesses who had subscribed the will when first executed were also present. They recognized the paper on which their names were signed and saw the provision inserted. This would seem to be a sufficient compliance with the statute. The mere rewriting of their names to the instrument would have added nothing to the importance of the transaction. Under the circumstances, it would have been a useless ceremony. The law, therefore, did not require its performance. We are decidedly of the opinion that the will, including the new provision, was duly executed and attested." Notwithstanding the ninth clause was inserted only a few days after the execution and attestation of the will as first made, and was so inserted by one of the attesting witnesses at the request of the testator, and in his presence and in the presence of the other attesting witness, still, this

new provision was never attested in the manner provided by the statute, and we cannot regard the position taken in *Wright v. Wright*, 5 Ind. 389, that a reattestation of the will was unnecessary, as sustained by the authorities, or as, in this state, being in accord with the provisions of the statute in regard to wills. In addition to the cases above cited, see 1 Am. & Eng. Ency. of Law, 941, note 1; citing *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, and *In Goods of Maddock*, L. R. 3 P. D. 169; also, 29 Am. & Eng. Ency. of Law, 264.

In commenting on the Indiana case, Mr. Redfield in his work on Wills, volume 1, pages 325, 326, says: "But it may be questioned how far this case is entirely reliable as a ground of action in future cases. The thing being done ²⁴⁸ in this mode, and the alternative being presented of either supporting it or nullifying the act, might some time induce courts to maintain it under such circumstances, so that we could not regard the case as a safe precedent to be followed in other cases. And if the rule that the witnesses must rewrite their names in order to constitute a re witnessing of the instrument, after an alteration, is to be regarded as fully established, there could be no question of the unsoundness of the preceding case."

It is not enough that the witnesses are present when the will is executed, but they must subscribe the instrument. If a codicil be added, even in their presence, they must subscribe it also as attesting witnesses, and where an alteration is made in the will by interlineation, there is no reason, in principle, why the statutory requisites may be dispensed with or the formalities required in the other cases mentioned disregarded. Indeed, prudence would dictate that where an interlineation is made it should be noted in an attestation clause to be signed by the witnesses, for, the interlineation appearing or being shown, the presumption is, in the absence of proof, that it was made after the execution of the will, and if, when the instrument is presented for probate, the witnesses are dead or in parts unknown, mere proof of their signatures to the original will, as provided for by the statute, would not establish the matter interlined as a part of the will. But even where it is shown, as in this case, that the attesting witnesses were present when the interlineation was made by one of them at the request of the testator, to hold that a reattestation of the will as changed, or an attestation of the interlined part evidenced by a resigning by the witnesses, is unnecessary, would be to dispense with a substantial requirement of the statute, and would lead to uncertainty and confusion as to the law in the proof of wills.

249 Our conclusion is, that the interlined ninth clause was void, and the jury should have been so instructed, but that the court erred in instructing the jury, as the proof stood, so far as the original will was concerned, to find that it was not the last will of the deceased.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein stated.

WILLS—DECREE OF PROBATE—WHO MAY APPEAL FROM. In will cases, all who are interested may become parties. Probate proceedings are in the nature of proceedings in rem, to which any person having an interest may make himself a party: Note to Meyer v. Fogg, 63 Am. Dec. 447. See, also, extended note to Schultz v. Schultz, 60 Am. Dec. 853-862. See, also, Briard v. Goodale, 86 Me. 100; 41 Am. St. Rep. 526.

WILLS—ALTERATIONS AFTER EXECUTION—NECESSITY OF PROPER ATTESTATION.—A testator made certain erasures and interlineations in a duly executed will, and, after they were made, had two persons sign the will as witnesses to "the erasures and interlineations made" by testator. What these interlineations, etc., were, the witnesses did not know. It was held that the alterations did not supersede the provisions of the will; that the witnessing of such alterations did not amount to an attestation of the will as altered; and that the alterations did not revoke the original will: Probate of Will of Penniman, 20 Minn. 245; 18 Am. Rep. 363, and note. The effect of an interlineation or erasure as a revocation or alteration of a will, or of some part thereof, may be averted by statutes prohibiting such revocation or alteration except by a writing signed and attested in the mode designated by such statutes: Extended note to Graham v. Rurch, 28 Am. St. Rep. 344-362. See, also, Estate of Hunt, 138 Pa. St. 260; 19 Am. St. Rep. 640, and note; note to Bigelow v. Gillott, 25 Am. Rep. 32.

LUMBERMEN'S MUTUAL INSURANCE COMPANY v. BELL.

[106 ILLINOIS, 400.]

INSURANCE.—PROOFS OF LOSS may be made by an agent where the assured was not in a position to make them.

INSURANCE.—OBJECTIONS THAT THE PROOFS of loss were made by an agent are waived if the insurer refuses to pay on the ground that the policy was void when issued.

INSURANCE POLICY ISSUED IN THE NAME OF A DECEASED PERSON.—If, after the death of a person, his business is carried on by his wife or other successor in interest, and a policy of insurance is issued in such name either by accident, mistake, or design, it is not necessary to go into equity to have it reformed, but the person to whom it was issued may sue thereon in his true name, averring that the instrument was made to him or her by the name appearing therein.

INSURANCE AGENTS—PROVISIONS IN POLICIES UNDERTAKING TO DETERMINE WHOM THEY REPRESENT.—Whether the persons who acted as brokers in procuring insurance

are to be deemed agents of the insurer or of the assured is to be determined from all the evidence bearing upon the question, and not merely from statements in the policy that they were the agents of the assured.

JURY TRIAL—INSTRUCTIONS AS TO AGENCY.—An instruction summing up the facts bearing upon the question of agency and telling the jury that if they find the facts to be true from the evidence as stated, then, as conclusions of law, certain designated persons are to be deemed agents of others, is objectionable. The question of agency is a mixed one of law and fact, and the jury should be directed to determine from the evidence in the case for whom the persons claimed to act who were acting.

JURY TRIAL—HARMLESS ERROR.—Though an instruction is objectionable, a verdict will not be set aside nor the judgment reversed, if they clearly appear from the whole evidence to be right.

INSURANCE.—A BROKER OBTAINING INSURANCE is not necessarily the agent of the assured.

INSURANCE.—NOTICE TO AN AGENT OF FACTS material to the risk is notice to the insurer.

INSURANCE—DECEASED PERSON, POLICY IN NAME OF.—The fact that the person in whose name a policy of insurance was issued was at the time dead, and his death was not communicated to the insurer, does not affect the insurance, if it was communicated to the agents of the insurer. If the policy was issued in the name of a deceased through the negligence and mistake of the agents of the insurance company, it cannot avoid the policy on that ground.

Myron H. Beach and Dodd & Pickerell, for the appellant.

Green & Gilbert, for the appellee.

⁴⁰³ **WILKIN, J.** This is an appeal from the appellate court for the fourth district. Eliza J. Bell, plaintiff below, as executrix of the last will of her deceased husband, James Bell, was operating a sawmill at Ulin, in this state. By the will of her husband she was given all his property and directed to continue the mill business as he had done in his lifetime. One H. C. Candee was an insurance agent, having his office at Cairo, and represented several different companies. In some of these the mill property in question had for several years been insured by James Bell, through Candee. Candee had also, from time to time, procured insurance upon the property in other companies when not able to get it from those he represented, which he did through Iott & Son, insurance brokers of Chicago. This course of dealing was continued by Mrs. Bell after the death of her husband. She, by her son George, applied to Candee for the policy in suit, and, not being able to place it in his own companies, he applied to Iott & Son to obtain it. The application was made for the "estate of James Bell," as owner. Iott & Son procured the policy from appellant, but by mistake it was issued to "James Bell." This policy was afterward renewed, the same mistake being continued in the renewal and not discovered until after the loss. Both the

original and renewal policies were delivered by appellant to Iott & Son, and by them to Candee, who gave them to Mrs. Bell, who held the same, paying all premiums thereon until June 4, 1890, when the property was destroyed by fire. Proofs of loss were made by her agent, George T. Adams, superintendent in charge of the mill, she being absent from the state. The company refused to pay ⁴⁰⁴ the loss on the ground that the policies were void when issued, because written in the name of James Bell, who was then dead. This suit was brought in the circuit court of Union county, where judgment was rendered in favor of appellee. That judgment has been affirmed by the appellate court.

It was insisted by defendant upon the trial of the case that plaintiff was not entitled to recover because she had failed to make proper proofs of loss, the principal objection being that they were made by an agent, and not by the assured herself. Where it sufficiently appears the insured was not in a position to make the proofs of loss in person, it may be legally done by an agent: *German etc. Ins. Co. v. Grunert*, 112 Ill. 68. Besides this, defendant having based its refusal to pay the policy upon the distinct ground that it was void when issued, because James Bell was then dead, objections to the proofs of loss were thereby waived: *Williamsburg City Ins. Co. v. Cary*, 88 Ill. 458.

The only defense going to the merits of the cause was that the policy was invalid because it insured the property in question as being owned by James Bell, who was then dead, and the validity of that defense rests upon the question as to whether Iott & Son, through whose mistake it was so issued, should be treated as the agents of the defendant or not. This question, so far as it is one of fact, has been settled adversely to appellant by the verdict of the jury and judgment of the appellate court. It is insisted, however, that the jury were erroneously instructed upon this branch of the case by the third, sixth, and ninth instructions given at the instance of plaintiff. The third is to the effect that the fact of James Bell's death would not necessarily bar plaintiff's right of recovery, but, if she was in control of the property, carrying on the business in the name of James Bell, and was the real person insured, she could maintain the action upon the policy. There was no error in this instruction. Where an instrument, by accident, mistake, or design, is made ⁴⁰⁵ payable to a person by a wrong name it is not necessary for such person to go into equity to have it reformed, but may sue thereon in his or her true name, averring that the instrument was made to him or her in and by the name therein appearing: *New York African Soc. v. Varick*, 13 Johns. 38.

The sixth instruction in substance announces the rule to be, that whether Iott & Son and Candee were the agents of the insurance company in the transaction of obtaining the policy is a question of fact, to be determined from all the evidence bearing on that subject, and not merely from the statement in the policy to the effect that the brokers were the agents of the assured. We think this instruction also announces the correct rule of law. The question as to whose agents they really were is open to inquiry, and may be shown by parol evidence, notwithstanding the statement in the policy: *Newark Fire Ins. Co. v. Sammons*, 110 Ill. 166; *Lycoming etc. Ins. Co. v. Ward*, 90 Ill. 545; *Union Ins. Co. v. Chipp*, 93 Ill. 96.

The ninth instruction is open to just criticism. It assumes to sum up the facts bearing upon the question of agency, informing the jury that if they find the facts to be true from the evidence as stated, then, "as conclusions of law, both Iott & Son and Candee are to be deemed agents of defendant." This method of instructing a jury is always objectionable. Here the question of agency is a mixed one of law and fact, and the jury should have been directed to determine, from all the evidence in the case, for whom these persons were acting, as was done by the sixth instruction. However, the most that can be said against it is, that it was calculated to mislead the jury; and we regard the evidence so clear, when considered as a whole, that the agents were, legally speaking, those of the defendant company and not of the insured, that no injury resulted to the defendant by giving it, though not strictly accurate. Error without prejudice will never work a reversal of a judgment.

⁴⁰⁶ The refusal of the second, third, and fourth instructions asked by the defendant is also assigned for error. The second is subject to the fatal objection that it assumes that Candee and Iott & Son were the agents of plaintiff, and then proceeds to say that if these agents knew the facts as to the death of James Bell, and failed to communicate them to the defendant, the policy would be null and void. As we have already said, whether or not they were such agents was only to be determined by the jury from all the evidence in the case, upon proper instructions as to the law by the court. The third assumes to state, as a matter of law, that a broker obtaining insurance is the agent of the insured, and not of the insurer. For the same reasons it was also properly refused. The fourth is to the effect that if James Bell was dead when the insurance was obtained, and that fact was not communicated to the insurance company, the policy would be void, omit-

ting entirely the question of notice to the company through its agents. Notice to the agent of facts material to the risk is in law notice to the insurer: *Phenix Ins. Co. v. Hart*, 149 Ill. 513. Without this qualification the instruction was clearly erroneous, and was properly refused.

The contention that the trial court erred in its rulings upon the admission and exclusion of evidence is, we think, without merit. No good purpose would be served by a discussion of that branch of the case. We have carefully examined the record, and agree with the appellate court in its conclusion that no substantial error was committed in that respect. The only question in the case, as we view it, is, whether the policy was void because issued in the name of James Bell, then deceased. Being so issued through the negligence and mistake of the defendant's agents, its contract of insurance was not thereby invalidated.

The judgment of the appellate court must be affirmed.

APPELLATE PRACTICE—ERRONEOUS INSTRUCTIONS.—A verdict which is right upon the evidence will not be reversed on appeal because of erroneous instructions: *Louisville etc. Ry. Co. v. Nicholas*, 4 Ind. App. 119; 51 Am. St. Rep. 206; *Kennett v. Peters*, 54 Kan. 119; 45 Am. St. Rep. 274.

TRIAL—RIGHT OF JURY TO WEIGH EVIDENCE.—It is the right of the jury and not of the court to determine the effect of evidence, unless in particular cases where its effect is declared by law: *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822, and note; also *Wadsworth v. Union Pac. Ry. Co.*, 18 Colo. 600; 36 Am. St. Rep. 809.

INSURANCE—LIFE—PRELIMINARY PROOFS—WAIVER.—It is the duty of an insurance company, on receipt of proofs of loss, to return them promptly, if they are objectionable, pointing out the particular defects and additional information required: *Davis Shoe Co. v. Kittaning Ins. Co.*, 138 Pa. St. 73; 21 Am. St. Rep. 904; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598, and note. Waiver of preliminary proofs may be presumed in an action for insurance, if the insurers always refused to pay on some other ground, and had never objected on account of any defect or deficiency in the preliminary proofs: *Martin v. Fishing Ins. Co.*, 20 Pick. 389; 32 Am. Dec. 220. Also, *Ocean Ins. Co. v. Francis*, 2 Wend. 64; 19 Am. Dec. 549.

INSURANCE—LIFE—NOTICE TO AGENT—WHEN IMPUTED TO INSURER.—Notice to general agent of the insurer is notice to the insurer: *Schaeffer v. Farmers' etc. Ins. Co.*, 80 Md. 563; 45 Am. St. Rep. 361; *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note. If an insured, who cannot write, makes true answers to an insurance agent, who writes the application and has full knowledge of the facts, but who, through misconception of the force and purport of questions, writes incorrect answers without the actual knowledge of the insured, the insurer is bound thereby: *Continental Ins. Co. v. Chew*, 11 Ind. App. 330; 54 Am. St. Rep. 506, and note. See, also, *German Ins. Co. v. Hayden*, 21 Colo. 127; 52 Am. St. Rep. 206.

INSURANCE—LIFE—BROKER—WHEN AGENT OF THE INSURER, AND WHEN OF THE ASSURED.—An agent for the purpose of soliciting insurance, sending application to the insurer, obtaining policies, and delivering them to the assured, and collecting premiums, is, in filling out and forwarding applications, the agent of the insurer, and if any error is committed or misstatement made by him, the assured should not suffer thereby: *State Ins. Co. v. Taylor*, 14 Colo. 499; 20 Am. St. Rep. 281. A condition in a policy of insurance that "if any broker, or other person than the assured, shall have procured this insurance to be taken by the company, such broker or other person shall be considered the agent of the assured, and not of the company," has reference to parties operating on their own account or on behalf of the assured, and not to agents representing the company in procuring insurance: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696. See, also, *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557; *Dietz v. Providence etc. Ins. Co.*, 81 W. Va. 851; 13 Am. St. Rep. 900.

MAYNARD v. RICHARDS.

[166 ILLINOIS, 466.]

PARTNERSHIP DISSOLUTION BY DEATH, EFFECT OF UPON EXISTING CONTRACTS.—If a partnership enters into a contract requiring a number of years for its performance, and is afterward dissolved by the death of one of its members, it is the duty of the surviving member to complete the contract and to account to the representative of the deceased partner for the profits thereof or for damages recoverable for its breach by the other contractor.

PARTNERSHIP—SURVIVING PARTNER, DUTY OF TO ACCOUNT FOR MONEYS COLLECTED FOR BREACH OF A CONTRACT.—If partners enter into a contract with a third person, requiring several years for its performance, and the latter commits a breach of such contract and refuses to proceed therewith, after which one of the partners dies, and the surviving partner maintains an action in which he recovers damages for the breach of such contract or compensation for the loss of the profits which would have accrued had he been permitted to perform it to the end of the time designated therein, the right of the representative of the deceased partner to participate in the sum so recovered is not limited to the profits which would have accrued up to such death, but extends to the profits for the whole term for which any recovery has been had.

PARTNERSHIP—COMPENSATION FOR PARTNER'S SERVICES.—One partner cannot charge the firm or his copartners for services in attending to the partnership business in the absence of a special agreement entitling him to do so.

PARTNERSHIP—SURVIVING PARTNER'S RIGHT TO COMPENSATION.—A surviving partner has not, as between himself and the representative of the deceased partner, any right to charge for his services in winding up the affairs of the partnership. The winding up of these affairs, within the meaning of this rule, is restricted to selling the firm property, receiving moneys due the firm, paying its debts, returning the capital contributed by each partner, and dividing the profits. For services in excess of these, the survivor may be entitled to compensation.

PARTNERSHIP—SURVIVING PARTNER'S COMPENSATION.—An agreement to pay a surviving partner for his services

may be implied where they are extraordinary and unusual and such as could not reasonably have been contemplated.

PARTNERSHIP. — THE SURVIVING PARTNER MAY PROPERLY BE AWARDED COMPENSATION FOR HIS SERVICES in commencing and maintaining an action after the dissolution of the firm by the death of his copartner, where the prosecution of such action occupied the greater portion of several years and resulted in a judgment for a large sum of money, constituting a partnership asset.

PARTNERSHIP. — A SURVIVING PARTNER IS NOT CHARGEABLE WITH INTEREST, unless his delay in paying moneys in his hands to the representatives of the deceased partner is unreasonable and vexatious.

EQUITY PRACTICE—JURY TRIAL.—In a suit by a surviving partner to settle the affairs of the partnership in which it is claimed that an attorney has performed services for which he ought to be compensated out of the firm assets, in which suit he is made a party defendant, the court may, without the aid of a jury, fix the compensation due such attorney and direct its payment out of the funds of the firm in the hands of the survivor.

JURY TRIAL—EQUITY CASES.—The provisions of the state constitution respecting the right to trial by jury do not extend to cases in equity unless they are specially named.

Suit in equity by Edward S. Richards against the executrix of John W. Maynard, deceased, to determine the interests of complainant and the estate of Maynard in certain moneys. William A. Gardner was also made a party defendant in order that his claims for compensation might be determined by the court. Richards entered into a contract with the Lake Shore and Michigan Southern Railway Company respecting the transfer of grain, and the construction and maintenance, upon lands of the railway company, of appliances to be used in such transfer. This contract was to continue for ten years after its date, January 2, 1894. On the same day, Richards and the decedent formed a partnership to which the contract was assigned, and the decedent furnished the moneys necessary to be used in the enterprise. On June 16, 1886, the railway company refused to further comply with its contract and abandoned it. The partners subsequently filed a bill in equity against the company for an accounting for what was due, up to the date of the abandonment of the contract by the railway company, and obtained a judgment. In July, 1886, the firm brought another suit in equity to recover damages for the total breach of the contract, which suit failed, because it was held that a court of equity was not the proper forum. On October 22, 1887, Maynard died, and his widow was appointed his executrix. In May, 1888, Richards, as surviving partner, brought suit at law against the railway company to recover the damages which had accrued for the total breach of the contract, and for future profits lost by the firm. On April 5,

1890, a judgment was rendered in this suit against the railway company for seventy-five thousand dollars and costs. An appeal was prosecuted to the appellate court, resulting in an affirmation there, and a further appeal to the supreme court of the state where the judgment of the appellate court was affirmed in June, 1894. On October 30, 1894, the judgment, with interest and costs, was paid to the attorney of Richards, aggregating ninety-five thousand five hundred and ninety-four dollars and seventeen cents. The defendant Gardner was the attorney in the prosecution of this suit, and claimed that he was entitled to fifteen thousand dollars for his services therein. Certain proceedings took place in the probate court, in the matter of the estate of Maynard, in which that court made an order finding that Richards, as surviving partner, was indebted to Gardner in a sum specified for his services, and was also entitled, as surviving partner, to be compensated for services rendered by him, and finding that there was in the hands of Richards, after discharging liabilities of the firm, sixty-seven thousand five hundred and seventy-five dollars and fifty-six cents, of which the executrix was entitled to one-half, less a credit of eleven thousand three hundred dollars before then paid to the executrix. Richards was also ordered to pay the executrix the further sum of twelve hundred and seventy-eight dollars and fifty cents, due her on account of advancements and disbursements. Richards appealed to the circuit court from the order of the probate court. The executrix also appealed from so much of the order as allowed Richards a credit for compensation allowed Gardner, and Gardner also appealed on the ground that the award to him was too small. The executrix further appealed from the order of the probate court allowing Richards compensation for his services. While these several appeals were pending the present suit was brought, and Richards moved that the several appeals be consolidated with the present suit. The circuit court found Richards not entitled to any compensation for his services, that the attorney, Gardner, was entitled to seven thousand five hundred dollars, that Richards had in his hands, as surviving partner, seventy-nine thousand two hundred and sixty-six dollars and fifty-nine cents, after paying the sum awarded to Gardner, one-half of which balance the executrix was decreed entitled to, after first deducting therefrom certain payments made to her. The court also directed that the surviving partner pay interest on the amount found to be due on the order of the probate court. From this decree of the trial court an appeal was taken to the appellate court, which held that Richards was entitled to compen-

sation for his services, and reduced the judgment in favor of the executrix to sixteen thousand seven hundred and thirteen dollars and seventy-seven cents, and directed that the costs be equally divided between the parties, and, from this judgment of the appellate court, the executrix appealed to the supreme court.

Gardner & McFadden, for A. R. Maynard and William A. Gardner.

Frank A. Johnson and William Brown, for E. S. Richards.

⁴⁷⁷ MAGRUDER, C. J. 1. It is contended by Richards that so much of the judgment for \$95,594.17 as represented the loss of the profits from October 22, 1887, the time of the death of Maynard, up to January 2, 1894, when the ten years, for which the contract with the railway company was to run, expired, did not belong to the firm of Richards, Maynard & Co., but belonged to Richards himself individually; and that, therefore, he was not bound to account for the same with Maynard's estate. It is claimed that, when Maynard died on October 22, 1887, the partnership between Richards and Maynard was thereby dissolved; and that the only portion of the judgment recovered against the railroad company belonging to the estate of Maynard is one-half of the proportionate part thereof which represents profits that would have accrued between June 16, 1886, when there was a total breach of the contract by the railroad company, and October 22, 1887, the date of the death of Maynard. As there were 2751 days between June 16, 1886, and January 2, 1894, the date of the termination of the contract with the railway company, and as there were 491 days between June 16, 1886, and October 22, 1887, it is contended that the amount to which Maynard's estate is entitled is one-half of the proportion which 491 days bears to 2751. This proportion is 17.85 per cent. In other words, the first question in the case is, whether the whole amount of the judgment recovered in the action at law against the railroad company is a partnership or firm asset, or whether so much thereof as represents the loss of profits between the death of Maynard and January 2, 1894, is the individual property of Richards.

It is true that the death of Maynard terminated the partnership between him and Richards; but a community of interests still continued to exist between Richards, as surviving partner, and the representatives of Maynard, ⁴⁷⁸ the deceased partner, notwithstanding the dissolution. The partnership continued to have a limited existence for the purpose of settling and winding up the affairs of the partnership: *Nelson v. Hayner*, 66 Ill. 487. The railway company abandoned the contract and was guilty of

a total breach thereof on June 16, 1886, during the life of Maynard. At that time, a right of action accrued to the firm to recover the damages or future profits, which were afterward recovered in the action at law begun on May 17, 1888. It was during the existence of the firm that the right of action accrued. It was during the existence of the firm, to wit, in August, 1886, that the chancery proceeding, which turned out to be ineffective, was instituted to recover the damages or future profits resulting from the total breach. Richards and Maynard, as partners, treated the repudiation of the contract by the railroad company as putting an end to it for all purposes of performance, and sued for the profits they would have realized if they had not been prevented from performing. The contract was thereby continued in force for that purpose: *Lake Shore etc. Ry. Co. v. Richards*, 152 Ill. 59. Such accrued right of action in favor of both partners could not be divested from the firm and vested in appellant individually, either in whole or in part. The construction and use of the transfer house by Maynard, and the assignment of the contract with the railroad company to the firm by Richards, were contributed to the firm for the express purpose of performing the contract, which was not to be completed for a period of ten years. If the railroad company had not refused to perform, the estate of Maynard would have been under obligations to allow Richards, as surviving partner, to continue the use of the transfer house and the machinery, in order to carry out the contract. So, also, the contract between the railroad company and Richards was assigned by him to the firm, and this assignment was ratified by the railroad company. The ⁴⁷⁹ contract was thereafter a partnership asset, and the obligation to perform it was upon both the partners equally, and upon the legal representatives of each of them in case of death. If two parties enter into a partnership for the purpose of performing a contract whose performance requires ten years, and each contributes certain property to the firm for the purpose of performing it, and such property is absolutely necessary to such performance, the right to its use should not be taken away from the surviving partner because the other partner happens to die. Maynard would certainly have had a right to his share of these damages if they had been collected in his lifetime, and his estate has not lost them by his death. It is the duty of the surviving partner to settle all the obligations of the firm and to collect all the debts due to the firm. This must be done in the name of the surviving partner at the expense of the firm: *Clay v. Freeman*, 118 U. S. 97. Where the object of the

partnership is to carry out a contract which was unfinished when one of the partners dies, the court will not necessarily order the property sold, nor the share of the deceased partner in it ascertained by valuation, but will leave the surviving partner to complete the contract, and will postpone the account until it is completed: *McClellan v. Kennard*, 9 L. R. Ch. P. 336; *Rust v. Chisolm*, 57 Md. 376; *Ayres v. Chicago etc. Ry. Co.*, 52 Iowa, 478; *King v. Leighton*, 100 N. Y. 386; *Davis v. Sowell*, 77 Ala. 262. Choses in action, debts, and other rights of action of a firm belong to the surviving partners, and they possess the sole and exclusive right to reduce them to possession, but, when they are recovered, the survivors are regarded as the trustees thereof for the benefit of the partnership, and the representatives of the deceased partner possess in equity the same right of sharing and participating in them which the deceased partner would have possessed if he had been living: *Story on Partnership*, sec. 346. In addition to what has already been said, the action, which ⁴⁸⁰ was brought for the recovery of these future profits or damages from the railroad company, was brought by Richards, as surviving partner of the firm of Richards, Maynard & Co. In the declaration in that suit, which is filed as an exhibit to the bill in this case, the amount due from the railroad company is spoken of as due to the firm, and the recovery sought is of the damages suffered by the firm, and of the profits lost by the firm. Counsel refer to certain authorities, which hold that a surviving partner may, in an action brought by him, include in his declaration a count for a debt due to himself in his own right. But here the declaration contains no count in which Richards claims the loss of profits for the period between the death of Maynard and the expiration of the ten years, as belonging to him in his own right; nor does the declaration contain a count for damages due to him, as surviving partner, for the period between the total breach of the contract and the death of Maynard. For the reasons thus stated, we are of the opinion that the amount of the judgment recovered in the action against the railroad company for damages or future profits was a partnership asset, and, therefore, should be divided between Richards and the estate of his deceased partner, Maynard.

2. The next question which arises is as to the right of Richards, as surviving partner, to have compensation for his services in obtaining for the partnership estate the fund of \$95,594.17 by the prosecution of the action at law against the Lake Shore and Michigan Southern Railway Company. It is well settled that one

partner cannot charge the firm, or his copartners, for his services in attending to the partnership business, unless there is a special agreement among the partners entitling him to do so. In the absence of such an agreement, the law will not imply one "from the greater industry or greater ability of any one partner": *Brownell v. Steere*, 128 Ill. 209; *Parsons on Partnership*, sec. 155. The reason of the rule ⁴⁸¹ is, that each partner is under obligations to devote his skill and efforts to the promotion of the common benefit of the firm: *Lewis v. Miffett*, 11 Ill. 392. The same rule applies as to services of a surviving partner as between himself and the representatives of the deceased partner. The text-books and the authorities all hold that, after the dissolution of the firm by the death of one of the partners, the surviving partner is entitled to no extra compensation for services rendered by him in winding up the affairs of the partnership, in the absence of any agreement allowing such compensation in the articles of copartnership: 17 Am. & Eng. Ency. of Law, 1183; 2 *Bates on Partnership*, secs. 771, 772; *Collyer on Partnership*, sec. 199; *Parsons on Partnership*, secs. 346, 155, note c.

But the rule that a surviving partner is entitled to no extra compensation applies to his services in winding up the partnership. The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, paying the firm debts and the advances of the partners, returning the capital contributed by each partner, and dividing the profits. Where, however, the surviving partner renders services in excess of the mere winding up of the partnership affairs, he will, under certain circumstances, be entitled to compensation for such excess: 17 Am. & Eng. Ency. of Law, 1154, 1183; 2 *Lindley on Partnership*, 1046; *Collyer on Partnership*, sec. 328; *Parsons on Partnership*, sec. 346. It is said, in *Bates on the Law of Partnership*, at section 773: "The rule applies merely to the simple and immediate winding up by collecting the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of the partnership and implied in the contract; but for time, skill, and labor expended beyond this, and inuring to the general benefit, the reason of the rule fails." The most usual cases, where the ⁴⁸² surviving partner is allowed compensation, are cases where he successfully continues the business of the firm, or successfully completes an enterprise in which the firm has been engaged, so that a substantial benefit is received from his efforts. The amount of compensation will vary accord-

ing to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and its necessity or desirability: 2 Bates on Partnership, sec. 773; 17 Am. & Eng. Ency. of Law, 1183. If he performs such extra services with the consent of the representatives of the deceased partner, such consent is sometimes an important factor in determining the question whether he is entitled to compensation. His claim to compensation will, in connection with the circumstances already mentioned, be looked upon with favor, if the representatives of the deceased partner elect to share in the profits realized from his services as surviving partner. While it is true that compensation will ordinarily be denied to a surviving partner in the absence of an agreement therefor, yet an agreement will sometimes be implied where the services are extraordinary and unusual, and such as could not reasonably have been contemplated: 2 Bates on Partnership, sec. 777; Robinson v. Simons, 146 Mass. 167; 4 Am. St. Rep. 299; Schenkl v. Dana, 118 Mass. 236; Newell v. Humphrey, 37 Vt. 265; Cameron v. Francisco, 26 Ohio St. 190; Hite v. Hite, 1 B. Mon. 177; Van Duzer v. McMillan, 37 Ga. 299; Bradley v. Chamberlin, 16 Vt. 615; Griggs v. Clark, 23 Cal. 427; O'Reilly v. Brady, 28 Ala. 530; Sears v. Munson, 23 Iowa, 880; Levi v. Karrick, 13 Iowa, 344.

Applying the principles thus announced to the facts of the present case, we are of the opinion that Richards, as surviving partner, is entitled to extra compensation for his services in the prosecution of the suit at law heretofore mentioned. A suit in chancery had already been begun for the recovery of future profits for the total breach of the contract by the railroad company in the lifetime of Maynard. This chancery suit had ended adversely ⁴⁵³ to the firm in May, 1888. If, at this point, Richards had ceased the prosecution of any further litigation for a recovery of future profits, it could not have been said at that time, with the light then had upon the chances of recovery, that he was recreant in his obligations to the estate of his deceased partner. But on May 17, 1888, seven months after the death of Maynard, he commenced an action at law against the railroad company for unliquidated damages or future profits under circumstances which, to say the least, seemed to make success a doubtful matter. This suit he prosecuted for six years, and finally succeeded in recovering nearly \$100,000 for himself and the estate of his deceased partner. His action in this regard was a continuation in another form of a litigation which the firm had been engaged in at the time of Maynard's death, and was the completion of an

effort at recovery which had been begun by the firm in the lifetime of Maynard. He spent a great deal of his time in securing evidence and attending upon numerous hearings and trials, in obtaining the attendance of witnesses, in procuring documentary evidence, in employing and consulting with attorneys, in looking up authorities, in doing clerical work, in reviewing abstracts of record, in making suggestions to his counsel. All this labor necessitated the practical abandonment of all other business. He engaged in the prosecution of the suit with the consent of the executrix of Maynard because she furnished money for costs; and the accounts in evidence show that the sum of \$1,278.50 was paid to her on account of disbursements made by her in and about the suit. As soon as the judgment was obtained and the money recovered, the executrix of Maynard's estate elected to share in the amount of the recovery. It cannot be denied that the services of Richards in this case were so extraordinary and unusual as to give rise to the presumption of an implied contract. The long and successful prosecution of the suit may be ⁴⁸⁴ regarded as service in excess of the mere winding up of the partnership affairs.

The case of Zell's Appeal, 126 Pa. St. 329, is somewhat similar in its facts to the case at bar. There, a surviving partner, many years after the death of the other partner, succeeded in compromising a land claim and realized therefrom some \$50,000; the claim was not merely doubtful, but had no real foundation in law or equity; and the court there said: "More than thirteen years after his death, Zell seems to have discovered this claim, . . . and he prosecuted it for four years, with the energy and under the circumstances already related, to ultimate success. And now that the others come in and claim a share in the success, . . . we think in equity they should make him a fair compensation for his services."

What the amount of the compensation of Richards should be is a question of fact. There is evidence in the record sustaining the finding of the appellate court upon this subject. We are not disposed to disturb their judgment, so far as concerns the amount of the compensation.

3. The circuit court charged Richards with interest upon certain balances in his hands and not at once paid over. The appellate court disallowed these charges for interest. We think that there was no error in this action of the appellate court. The record shows that Richards did at one time pay over to the executrix upon order of the probate court \$11,300, and at another time

\$1,278.50. The questions involved as to the equitable distribution of the fund recovered were fairly debatable, and were litigated in good faith, so far as we are able to discover. We have held that delay of payment, in order to justify a recovery of interest in such cases as the present one, must be both unreasonable and vexatious: *Devine v. Edwards*, 101 Ill. 138. We cannot see that there was any unreasonable and vexatious delay here on the part of Richards.

⁴⁸⁵ 4. The circuit court allowed William A. Gardner \$7,500 as compensation for his services as attorney of Richards, as surviving partner of the firm. Two questions of fact were involved in this branch of the controversy: 1. Whether Gardner was actually employed by Richards, as surviving partner, or whether he was merely employed by Mrs. Maynard to look after her individual interests; and 2. If he was employed by Richards, as surviving partner, what amount of compensation should be allowed to him for his services. The lower courts found that Gardner was employed by Richards, as surviving partner, to perform legal services for the benefit of the firm, and we think that the evidence sustains that finding. The testimony as to the value of his services fixes such value at amounts ranging all the way from \$3,500 to \$15,000. We are not disposed to interfere with the conclusion of the chancellor below, which has been affirmed by the appellate court, that his services were worth \$7,500.

5. It is claimed that the circuit court, sitting as a court of equity, did not have jurisdiction to pass upon Gardner's claim for fees, and that the determination of such claim should have been submitted to a jury. We are unable to agree with this contention. When Richards filed his account in the probate court, he set out therein the claim of Gardner against himself, as surviving partner, for fees. In that court it was agreed between Gardner and Richards that the matter should be submitted to the probate court, and the probate court accordingly heard and determined it, making an allowance to Gardner. The probate court passed upon Gardner's fees as an item in the account submitted by Richards to that court. The statute provides that, upon the application of the executor or administrator of a deceased partner, the county court may, whenever it may appear necessary, order such surviving partner to render an account to the county court, and, in case of neglect or refusal, may, after citation, ⁴⁸⁶ compel the rendition of such account by attachment: 1 Starr & Curtis' Annotated Statutes, 229. Upon appeal to the circuit court from the orders of the probate court in reference to the ac-

count submitted by Richards, the matter of the account was placed upon the chancery docket. By consent of Richards, and upon his motion, these appeals were consolidated with the chancery cause which he began in the circuit court by the filing of a bill, and the consolidated causes were heard together. Gardner was a party defendant to the bill in chancery. The whole of the account of Richards, including the item as to Gardner's fees, was thus brought within the equitable jurisdiction of the circuit court. A jury trial was not, therefore, a matter of right. It is within the discretion of the chancellor to require the issues of fact arising in equity cases to be tried by a jury at any time before decree; and his action in the matter will not be reviewed: *Russell v. Paine*, 45 Ill. 350; *Guild v. Hull*, 127 Ill. 523; *South Park Commrs. v. Phillips*, 27 Ill. App. 380. The provision of the constitution of 1870, prescribing the right to trial by jury, does not extend to cases in equity, but is confined to cases at law: *Flaherty v. McCormick*, 113 Ill. 538; *Heacock v. Hosmer*, 109 Ill. 245. The remedy, given by statute to compel a surviving partner to account in the county court with the administrator of the deceased partner, is to be governed by the same equitable rules and principles as a proceeding in equity: *Mack v. Woodruff*, 87 Ill. 570. The constitutional provision as to jury trials was not intended to introduce the jury trial into special summary jurisdictions unknown to the common law, and which did not provide for that mode of trial: *Ward v. Farwell*, 97 Ill. 593. The citation to an administrator to account is not a suit at law, but the exercise of a summary power conferred by statute, and is like a bill in chancery for discovery, to sift the conscience: *In re Steele*, 65 Ill. 322. Where there was an appeal from the order of the county court approving the settlement of an estate, we said: ⁴⁸⁷ "The probate court should on the trial proceed as though a bill in chancery had been filed, hear the testimony and investigate the accounts without the intervention of a jury": *Heward v. Slagle*, 52 Ill. 336. The statutory proceeding in reference to an accounting by a guardian in the probate court is in substance a chancery proceeding: *Cheney v. Roodhouse*, 135 Ill. 257. Inasmuch, therefore, as the statutory proceeding requiring a surviving partner to account is, like the proceeding requiring administrators and guardians to account, in the nature of a chancery suit, and inasmuch as, in this case, the appeals from the order of the probate court were consolidated with the chancery suit, and tried as such, it cannot be said that the court below committed

any error in not submitting the question of the amount of Gardner's compensation to a jury.

6. We are of the opinion that the judgment of the appellate court was correct in dividing the costs equally between Richards and the executrix.

After a careful examination of the whole record, we are unable to find any error in the judgment of the appellate court. That judgment is accordingly affirmed.

PARTNERSHIP—COMPENSATION FOR PARTNER'S SERVICES.—A partner is not entitled to compensation for services in conducting the partnership business, beyond his share of the profits, unless there is a stipulation to that effect: *Anderson v. Taylor*, 2 Ired. Eq. 420; 38 Am. Dec. 689; *Reybold v. Dodd*, 1 Harr. 401; 26 Am. Dec. 401. See, also, note to *Marsh's Appeal*, 69 Pa. St. 30; 8 Am. Rep. 212.

PARTNERSHIP—DISSOLUTION BY DEATH—DUTY OF SURVIVING PARTNER.—On the death of one partner, title to the partnership assets vests in the survivor, who in all matters connected with the partnership, becomes the party to sue and to be sued: *Van Kleeck v. Hammel*, 87 Mich. 599; 24 Am. St. Rep. 182, and note; *Durant v. Pierson*, 124 N. Y. 444; 21 Am. St. Rep. 686. He may maintain actions at law for the purpose of collecting debts due the firm to the exclusion of the administrator of the deceased partner: *Shields v. Fuller*, 4 Wis. 102; 65 Am. Dec. 293, and extended note. He must pay over to the administrator of the deceased partner all profits of the realty and personalty of the firm which rightfully belong to the estate: *Smith v. Walker*, 88 Cal. 385; 99 Am. Dec. 415. See, also, extended note to *Gilmore v. Ham*, 40 Am. St. Rep. 561-576.

PARTNERSHIP—DISSOLUTION BY DEATH—SURVIVING PARTNER—COMPENSATION—INTEREST.—A surviving partner is not ordinarily entitled to compensation for his services in winding up the affairs of the partnership: Notes to *Redfield v. Gleason*, 15 Am. St. Rep. 893, *Gilmore v. Ham*, 142 N. Y. 1, 40 Am. St. Rep. 555, and *Shields v. Fuller*, 4 Wis. 102, 65 Am. Dec. 293. But compensation may be allowed under express agreement: Note to *Gilmore v. Ham*, 40 Am. St. Rep. 570; and has been allowed where the surviving partner showed that he performed especial services in excess of his duties: *Redfield v. Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889. See, also, *Robinson v. Simmons*, 146 Mass. 167; 4 Am. St. Rep. 299; note to *Marsh's Appeal*, 8 Am. Rep. 206. In the absence of special agreement, interest cannot be charged on a partnership account, except upon a balance due at the time of the dissolution of the firm, and until a settlement of accounts be made: *Holden v. Peace*, 4 Ired. Eq. 223; 45 Am. Dec. 515, and note.

JURY TRIAL—EQUITY CASES.—The provision of the constitution declaring that "a trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever" relates to trials of issues of fact in civil cases or criminal prosecutions, and not to the trial of issues in equity: *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274; 26 Am. St. Rep. 523, and note. See, also, *Kleinschmidt v. Greiser*, 14 Mort. 484; 43 Am. St. Rep. 652.

EQUITY PRACTICE—JURY TRIAL.—The right to have certain questions of fact passed upon by the jury in a civil action of equitable cognizance is a matter in the sound discretion of the court: *Saint v. Guerrero*, 17 Colo. 448; 81 Am. St. Rep. 820, and note; *Van*

Fleet v. Olin, 4 Nev. 95; 97 Am. Dec. 513. In a suit in equity where there is a finding of facts by a jury and also by the court, the latter is as conclusive as if no jury had been impaneled in the case: *Harris v. Lloyd*, 11 Mont. 390; 28 Am. St. Rep. 475; *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 436.

LURIE v. RADNITZER.

[166 ILLINOIS, 609.]

WILLS—UNBORN CHILD, INTENTION TO DISINHERIT. Though it appears by the will that a testator had an unborn child in his mind, and that he did not therein make any provision for it, yet such will does not manifest an intention to disinherit the child, and it is entitled to the same share in its parent's estate as if he died intestate.

WILLS.—PARTS OF A WILL WHICH HAVE BEEN ERASED by a testator are no more a part of such will than if they had never been written therein. Hence, if the part erased made provision for an unborn child, it cannot, having been erased, constitute evidence that he intended to disinherit such child.

WILLS—EVIDENCE OF INTENTION TO DISINHERIT.—Evidence of what a testator said at a time when he erased a clause in his will in favor of an unborn child cannot be received for the purpose of proving that he intended to disinherit such child.

Suit for the partition of certain lands which had been owned by Adolph Lurie in his lifetime. The complainant was the wife of Lurie at the time of his death. He left surviving him three children by a former marriage, and there was born to him, after his death, another child, Adolph, and the question was whether the will of the decedent disinherited such child. Such will was in the words and figures following:

"First. I hereby order and direct that my executors hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second. I hereby give, devise, and bequeath to my friend, Jacob Kauder, the sum of two hundred dollars.

"Third. I hereby give, devise, and bequeath to my beloved wife Jennie two-fifths (2-5) of all my property, real, personal, or mixed, of every name and nature which I now have, may die possessed of, or may die entitled to at the time of my death, her heirs and assigns forever.

"Fourth. I give, devise, and bequeath to my beloved children, Albert, Gottlieb, and Bertha, to each one-fifth (1-5) of all my property, real, personal, or mixed, of every name and nature, which I now have, may die possessed of, or may be entitled to at the time of my death, to be theirs forever.

"Fifth. I give, devise, and bequeath to my child as yet unborn, and future heir, one fifth (1-5) of all my property, real, personal, or mixed, of every name and nature, which I now have, may die possessed of, or may be entitled to at the time of my death.

"Sixth. I do, by this, order and direct that Joseph Lurie and Ignac S. Lurie shall have the custody and tuition of my beloved children, Albert, Gottlieb, and Bertha, during their minority, and do hereby appoint said Joseph Lurie and I. S. Lurie as their guardian.

"Seventh. I hereby order and direct that my business at both the stores, namely, at the corner of Van Horn street and Hoyne avenue, and also at No. 561-563 Blue Island avenue, shall be kept and conducted in the future as it has been in the past, providing it can consistently be done so.

"Eighth. I do hereby name, constitute, and appoint Joseph Lurie and Ignac S. Lurie as the executors of this, my last will and testament, and it is my wish, and I do hereby request, that they may not be compelled to give any bond or security as such executors or guardians.

"Ninth. I do hereby order and direct that ~~in case the child~~
~~wherewith my wife is pregnant at this time should be still born,~~
~~or~~ in case any of my children, Albert, Gottlieb, or Bertha, should die before attaining their maturity, then his or their shares shall be divided equally, share and share alike, among the remaining children.

"Tenth. It is my wish, and I hereby order and direct that my executors hereinbefore mentioned shall have the power and authority to sell any or all of the real or personal estate, at public or private sale, for such price and upon such terms as they may deem best, and to convey title thereto by proper deeds.

"In witness whereof I have hereto subscribed my name and affixed my seal, the nineteenth day of February, in the year of Lord one thousand eight hundred and ninety-two (1892).

"ADOLPH LURIE. [Seal]

"This instrument was on the date thereof signed, published, and declared by the said testator, Adolph Lurie, to be his last will and testament, in the presence of us, who, at his request, have subscribed our names thereto as witnesses, in his presence and in the presence of each other.

CHRISTIAN R. WALDECK. [Seal]

FRANK ZAJICEK. [Seal]

"Corrections and erasures made before this will was signed, and with my sanction and approval and by my order.

"ADOLPH LURIE. [Seal]

"Signature witnessed by

"CHRISTIAN R. WALDECK.

"FRANK ZAJICEK."

The erasures shown were made before the execution of the will. The trial court decided that the will did not show any intention of disinheriting the posthumous child.

Charles Lane, for the appellants.

R. A. Childs and Charles Hudson, for the appellees.

⁶¹⁵ CARTER, J. The question here is, whether it appears by the will of Adolph Lurie, deceased, that it was his intention to disinherit his then unborn child, who is one of the appellees herein.

Section 10 of chapter 39 of the Revised Statutes is as follows: "If, after making a last will and testament, a ⁶¹⁶ child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given shall be abated in equal proportions, to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will."

The will upon its face bears evidence that at the time of its execution the testator knew that his wife was pregnant with this child, for, independently of the fact that the erased clauses, whether originally written by him or at his direction or not, were after such erasures easy to be read, he expressly refers in the certificate to the will, signed by him, to the corrections and erasures (and there were no such corrections or erasures except those canceling the provisions mentioned in the fifth and ninth clauses), and stated that such corrections and erasures were made before the will was signed, and with his sanction and approval and by his order. We think, therefore, that it sufficiently appears that the testator had said unborn child in mind. But the question still remains whether it appears by the will that it was his intention to disinherit such child.

It must be conceded that the erased clauses are no more a part

of the will than if they had been so completely erased that they could not be read or had never been inserted in the draft for such will; and it must further be admitted that no provision was made in this will for such child. So it is by no means clear that the case does not fall within the section of the statute above quoted, for the child was born after the will was made, and no provision was made for the child in the will, and, unless it appears from the will itself that it was the intention of the testator to disinherit the child, the case must ⁶¹⁷ be controlled by and the child must take under said section of the statute. We have heretofore held that it is not necessary that such intention to disinherit should expressly appear by the will, but that it is sufficient "if the testator simply indicate by his will that such was his intention": *Hawhe v. Chicago etc. R. R. Co.*, 165 Ill. 561; *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130. In the case at bar, the most that can be said, it seems to us, is, that the testator knew of such child, and that, for reasons not disclosed, he thought it proper to make no mention of it in his will. The will contains nothing from which it can justly be said that the testator did not intend that the statute should have its full operation. The presumption must be indulged that he knew the law—that he knew of the provisions of this statute. The will contains no language having any tendency to show an intention to disinherit. So far as this child is concerned, it contains no negative expressions whatever, and were it not for the erased provisions appearing in connection with the will as finally made, and the reference to them in the certificate signed by him, it would be clear, beyond doubt, that said posthumous child would be entitled, under the statute, to its share. The mere fact that the testator knew that such child was likely to be born to him, and that he had such knowledge when he executed his will, would not be sufficient, under the statute, to deprive such child of his share in his father's estate. It will be noticed that the will, as originally drawn, undertook to dispose of six-fifths of the estate. This anomaly was corrected by canceling the provision, as it then stood, for this unborn child. It may be observed, also, that the testator could not know that the child would be born alive. He did know, however, as it must be held, that if he made no provision for the child, and did not by the will show an intention to disinherit it, it would, if born alive, receive its due share under the statute making provision in such cases. Had it been ⁶¹⁸ his intention, as contended by appellants, that the provision in the will giving his wife two-fifths of his estate should inure also to the benefit of this child if born

alive, we would expect to find something in the will to indicate such intention. If such intention appeared in any way by the will, this provision of the statute would not apply, for then a provision would have been made by the will for the child. Suppose the testator had himself prepared a draft of his will and had signed it, which draft contained the same provisions which were erased in the instrument offered in evidence, and had submitted such draft to his counsel with the request to incorporate such provisions and to draw an instrument for a will in accordance therewith, for him to execute, and had afterward directed his counsel to omit from such instrument the provisions in the draft made by him relating to such unborn child, and such instrument had been so drawn, omitting the provisions last mentioned, and had been duly executed by him, could the draft for such will as originally prepared by him be held sufficient to show, either expressly or impliedly, that it appeared by the will that the testator intended to disinherit such child? If not, can the canceled provisions of this will have any greater force as tending to prove such intention?

The meaning of the statute is, that the intention to disinherit must appear from the will, and the court below therefore properly refused to allow proof to be made as to what the testator said when the erasures above mentioned were made. While, as said in *Hawhe v. Chicago etc. R. R. Co.*, 165 Ill. 561, evidence as to the circumstances surrounding the testator at the time the will was made is often proper and sometimes indispensable to an intelligent construction of the language used, by enabling the court to stand in the testator's place and to read the will in the light of those surrounding circumstances, still this would not authorize the admission of evidence as to what the testator said his intention was ⁶¹⁹ with respect to his will or any part of it. The intention must be derived from the will itself.

We are of the opinion that it does not appear by the will in question, expressly or by implication, that the testator intended to disinherit the child in question, and that the construction placed upon the will by the court below was correct.

We have been referred to many authorities under similar statutes of other states, and which we have examined, but none of them cover the precise point here involved, nor does the reasoning employed lead us to any other conclusion than the one stated.

Finding no error, the decree of the superior court will be affirmed.

WILLS—UNBORN CHILD—INTENTION TO DISINHERIT.—
Unless an unborn child is provided for, the conclusive presumption

is that he was not expected, and the law declares that he shall take the same share of his father's estate as if the father had died intestate: Extended note to *Rhodes v. Weldy*, 15 Am. St. Rep. 392-395, and *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164, where it is held that a will not providing for children of the testator subsequently to be born, is revoked in law, pro tanto, by the subsequent birth of a child to the testator in his lifetime, despite a statute providing that it can be revoked only by cancellation, destruction, or the execution of a subsequent will. The intention of the testator to disinherit the unborn child must be shown: Extended note to *Wilson v. Fasket*, 39 Am. Dec. 740-744. See, also, *In re Salmon*, 107 Cal. 614; 48 Am. St. Rep. 164.

WILLS—INTENTION TO DISINHERIT—EVIDENCE.—Parol evidence is inadmissible for the purpose of determining whether the omission from a will of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator. This can be determined only from the face of the will: *In re Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, and note. The declarations of a testator are inadmissible as evidence to add to, or explain, or in any manner control, the construction of a will: *Couch v. Eastham*, 27 W. Va. 796; 55 Am. Rep. 346; *Magee v. McNiel*, 41 Miss. 17; 90 Am. Dec. 354, and note. See extended note to *Graham v. Burch*, 28 Am. St. Rep. 361.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

TRIMBLE v. STATE.

[145 INDIANA, 154.]

MARRIED WOMEN—ESTOPPEL.—If a husband and wife holding land by entireties make application to the county recorder to obtain a loan from the school fund, comply with all the statutory requirements, and execute a mortgage upon their land to secure the loan so obtained, the wife is thereby estopped from disputing the validity of the mortgage, although the auditor, at the time the loan was made, knew that the money so loaned was to be used to pay the individual debts of the husband.

J. W. Sutton and Davidson & Storms, for the appellants.

C. V. McAdams, for the appellee.

¹⁵⁴ **JORDAN, J.** This action was instituted by the appellee to foreclose a mortgage executed by appellants to secure the payment of a loan obtained from the school fund. The questions presented by the appeal arise out of the special finding of facts and the conclusions of law thereon.

The material facts in the case, as summarized from the court's special finding, are as follows: On March 19, 1894, and for fifteen years prior thereto, the appellants, John A. Trimble and Clara J. Trimble, were husband and wife, and said relation still continues; that on said date, and prior thereto, ¹⁵⁵ they were the owners, as tenants by entireties, of the real estate described in the mortgage in suit. Several months before the said nineteenth day of March, 1894, the husband, John A. Trimble, made a verbal application to Samuel C. Fenton, then auditor of Warren county, Indiana, for a loan to him of \$1,500 from the school fund, in the hands of said officer. The auditor verbally agreed to make the loan, when the amount of the fund on hand was

sufficient, and the defendant could furnish the security required by law; that upon the auditor discovering that the lands offered as a security were held by Trimble and wife as tenants by the entirety, he required both of them to join in the execution of the note and mortgage given for the loan, when it was made; that for the purpose of securing said loan before the same was made, the appellants joined in the execution of the affidavit required by section 5803 of the Revised Statutes of 1894: Rev. Stats. 1881, sec. 4376. Prior to the making of the loan, the lands in dispute were appraised, as required by the statute, and the appraisement filed with the auditor, and also the required certificate of the clerk and recorder of the county was filed in compliance with the statute, under which the loan was made. At the time the said parties were prepared to perfect the loan in question, there being but \$1,200 of the school fund on hand, this amount was, on March 19, 1894, loaned, and the appellants, for the purpose of securing the payment thereof, executed the note and mortgage provided for by the statute. The mortgage was duly acknowledged and recorded in the recorder's office of Warren county, on said nineteenth day of March, 1894. On the date aforesaid, after the making of the statutory affidavit, as stated, and the execution of the note and mortgage by said Trimble and wife, the auditor, without any objections from Mrs. Trimble, drew, in the name of her husband, an order ¹⁵⁶ on the county treasury for the said sum of \$1,200, so loaned, and the amount of said order was by the treasurer paid to the husband with the knowledge of his wife; that on said day, the husband paid, in the name of himself and wife, as interest for six months in advance, the sum of \$72, upon the loan in controversy. On the day that the appellants procured the loan of \$1,200, they expressed a desire to the auditor for an additional \$300, in order to increase the loan to \$1,500, the amount which the auditor had originally promised to loan. The auditor informed them that as soon as the additional \$300, so desired, was on hand, they could have it, and the note and mortgage would be changed so as to cover this additional amount, and no objections were made by either of the appellants to this arrangement. Thereafter, on May 10, 1894, the said amount of \$300 of the school fund being on hand, the auditor drew a warrant upon the treasury in the name of the husband for that amount, which was paid him. The act of the auditor in drawing the warrant for this latter amount was in accordance with the arrangement made to increase the loan to \$1,500; and with the consent of the husband, but in the absence of the wife, the note and mortgage

originally executed by the parties were changed by the auditor by substituting \$1,500 therein for \$1,200; that the mortgage so changed was not recorded, neither was the former record changed or altered; that \$350 of the money obtained on the original loan was, by the appellants, applied in settlement of a lawsuit between them and one Mitchell, and the remainder, with the knowledge and consent of the wife, was used in paying the individual debts of the husband. The wife executed the mortgage and note at the request of the husband to obtain the money for the purpose for which the same ¹⁵⁷ was used, but the auditor had no knowledge or information, at and prior to the time the loan was made, as to what purpose the money was to be applied.

The court further finds that there is due and unpaid upon the mortgage, as first executed, the sum of \$1,268.88, and upon the instrument as changed, the sum of \$1,583.55.

Upon the facts as found, the court stated its conclusions of law in substance as follows: 1. That the plaintiff is entitled to a decree, foreclosing the mortgage in suit, for the sum of \$1,268.88; 2. That the plaintiff is not entitled to foreclose the mortgage for the \$300 additional loan to the husband, John A. Trimble; 3. That as to this loan the plaintiff is entitled to a personal judgment against John A. Trimble only, for the sum of \$314.67. Judgment followed in accordance with the conclusions of law.

The only question presented and discussed by counsel for Clara J. Trimble is the contention that, under the finding of facts, it is disclosed that the execution of the mortgage in question was an attempt to pledge real estate held by her and her said husband, as tenants by entireties, for the debt of the latter. That it was a contract of suretyship, as to her, into which, under section 6964 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 5119), she was expressly prohibited from entering, and therefore the instrument is void and cannot be enforced. It is settled law, in this state, that a mortgage executed by a married woman upon her separate real estate to secure the debt of her husband, or others, is invalid. Also, that a mortgage executed by husband and wife, upon lands held by them as tenants by entireties, to secure the debt of the husband, or others, is void as to both. This rule, however, is subject to the principle ¹⁵⁸ of estoppel in pais as against the wife, by which she is bound, when the same is established, by the facts in any particular case: *Taylor v. Hearn*, 131 Ind. 537, and cases there cited.

It is also settled that where a married woman, to obtain a loan from the school fund, complies with all the statutory require-

ments, and executes a mortgage upon her real estate to secure the loan so obtained, she is thereby estopped from disputing the validity of the mortgage, and this is true, although the auditor, at the time the loan is made, may have knowledge that the money so derived is to be used for the benefit of her husband or other persons: *Snodgrass v. Morris*, 123 Ind. 425; *Lloyd v. State*, 134 Ind. 506; *Davee v. State*, 7 Ind. App. 71; *Welch v. Fisk*, 139 Ind. 637.

In *Snodgrass v. Morris*, 123 Ind. 425, which was an action by a married woman to cancel a school fund mortgage, upon the ground that the mortgaged premises belonged to the plaintiff, and were mortgaged to obtain money for the husband, Elliott, J., speaking for the court, said: "A county auditor is a public officer, invested by the statute with certain rights and duties, and he possesses no other rights than those conferred by the statute. He is, in no sense, the owner of the school fund, nor has he any right to release or cancel mortgages given to secure loans made from that fund, except as the statute provides; and there is nothing in the statute empowering him to decide whether a mortgage is, or is not, void because executed by a married woman to obtain money for the benefit of her husband."

In the case of *Lloyd v. State*, 134 Ind. 506, where it appeared that the appellant, who was a married woman at the time she executed the mortgage upon her lands ¹⁵⁹ to secure the loan obtained from the school fund, had complied with all the requirements of the law, it was held that she could not defend against the mortgage, although the money in that case was secured to discharge a debt of the husband, and so applied by the latter, all of which the auditor had knowledge at the time the loan was secured. This court, in that case, said: "There is nothing to prevent a married woman from securing a loan from the school fund. If she complies with the law, she is as much entitled to a loan as any other person, and she is presumed to know the law, as are all persons, and to know what rights and duties the county auditor is vested with. When she executes her note and mortgage, and it is accepted, she has the right to the money which the loan calls for, and if the officer or officers refuse to discharge their duties in this behalf, and refuse to pay the money over to her, she has a remedy, and may compel the payment of it to her; and if she fails to exact her rights in that behalf, or waives her right to the money, and directs the auditor to pay the money to another, or permits him to retain it and apply it to other purposes, she may have a right against him, but she cannot defend against the

mortgage executed to the state. The mortgage is the property of the state, and is enforceable against her. The state cannot be prejudiced or suffer loss by reason of her laches in failing to demand and receive the money on the execution of the mortgage, or in directing or permitting the auditor to retain and apply it in payment of her husband's debts."

In the appeal of *Davee v. State*, 7 Ind. App. 71, another branch of *Lloyd v. State*, 134 Ind. 506, was very fully considered by the appellate court, and it was there held that the wife, under the facts in that case, had estopped herself ¹⁶⁰ from denying the validity of the mortgage. By these decisions, the principle of estoppel is more strictly enforced against a married woman who seeks to defeat a mortgage, executed by her upon her realty to the state, to secure the payment of a loan from the school fund, obtained under and in compliance with the provisions of the school law, than it has been, perhaps, in a case where the money has been loaned by a private individual. Cogent reasons, however, in support of the principle asserted, are stated by the court in these several decisions, and the rule therein affirmed is controlling in the case at bar.

For obvious reasons, we think, a distinction should be made. The loaning of money to anyone by an individual from his private funds is optional with him, and is a matter in which he may fully exercise his own judgment as to when, how, and to whom he will loan. He has the undisputed right to select his own agent to act for him in making loans. He can formulate the written instruments, which he will require the borrower to execute, in order to obtain and secure the payment of the loan. He may impose such legitimate conditions and require such steps to be taken, by applicants for loans, as his wisdom and judgment may dictate. But it is quite different on the part of the auditor, in loaning the money belonging to the school fund. The latter is a public officer, who is commanded by the statute to loan the money belonging to this fund. He has no choice in the matter. The language of the law is, that the money of the fund "shall be loaned": Rev. Stats. 1894, sec. 5796. All the antecedent steps to be taken by a borrower are prescribed by the statute. The law even defines the form of the note and mortgage that are to be executed by the borrower. The evident object sought by the legislature, under these statutory requirements, was to ¹⁶¹ guard the safety of this sacred fund, and thereby make every loan thereof secure beyond any contingency: *Deming v. State*, 23 Ind. 416.

There is no law to prevent a married woman from joining with

her husband in the application for a loan from the school fund for her own use and benefit, and to join with him in pledging by mortgage real estate held by them as tenants by entireties to secure the payment thereof.

In the case before us, it appears that the wife, Mrs. Trimble, voluntarily subscribed to the affidavit prescribed by the statute, and joined with him in producing the certificate of the clerk and recorder, and in complying with the other requirements of the law, in order to obtain the loan in dispute. By these solemn acts of hers she must be held to have represented herself to be an applicant for the loan in question. Having done all this, it was no concern of the auditor to ascertain what arrangement, if any, existed between her and her husband as to the disposition that was to be made of the money to be obtained. When, as provided by section 5796 of the Revised Statutes of 1894 (1261, E. S.), it was shown to the satisfaction of the latter that the real estate offered by the applicants was in value fully sufficient to secure the desired loan, and that it was held by them by a good and sufficient title, without encumbrance, and not derived from a sale for taxes, and they had fully complied with the other requirements of the law, it was not incumbent, under the statute, upon the auditor to proceed further and ascertain if the money was to be used or applied for the benefit of the wife, and his knowledge of the facts, as to the purpose for which the money was desired, would not be binding upon the state. Had Mrs. Trimble desired that the warrant drawn for ¹⁶² the money should be made payable to her, it was her duty to demand that the auditor issue it in her favor, and her neglect to do so, and in permitting her husband to receive and use the money, cannot be chargeable against the state. The disability as to suretyship, imposed by the statute upon a married woman must be considered in connection with another provision of the same act, to the effect that she shall be bound by an estoppel in pais, and no construction ought to be given to this exception by the statute of her ability to contract, as will place in her hands a sword to defend her own fraud and imposition on others, instead of a shield for her protection, as the law intended.

Under the facts in this case, it must be held that the appellant, Mrs. Trimble, is estopped from denying the validity of the mortgage in suit, and that the court did not err in decreeing a foreclosure of the mortgage executed for the original loan of \$1,200.

No special reasons are urged to show that the judgment against John A. Trimble on the additional loan should be reversed, and hence we do not consider that question.

The judgments are affirmed.

Estoppel against Married Women.

In the treatment of this topic but little consideration is due to the common-law rule that a married woman, by reason of her inability to contract is not bound by an estoppel. Under enabling statutes, which exist very generally throughout the states of this Union, the common-law disabilities of married women to contract have been removed, and the prevailing doctrine now is, that a married woman who deals, or assumes to deal, in respect to a matter concerning which her common-law disabilities have been removed is bound by an estoppel the same as any other person. On the other hand, if the contract relates to a matter concerning which the common-law disabilities continue, so that the contract is void for want of capacity or power to make it, the doctrine of estoppel cannot be invoked: *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17; *Crenshaw v. Julian*, 26 S. C. 283; 4 Am. St. Rep. 719; *Colorado Cent. R. R. Co. v. Allen*, 13 Colo. 229; *Krathwohl v. Dawson*, 140 Ind. 1.

Judgments.—In some jurisdictions, it has been held that a married woman, being unable to make a valid contract, is not estopped by a judgment by default obtained against her on a contract to which she is a party: *Griffith v. Clarke*, 18 Md. 457; *Morse v. Toppan*, 3 Gray, 411. This doctrine and the cases maintaining it have been severely criticised in other jurisdictions, where the courts not only deny the rule, but maintain that though a contract executed by a married woman is void, yet, if in an action thereon she makes default and a judgment is rendered against her, she is estopped to deny or collaterally attack it: *Burk v. Hill*, 55 Ind. 419; *Elson v. O'Dowd*, 40 Ind. 800.

A judgment against a married woman upon a contract made by her during the marriage is valid until reversed, and cannot be impeached in a collateral proceeding on the ground of her coverture: *Gambette v. Brock*, 41 Cal. 78; *Hartman v. Ogborn*, 54 Pa. St. 120; 93 Am. Dec. 679. If a married woman suffers judgment to be rendered against her in an action upon a note in which she is a comaker with, or surety for, her husband, she cannot escape liability on the judgment by pleading her coverture: *Guthrie v. Howard*, 32 Iowa, 54; *Van Metre v. Wolf*, 27 Iowa, 341. Married women are estopped by judgments in actions to which they are proper parties in the same manner as persons sui juris: *Grantham v. Kennedy*, 91 N. C. 148. Under statutes removing the disability of married women to contract, there can be no doubt that they are thus bound: *Frelson v. President etc. Bates College*, 128 Mass. 464; *Crenshaw v. Julian*, 26 S. C. 283; 4 Am. St. Rep. 719. A decree of a court procured to be made by a married woman cannot be set aside at her instance after the termination of her coverture on the sole ground of her want of power to consent to the decree by reason of her coverture, when, for a long period of time, she has enjoyed the fruits of the decree, and she is the only person who complains of it. She is clearly estopped, in such case, from asserting the invalidity of the decree: *Bigham's Appeal*, 123 Pa. St. 262; 10 Am. St. Rep. 522. A married woman is estopped to deny on appeal the validity of a decree of divorce when, after the decree is rendered in the lower court, she brings an action against

her former husband to recover property the possession of which can only rightfully be claimed by her on the ground that the bonds of matrimony have been legally dissolved, and recovers a judgment therefor, which has not been appealed from: *Baily v. Baily*, 44 Pa. St. 274; 84 Am. Dec. 439.

Deed.—As a general rule, married women are not estopped from asserting title to their lands, except for fraud, and can be divested of their interest therein only in the mode prescribed by statute. Hence, a deed executed by husband and wife, not acknowledged nor recorded, granting to a railway company a strip of the wife's land as a right of way, does not divest her title, nor estop her from asserting title thereto, though without fraud she may have thus induced the company to build its road along the route taken: *Louisville etc. Ry. Co. v. Stephens*, 96 Ky. 401; 49 Am. St. Rep. 303. If a husband executes a deed which is also signed by his wife, but is void as to her by reason of being defectively executed, and the consideration of the conveyance is a transfer of other tracts of land to him, she is not, by her subsequent joinder in a conveyance to a third person of the lands so acquired by her husband, estopped from denying the validity of the original deed: *Stone v. Sledge*, 87 Tex. 49; 47 Am. St. Rep. 65. Any conveyance made by a married woman in which the statute is not strictly complied with is void as to her and cannot bind her by estoppel: *Merriam v. Boston etc. R. R. Co.*, 117 Mass. 241. A married woman is not estopped by her unrecorded deed made in ignorance of her rights and not in accordance with the provisions of the statute: *Ray v. Wilcoxson*, 107 N. C. 514. A married woman who joins her husband in a conveyance of lands in consideration of their support is not thereby estopped from enforcing the lien of a judgment which she has acquired against her husband's estate for a debt existing prior to the conveyance: *Houseman v. Grossman*, 177 Pa. St. 453. An executory and unacknowledged contract of a married woman to convey real estate is void, and no estoppel can accrue against her in regard to land not held as her separate estate: *Wood v. Terry*, 30 Ark. 385. In the absence of statutes removing the disability of a married woman to contract, she is not bound by deed made jointly with her husband, nor by recitals contained therein. Under the common-law rule, a feme covert cannot bind herself personally by covenant or contract during the coverture. Hence, a deed executed by husband and wife, with covenants of warranty, does not estop the wife from setting up a subsequently acquired interest in the same land: *Jackson v. Vanderhayden*, 17 Johns. 167; 8 Am. Dec. 378; *Goodenough v. Fellows*, 53 Vt. 102; *Bank of America v. Banks*, 101 U. S. 240; *Barker v. Circle*, 60 Mo. 258; *Strawn v. Strawn*, 50 Ill. 33; *Gonzales v. Hukil*, 49 Ala. 260; 20 Am. Rep. 282. A married woman who executes a warranty deed of her real estate, bearing date previously to her marriage, by the name which she then bore, with the fraudulent purpose of imposing upon a person to be affected, and without disclosing the fact of her marriage is not estopped to set up her title in the land as against her grantee or a purchaser from him without notice: *Lowell v. Daniels*, 2 Gray, 161; 61 Am. Dec. 448. It has, however, been

held, that if a wife joins her husband in executing a deed of general warranty, she is estopped by her covenant from setting up a subsequently acquired title: *Hill v. West*, 8 Ohio, 222; 81 Am. Dec. 442; *Dukes v. Spangler*, 85 Ohio St. 119-127. It has also been held that a wife, by joining her husband in the execution of a deed is estopped to dispute the grantee's title thereunder, although her name does not appear on the face of the deed as a grantor: *Gates v. Card*, 93 Tenn. 334. Under statutes enabling a married woman to contract, her warranty deed is generally binding, by way of estoppel, upon her and her subsequent grantees to the same extent as if she were unmarried: *Knight v. Thayer*, 125 Mass. 25; *Littell v. Hoagland*, 106 Ind. 320. Thus where a married woman joins her husband in a conveyance of land which purports to convey the entire estate therein she is estopped from subsequently setting up any title to such lands existing at the time of the conveyance or subsequently acquired: *King v. Rea*, 56 Ind. 1; *Guertin v. Momblean*, 144 Ill. 32. Although a contract for the sale of community property is signed by the husband alone, the wife is estopped to deny her interest in the contract, when it is made by her husband at her request with her knowledge and consent as to its terms, and she has allowed the other party to the contract to perform his part of it, and has accepted its fruits: *Konnerup v. Frandsen*, 8 Wash. 551. The rule that a married woman may be bound by her deed and estopped to deny its recitals applies with especial force to a conveyance by a feme covert of her separate estate. In the case of *Dobbin v. Cordiner*, 41 Minn. 165, 16 Am. St. Rep. 683, it was well said, and the language applies generally, that: "Our statutes have gone far to remove the common-law disabilities of married women. The property held by them at the time of their marriage continues to be their separate property after marriage. They may during coverture receive, hold, use, and enjoy property of all kinds, and the rents, issues, and profits thereof and all avails of their contracts and industry, free from the control of their husbands. They are capable of making contracts by parol or under seal. They are bound by their contracts, and responsible for their torts, and their property is liable for their debts and torts to the same extent as if they were unmarried. Their power to contract and to convey real estate is, however, so far qualified that they cannot contract with their husbands relative to the real estate of either or by power of attorney or otherwise authorize their husbands to convey their real estate or any interest therein; and, in general, in all conveyances by married women of their real estate, their husbands must join. Married women cannot enjoy these enlarged rights of action and of property and remain irresponsible for the ordinary and legal and equitable results of their conduct. Incident to this power of married women to deal with others is the capacity to be bound and to be estopped by their conduct, when the enforcement of the principle of estoppel is necessary for the protection of those with whom they deal, although there are, without doubt, limitations upon the application of this doctrine." If a married woman executes a deed to her separate estate upon a sufficient consideration and in the man-

ner provided by statute, she is estopped to deny its validity: *St. Louis etc. R. R. Co. v. Foltz*, 52 Fed. Rep. 627; *Harden v. Darwin*, 77 Ala. 472; or, to set up an after-acquired title: *Zimmerman v. Robinson*, 114 N. C. 39. And a married woman who, at her husband's request, executes and acknowledges a deed, knowing it to be such, and allows her husband to deliver it to an innocent purchaser, is estopped, as against him, to assert that the deed is invalid by reason of the fact that when she executed it, no grantee was named therein, or because she did not know that the land described was her own, she not having read the deed, nor having shown sufficient excuse for not reading it: *Dobbin v. Cordiuer*, 41 Minn. 165; 16 Am. St. Rep. 683.

Although a deed of a married woman, in which her husband joins in attempting to convey her separate estate, is defectively acknowledged, yet it is subject to ratification by the husband and wife, and, if so ratified, estops her from setting up any claim to the land: *Morris v. Turner*, 5 Tex. Civ. App. 708. If the separate property of a wife is exchanged for other land, and the deed for the latter is, by mistake, made to both husband and wife as grantees, and accepted under a promise that the husband will thereafter convey to his wife, which agreement he fails to keep for a long period, she is not estopped to claim title to the land as against judgment creditors of the husband, if no credit has been extended upon his apparent ownership: *De Vore v. Jones*, 82 Iowa, 66. The deed of a married woman conveying her separate estate, if executed in any other manner than that prescribed by statute or founded on a consideration not sanctioned by law, does not estop her from asserting its invalidity and asking for its cancellation: *Harden v. Darwin*, 77 Ala. 472.

Deeds Releasing Right of Dower.—In a conveyance of land by a husband and wife, words of release by the wife are necessary to bar her right of dower, otherwise she is not estopped from claiming dower in the lands conveyed, upon the death of her husband: *Lufkin v. Curtis*, 13 Mass. 223; *Lothrop v. Foster*, 51 Me. 867. When a wife joins in a deed of land with her husband, "in token of her relinquishment of dower, without words of grant on her part, she is estopped to claim dower although her husband has previously parted with all his title to the grantee: *Stearns v. Swift*, 8 Pick. 532. And a woman who joins her husband in a deed especially relinquishing her right of dower is estopped to claim dower in the same land thus conveyed: *Usher v. Richardson*, 29 Me. 415. A married woman, who unites with her husband in a warranty deed of his land, merely for the purpose of enabling him to pass the title free from her inchoate right of dower, is not estopped from asserting in her own favor an after-acquired title to such land: *Sandford v. Kane*, 133 Ill. 199; 23 Am. St. Rep. 602; affirming *Sanford v. Kane*, 24 Ill. App. 504; *Raymond v. Holden*, 2 Cush. 264. But if a feme covert with all the powers of a feme sole agrees in writing, for a valuable consideration, to release her dower in land, she is thereafter estopped from claiming dower therein: *Smith v. Oglesby*, 33 S. O. 194.

Mortgages.—A married woman is generally estopped by a mortgage to which she is a party. She is estopped from denying her positive representations made to a mortgagee, who, acting in good faith,

and without notice, is thus induced to take a mortgage on her lands: *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621. A mortgage executed by a married woman charging her separate estate with the payment of a debt and declaring that the debt is for the benefit of such estate estops her from averring the contrary against an innocent purchaser for value before maturity: *Bailey v. Seymour*, 42 S. C. 322. And a married woman is estopped to deny the consideration for the execution of a mortgage on her separate estate, as against an assignee whom she has induced to purchase the mortgage debt: *Howell v. Hale*, 5 Lea, 405. If a wife joins her husband in procuring a third person to purchase an invalid mortgage of the wife's separate estate, she is estopped to deny the validity of the mortgage: *McCullough v. Wilson*, 21 Pa. St. 436. If a married woman, either directly or through her agent, borrows money on a mortgage, the money borrowed becomes at once a part of her separate estate, and the mortgage may be enforced against her. The mortgagee, in the absence of notice to the contrary, has the right to assume that the money was borrowed for the use of the mortgagor, and she is estopped from denying that fact, unless it is shown that the mortgagee had notice to the contrary: *Hibernia Sav. Inst. v. Luhn*, 84 S. C. 176; *Scottish etc. Mortgage Co. v. Deas*, 35 S. C. 42; 28 Am. St. Rep. 832. A married woman who joins with her husband in a mortgage of lands in which she has an equitable estate is estopped to deny the title of the mortgagee, or to assert that she did not have an alienable estate in the lands: *Jones v. Reese*, 65 Ala. 135. A married woman who buys land and jointly with her husband executes a mortgage to secure the purchase money is estopped to deny that the consideration moves from her and that she is liable for such purchase price: *Kedy v. Kramer*, 129 Ind. 478; *Simmons v. Richardson*, 107 Ala. 697. If a wife transfers her separate estate to her husband to enable him to mortgage it as his property, for his own benefit, she is estopped by the mortgage, as against the mortgagee not shown to have had knowledge of the conveyance as a contrivance to evade the statute, to deny the validity of such conveyance or of the mortgage: *Long v. Crosson*, 119 Ind. 3. If a married woman, jointly with her husband, executes a mortgage containing covenants of general warranty to secure an obligation on which she is a joint debtor, she is estopped after foreclosure of the mortgage to assert an after-acquired title to the land. Such title inures to the benefit of the purchaser on foreclosure: *Yerkes v. Hadley*, 5 Dak. 324. A married woman who, jointly with her husband, gives a trust deed to her property to secure their joint debt, cannot, after the property has been sold under the trust deed, impeach the sale by showing that such deed was not given to secure the joint debt of herself and husband, but to secure a debt for which she would not be liable: *Cross v. Hedrick*, 66 Miss. 61. If a married woman purchases land, taking title to herself, and executes, jointly with her husband, a mortgage for the purchase money, she cannot set up her coverture in bar of foreclosure: *Strong v. Waddell*, 56 Ala. 471. If a wife executes a mortgage in blank, upon the representation of her husband that it is to cover his

land, and he then inserts in the mortgage a description of the wife's land, and borrows money thereon, the wife is bound by the acts of her husband and estopped to deny the validity of the mortgage: *Nelson v. McDonald*, 80 Wis. 605; 27 Am. St. Rep. 71. If a wife joins with her husband in a mortgage of his land to secure his debt and releases her right of dower and homestead therein; and, the husband then induces a third person to purchase the mortgage debt after maturity, upon his assurance that the price paid is due on the mortgage, the wife is estopped by his representations and cannot be allowed to redeem for a sum less than that for which her husband is liable on the mortgage debt: *Casler v. Byers*, 129 Ill. 657. If a wife joins her husband in the execution of a mortgage upon her land, knowing that the title thereto stands in her husband's name, and that the mortgagee relies upon his ownership and has no notice of the interest of the wife, and she does not notify him that she has any interest or ownership in the lands mortgaged, she is estopped to set up her title in an action to foreclose: *Duckwall v. Kisner*, 136 Ind. 99.

Under the laws of South Carolina, a married woman cannot pledge her estate by mortgage to secure the contract of another, having no reference to her separate estate, even though such other is her husband and though the mortgage purports in positive terms to bind her separate estate. Hence, she is not estopped to deny the validity of such a mortgage: *American Mortgage Co. v. Owens*, 72 Fed. Rep. 219. The mere recital in a mortgage upon the wife's property to secure the husband's antecedent debt that she and her husband are jointly and severally indebted to the mortgagee cannot estop the wife or forbid inquiry into the consideration of the mortgage: *Chaffee v. Browne*, 109 Cal. 211; *Cole v. Temple*, 142 Ind. 498. And a mere recital in a married woman's mortgage of her separate estate executed by her and her husband, that it is given to secure her indebtedness, does not estop her from showing that it was given for supplies furnished for a plantation, which her husband cultivated in his name and for his own benefit: *Bank of America v. Banks*, 101 U. S. 240. A married woman is not estopped to dispute the validity of a mortgage given by her upon her separate estate, but which is invalid for defective acknowledgment if it does not appear either that the debt to secure which the mortgage was given was for money advanced to her, or for anything of which she had the benefit, or that the mortgagee was deceived into allowing the debt to be contracted upon the faith of her executing a mortgage to secure it: *Tolman v. Smith*, 74 Cal. 345. And if a wife, to avoid a statute prohibiting her from becoming surety for her husband, and to enable him to mortgage her land, conveys her land through a third person to her husband, she is not estopped, the mortgagee having notice of all the facts, to deny the validity of the mortgage: *Sohn v. Gantner*, 134 Ind. 81. A married woman who, together with her husband, gives a mortgage on land owned by them as tenants by entireties, to secure a debt of her husband, is not estopped to deny the validity of the mortgage by the mere fact that she knew that it was invalid and failed to notify the mortgagee of the character of her interest in the

property: *Coats v. Gordon*, 144 Ind. 19. A married woman who assumes that her husband is dead from his long absence, and marries again, and, while, living with the latter man, joins him in a mortgage of her separate estate, may, upon the return of her lawful husband and the resumption of marital relations with him, avoid such mortgage on the ground that he did not join in its execution. In such case, the doctrine of estoppel does not apply: *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17. A married woman is not estopped to deny the validity of a mortgage on a stock of goods owned by her, executed by her husband without her knowledge or consent, by the fact that he is permitted to remain in possession, purchasing on credit and selling at retail, and that the mortgagee sold him the goods and took the mortgage, believing him to be the owner of the business: *Kiefer v. Klinsick*, 144 Ind. 46.

Estoppel as against Husband's Creditors. — Generally, if a wife permits her husband to use her money or property, real or personal, as his own for a considerable period of time, incurring obligations and obtaining credit upon the faith of others that the property belongs to him, she is estopped to set up her title as against her husband's creditors: *Swartz v. McClelland*, 31 Neb. 646-649; *Hopkins v. Joyce*, 78 Wis. 443; *Leete v. State Bank*, 115 Mo. 184-204. A wife who allows stock purchased with her money to stand for several years in her husband's name, in order to give him credit, is estopped to assert her ownership as against his creditors: *Hamlen v. Bennett*, 52 N. J. Eq. 70. If a husband collects his wife's money, and, without objection on her part, uses it as his own for a number of years, obtaining credit on the faith of its being his own, she is estopped to assert her claim to it or its proceeds as against his creditors: *Driggs etc. Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78. If a married woman voluntarily permits her husband to use her money as his own by investing it in property in his own name, and thereby obtains credit on the faith of his being the owner, the wife is estopped to interpose a claim to the property to the detriment of his creditors: *Warner v. Watson*, 85 Fla. 402. If a wife permits her husband to invest her money in his own name and obtain credit upon the strength of his apparent ownership, she cannot assert her claim to the money or its proceeds, as against her husband's creditors: *Taylor etc. Co. v. Bell*, 62 Ark. 26. A married woman who is the equitable owner of a tract of land, the title to which she knows to be in her husband, is estopped to assert her ownership as against creditors of the husband who have given credit on the faith of his ownership: *Pierce v. Hower*, 142 Ind. 626; *Hopkins v. Joyce*, 78 Wis. 443. If a husband purchases land, taking the deed in his own name, and the wife furnishes part or all of the purchase money, with knowledge that the deed is made to her husband, and she suffers the title to remain in him while he receives credit on the faith of his ownership in the land, she is estopped to assert her title thereto as against those who have no notice or knowledge of any claim of ownership on her part, and who have acquired an interest in the land on the faith of the husband's ownership: *Minnich v. Shaffer*, 135 Ind. 634; *Le Coll v. Armstrong etc. Co.*, 140 Ind. 256. The fact that the wife's land stands in her husband's name

does not estop her to claim the property as hers, if the creditor, when he gave credit to the husband, had such notice or information as to the actual ownership as would have put a man of ordinary business prudence upon inquiry as to the fact: *Chadbourn v. Williams*, 45 Minn. 294; and it has been held that though the record title to the wife's property is allowed to remain in the name of her husband while he contracts debts in carrying on business, she is not estopped to assert her title to such separate estate, in the absence of bad faith and fraudulent intent on her part, and when she has treated her husband as her creditor and repeatedly demanded a conveyance from him: *Kemp v. Folsom*, 14 Wash. 16. Where the title deeds stand in the wife's name, this is constructive notice of her ownership, and if she does not represent that the title is in her husband, and does not know that he claims the ownership when he has a building erected on her land, claiming it as his own, the wife is not estopped to assert her title and to resist a mechanic's lien arising out of the erection of such building: *Campbell v. Jacobson*, 145 Ill. 389; *Huntley v. Holt*, 58 Conn. 445. If land is purchased with a wife's money, and the deed therefor taken and recorded in her husband's name, who, without the knowledge of his wife and entirely out of the course of his ordinary business, becomes liable as surety on a note, she is not estopped to deny her husband's title to the land, although the creditor of the husband loaned the money for which the note was given on the faith of the latter's ownership of the land: *De Berry v. Wheeler*, 128 Mo. 84; 49 Am. St. Rep. 538. If property is purchased with a wife's money and the title taken in her husband's name, who subsequently, and while he is solvent, conveys the property to her, she is not estopped to assert her title as against her husband's creditors who have extended him credit on the faith of his apparent ownership, but without either the husband or wife making any representation as to the ownership, or knowing that credit had been given on the faith of his ownership, and when the title had not been put in his name for the purpose of gaining credit for him: *Marston v. Dresen*, 85 Wis. 530. A married woman is not estopped from claiming, as against her husband's creditors, a resulting trust in land paid for by another and intended to be hers, but deeded to her husband through collusion with the grantor, although she fails to take positive action for a number of years, not knowing how the title stood, but does assert her title before it is assailed: *Steagall v. Steagall*, 90 Va. 73. If goods are bought by a wife for the use of the family, while credit is given to the husband as is customary, the wife is not estopped, by a judgment against her husband for the price of such goods, from claiming as her own land standing in his name, she not having knowingly concealed her title and the creditor not having extended credit on faith of the husband's apparent ownership of the land: *Scrutchfield v. Sauter*, 119 Mo. 615.

Agency of Husband.—If a married woman holds her husband out to the world as her agent, or allows him to act with reference to her property so as to induce the belief that he acts as her agent with reference thereto, she is estopped to deny his authority to act as her agent: *McNichols v. Kettner*, 22 Ill. App. 493; *American Mortgage Co. v. Owens*, 64 Fed. Rep. 249-252. Thus if, during two years, a

husband and wife lived together on a farm held by her as dower from the estate of a former husband, and during that time her present husband acted as general agent in connection with the farm, and made purchases as such agent, and during the third year remained in possession of the farm conducting the entire business and making similar purchases purporting to be her agent, from persons who had known of his agency, and had no notice of its termination, while the wife with knowledge failed to put the parties on notice, she is estopped to deny the agency of her husband during the third year, although he may not in fact have obtained the purchases for her but for himself and his own benefit: *Foster v. Jones*, 78 Ga. 150. If a married woman, through her husband as her agent, makes application for a loan of money, and the lender is without notice that the money is not for her use, it becomes a part of her separate estate, and she is estopped to deny the validity of a bond given by her for the repayment of the loan, although the money is received and used by her husband for his own purposes: *Building etc. Assn. v. Jones*, 32 S. C. 308. The husband of a married woman may be by her constituted her agent for the management of her separate estate, and if he, being such agent, purchases articles for her or her separate estate, or supplies for her tenants thereon, she is estopped to deny liability therefor: *Brown v. Thomson*, 31 S. C. 436; 17 Am. St. Rep. 40. If a wife makes her husband her agent for the purchase of land which becomes her separate property, and he takes the contract for the land in his own name, borrowing money to apply in payment therefor, and depositing the contract as security for its repayment, the wife is estopped to deny the equitable lien created by the deposit of the contract, if the husband and wife obtain possession of the contract by fraud and procure a deed to the land in her name: *Curtis v. Janzen*, 7 Wash. 58. Where a husband, as agent for his wife, while in possession of a note and mortgage given to her, induces her to indorse them, and subsequently while so in possession, he assigns them by indorsing them to himself and wrongfully appropriates the proceeds to his own use, the wife is estopped to deny the validity of the transfer and such misappropriation by the husband is no ground for annulling the transfer, unless she can show fraud both on the part of her husband and the assignee of the note and mortgage: *First Nat. Bank v. Nelson*, 106 Ala. 535.

Estoppel by Note.—By signing a joint note with her husband a wife clothes the holder with evidence of her intention to charge her separate estate, and is estopped to deny such intention when an innocent holder has advanced money upon the faith of such intention: *Nelson v. McDonald*, 80 Wis. 606; 27 Am. St. Rep. 71. If a married woman makes her note in terms referring to her separate estate, an innocent indorsee for value before maturity has a right to rely upon the statement made in the note and the maker is estopped to deny such statement unless she can prove that the holder of the note knew them to be untrue: *Nott v. Thomson*, 35 S. C. 461. If a wife makes her note to her husband's order and delivers it to him to enable him to procure its discount, and with the proceeds pay his own debt, and the husband applies for its discount at a bank having notice that the note

As without consideration and for discount, but not that the proceeds are to be applied for the husband's benefit, and the bank discounts it by check to the wife's order, which the wife indorses and delivers to her husband, knowing that it is the proceeds of the discount of her note, she is estopped from setting up against the bank that she was a mere surety on the note: *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 156. Where a wife, being the owner of a note, indorses it in blank and delivers it to a creditor of her husband as collateral security for the debt of the latter and such creditor assigns the note for value to an innocent purchaser, the wife is estopped to assert that her assignment is different from what it appears to be on its face: *Shirk v. North*, 138 Ind. 210. When suits for large sums have been commenced against a married woman, and she has answered therein failing to plead that the debts were her husband's or marital coercion or other like defense, and has compromised the suits, given notes for the amount of the compromise, and thereby obtained remission of a large amount of the indebtedness due, she is estopped, in a subsequent suit upon the compromise notes, to set up the above defenses to avoid payment of the notes: *Sentell v. Stark*, 37 La. Ann. 679. If a husband contracts for machinery to be erected upon a farm which is the separate property of his wife, and such contract is made without her knowledge or consent, and she, together with her husband, subsequently signs a note to pay for such machinery, she is not estopped, in an action on the note, to deny her liability thereon: *Gossard v. Lea*, 8 Tex. Civ. App. 8.

If a note is signed by a married woman payable to the order of her husband, and is indorsed and presented by him, with no implication, representation, or presumption that she is to be benefited in her estate or her business to be drawn from the form of the note or from the fact that she gave it to her husband to be discounted, she is not estopped to deny liability on the note, in the absence of evidence that she intended to be bound thereby, and the fact that she is possessed of a separate estate is not sufficient to estop her: *Saratoga County Bank v. Pruyn*, 90 N. Y. 250.

Representations, Silence, or Conduct.—In order to estop a married woman by matter in pais, it must appear that there has been a false representation or a concealment of material facts by her, and that the party to whom such representation was made, or from whom such facts were concealed must have been ignorant of the existence of the facts concealed or of the falsity of the representation and must have relied upon its truth. Hence, a married woman is not estopped by act in pais, unless her conduct has been intentionally wrong and fraudulent: *Steed v. Petty*, 65 Tex. 490. And to estop a feme covert by an act in pais from asserting her right to her land, she must be guilty of some positive fraud or of some act of concealment or suppression which in law is equivalent to fraud: *Johnson v. Bryan*, 62 Tex. 623; *Munk v. Weldner*, 9 Tex. Civ. App. 491; *Smith v. Powell*, 5 Tex. Civ. App. 373; *Louisville etc. Ry. Co. v. Stephens*, 96 Ky. 401; 49 Am. St. Rep. 808. A married woman cannot profit by her own fraud to the prejudice of a bona fide purchaser from her. Therefore, if she has received and invested the proceeds of a sale of her lands

to him conveying an imperfect title by purchasing other lands for her use and benefit, she is estopped from dispossessing him except upon refunding the purchase money, and paying for such necessary improvements as may have been made in good faith: *McDanell v. Landrum*, 87 Ky. 404; 12 Am. St. Rep. 500. A married woman may, by acts in pais done without any intentional fraud but which in effect amount to fraud, estop herself to assert title to her land as against persons misled to their prejudice by such acts: *Galbraith v. Lunsford*, 87 Tenn. 89. A married woman is estopped by her representations, as against a creditor relying upon them as true, to deny their truth. Thus, a feme covert who contracts a debt upon a representation made by her that she is carrying on a business in her own name, about which the indebtedness is contracted, is estopped to show in defense of the liability thus created that her representations were in fact untrue: *Smith v. Weeks*, 65 Vt. 566. A married woman who represents to her creditor, at the time, or before she contracts a debt, that the contract has reference to her separate estate, and it does not appear that the creditor had knowledge to the contrary, is estopped from denying the truth of such representation of fact: *Gwynn v. Gwynn*, 81 S. C. 482; *Brown v. Thomson*, 81 S. C. 436; 17 Am. St. Rep. 40. If a married woman borrows money or buys property from another, and by her conduct or representations induces the lender or vendor to suppose that she is borrowing the money or buying the property for her own use, when in fact her purpose, unknown to the party with whom she is dealing is to obtain the money or the property for her husband or a third person, she is estopped to deny the truth of her representations: *Bratton v. Lowry*, 39 S. C. 383-386; *Tombler v. Reitz*, 134 Ind. 9; *Wertz v. Jones*, 134 Ind. 475. A feme covert is estopped from denying her positive representations made to a mortgagee, who, acting in good faith, and having no knowledge that the facts as stated are untrue, is induced by such representations to take a mortgage upon her real estate: *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621. And if a married woman represents that a loan, secured by mortgage on her land, is for her own use, she is estopped, as against one who in good faith has contracted with her in reliance upon her statements, from asserting that she is a surety and not the principal in the transaction: *Taylor v. Hearn*, 131 Ind. 537. Married women are generally estopped by their conduct when the enforcement of the principles of estoppel is necessary for the protection of those who are innocent and deal with them in good faith: *Dobbin v. Cordiner*, 41 Minn. 165; 16 Am. St. Rep. 683.

A married woman is held, in relation to matters about which she is competent to contract, to the observance of that good faith in her dealings to which others are bound. Hence, she may be estopped by her silence whenever it is her duty to speak: *Grim's Appeal*, 105 Pa. St. 375; *Logan v. Gardner*, 136 Pa. St. 589; 20 Am. St. Rep. 939; *Schweitzer v. Wagner*, 94 Ky. 458, 462; *Mudgett v. Olay*, 5 Wash. 103, 111; *Tracy v. Lincoln*, 145 Mass. 357. If a wife holds a mortgage on her husband's land by assignment from the mortgagee, and her husband, to obtain a loan from another, states to the latter, in the pres-

ence of the wife that her mortgage has been fully paid, and she does not contradict this statement, knowing it to be untrue, and, in reliance thereon, the loan is made and a mortgage executed by the husband and wife upon the same land to secure it, she is estopped to assert the priority of her mortgage as against the later one which has priority: *Kelley v. Flisk*, 110 Ind. 552. If, after a contract for labor on a building belonging to a wife is made by her husband with one who has no knowledge of the wife's interest, the latter, knowing what is being done, does not disclose her interest or prevent the work, she is estopped to set up her title as a defense to a mechanic's lien: *Bruck v. Bowermaster*, 36 Ill. App. 510. If a married woman permits a railroad company to grade its roadbed through her lot, and accepts pay therefor, and then stands silently by and permits the company to expend its money in building and constructing its road, she is estopped to claim such lot not only as to that company but also its grantees: *Ragan v. Kansas City etc. Ry. Co.*, 111 Mo. 456-463. If a husband, in the presence of his wife, offers to sell her note to a third person representing it as belonging to himself, and such party does not purchase the note, but afterward takes it from the husband for collection, under direction from him to apply the proceeds to his debt, the silence of the wife when her husband offered to sell her note is not an admission of his right to use the proceeds in the manner indicated, and the wife is not estopped to deny his authority to do so: *Swager v. Lehman*, 63 Wis. 399. And only the positive and unequivocal consent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, can estop her from asserting her title thereto: *Branch v. Ward*, 114 N. C. 148; citing *Wells v. Batts*, 112 N. C. 283; 84 Am. St. Rep. 506.

Void Contracts—Want of Capacity.—A person can never be estopped by an act that is illegal and void. Hence, a married woman is not estopped by a contract which she has no legal capacity to make: *Mattox v. Hightshue*, 39 Ind. 95. She is not bound by a separate deed of her land when the consent and joinder of her husband therein is required by statute: *Mattox v. Hightshue*, 39 Ind. 93; *Carolina etc. Assn. v. Black*, 119 N. C. 328; *Logan v. Gardner*, 136 Pa. St. 589; 20 Am. St. Rep. 939; *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17. In cases where the contract of a married woman is void for want of power or capacity to make it, the doctrine of estoppel cannot be invoked against her in order to remove such incapacity: *Parsons v. Rolfe*, 66 N. H. 620; *Cook v. Walling*, 117 Ind. 9-12; 10 Am. St. Rep. 17. An exception to this rule may exist, as we shall hereinafter show, when she is living separate and apart from her husband, under the belief that the marriage has been terminated by death or divorce, or she has expressly or impliedly represented herself to be an unmarried woman. The fact that a contract made by a married woman has been acted upon by the promisee, does not estop her from denying the validity of the contract on the ground of her inability to make it: *Saulebury v. Corwin*, 40 Mo. App. 373; nor is her right barred by any period within that prescribed by the statute of limitations: *Brick v. Campbell*, 122 N. Y. 337. A married woman is not estopped to claim her land as against

a contract or the sale thereof, not acknowledged by her as required by statute: *Stivers v. Tucker*, 126 Pa. St. 74. Unless fraud is present in the declarations or conduct of a feme covert, on the faith of which another has the right to rely and has relied to his injury, she is certainly not estopped by her personal contract which she has no legal capacity under the law to make: *Weathersbee v. Farrar*, 97 N. C. 106. In order for a married woman to be able to interpose as a defense her inability to contract, she must be free from fraud, for she is estopped from interposing her inability to contract in bar of the consequences of her fraud: *Newman v. Moore*, 94 Ky. 147; 42 Am. St. Rep. 343.

Miscellaneous.—A married woman is estopped to dispute a parol partition of land made by her husband as a cotenant, if fair and equal, made with her consent and followed by long possession and acquiescence: *Berry v. Seawall*, 65 Fed. Rep. 742. Failure on the part of a married woman to act upon information which proves to have been erroneous and on which action would have been futile will not create an estoppel: *Anderson v. Crowley*, 96 Mich. 457. A wife is not estopped by the declarations and conduct of her husband in her presence concerning her interest in property to which she is entitled jointly with him: *Phillips v. Hodges*, 109 N. C. 248. If a married woman's separate estate is sold by an administrator unlawfully, and she has never received any of the purchase money, she is not estopped to claim the land, although, thinking the sale to be legal, she has, without making any claim, permitted the purchaser to make improvements and pay taxes: *Thockmorton v. Pence*, 121 Mo. 50. A wife may, at her husband's request, execute to him a valid release of a legacy charged upon land of which he is seised without his joinder therein and without a separate acknowledgment, and, as to such of his creditors as have advanced money, subsequent to the execution of such release on the faith thereof, she is estopped from denying its validity, but, as to such of the husband's creditors as have not loaned their money with knowledge of, and on the faith of, the release, the wife is not estopped: *Powell's Appeal*, 98 Pa. St. 403.

A married woman may create an estoppel against herself as to her separate personalty to which she can pass title by parol and delivery, and such estoppel results when another person, with her consent or acquiescence, assumes to sell such property as his own, and an innocent purchaser relies upon his representations in making the sale that such property is the property of the seller: *Ingals v. Ferguson*, 59 Mo. App. 299. If the equitable estate of a married woman is held by her under a deed with covenants of warranty purporting to convey an absolute estate in fee, while the fee is in fact outstanding in a third person and afterward passes to her on its acquisition by her vendor, such after-acquired interest is bound by her contracts: *Parker v. Marks*, 82 Ala. 548.

Estoppel of Wife to Assert her Coverture.—Persons dealing with a married woman may be ignorant of her marriage, and she herself may believe it has terminated by a divorce which is subsequently ascertained to have been void. In cases of this character, her living

as an unmarried woman, and being generally known as such and unquestionably free from the control of her husband, places her beyond the reason of the rule requiring that her conveyances of real property shall be executed under such circumstances that there can be no doubt that she did not act under his coercion or other undue influence. Where she is thus circumstanced, it may well be held that a conveyance executed by her as an unmarried woman must be regarded as effective against her, either upon the principle of estoppel or upon the other principle that the statutes requiring conveyances of married women to be executed in a particular manner are not applicable to her. There are, indeed, cases maintaining the broad proposition that when a statute has required the conveyance of a married woman to be executed or acknowledged in a particular manner, she cannot be bound, through the operation of an estoppel in pais, by a conveyance executed in some other manner. One of the most extreme of these cases is that of *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17. In this case, it appeared that a married woman, because of the absence of her husband unheard of for more than seven years, assumed him to be dead, and contracted a marriage with another man, and, while living with the latter as his wife, in the honest belief of the death of her first husband and the validity of her second marriage, she joined with her second husband in mortgaging her separate estate. Afterward, her first husband returned, and she resumed marital relations with him, and sought to avoid the mortgage executed by her on the ground that he did not join therein as by law required; and the court stated the principle to be that: "Where, however, the contract relates to a matter concerning which all the common-law disabilities continue, so that the contract itself is utterly void for want of power or capacity to make it, the doctrine of estoppel cannot be invoked in order to remove the incapacity. In other words, while a married woman may be estopped by affirmative representations concerning the character of a contract, which, if her representations be true, she is, notwithstanding her coverture, under no legal disability to make, she cannot, by her own act or representation, remove her legal incapacity to make a contract which coverture alone, under any and all circumstances, disqualified her from making except in a prescribed way." This view is sustained by the courts of Pennsylvania, which hold that, though a married woman represents herself to be a widow, and thereby procures a loan of money upon a contract executed in the form applicable to unmarried women, she is not estopped from showing that her representation was false, and thereby escaping her obligation: *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524; *Klein v. Caldwell*, 91 Pa. St. 140. We believe, however, that the weight of the more recent adjudications is to the effect that a wife may be estopped from avoiding her deed, though executed in the mode appropriate to unmarried women, where it appears by her representation, express or implied, she had induced the persons dealing with her to believe her to be unmarried. A widow, having contracted a second marriage, thereafter acquired title to real property, taking a conveyance to herself under the name which she bore while a widow. She afterward sought a loan on the

property, stating herself to be a widow and concealing the fact of her second marriage. She executed trust deeds to secure the moneys loaned to her, and, in default of payment, the property was sold under powers conferred by these deeds. She afterward attempted to avoid her deeds upon the ground of her coverture, and that the indebtedness which they were given to secure was that of her husband. It was held that her conduct had been fraudulent, and that she was therefore estopped. The court said: "The true doctrine is, that contracts and agreements of married women in reference to their real estate, when not joined therein by their husbands, where such agreement is free from fraud, cannot be enforced in law or equity. But where married women make such contracts or agreements by fraudulent means, and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up, and relying on, their coverture to retain the advantage. The court will require them to execute and perform the contract, if executory, or prevent them from avoiding it if executed, or will compel them to place the other party in statu quo, before they will be allowed to rescind or repudiate such agreements or contracts. Whether the one or the other form of relief will be granted must depend upon the equities of the case": *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 23. A woman living under her maiden name, apart from her husband, and representing herself as a single woman, executed a power of attorney to her father under which he made application for, and secured, a loan of moneys, and executed a conveyance to secure their repayment. Afterward she made a deed confirming that executed by her father as her attorney in fact. This deed described her as an unmarried woman, and the certificate of acknowledgment was not in the form requisite for the acknowledgment of a conveyance by a married woman. It was afterward discovered, or, at least, claimed, that a divorce entered before this transaction was invalid, that she was consequently a married woman at the date of the execution of the power of attorney as well as of the deed, and it was hence claimed that the conveyances executed by and in her name were void. The court, without indicating with great particularity the grounds upon which its judgment was based, sustained the deeds on the ground that, in construing them, the court ought to regard her as she regarded herself at the date of their execution, namely, as an unmarried woman: *Reis v. Lawrence*, 63 Cal. 129; 49 Am. Rep. 83. Other cases may be found in which a similar conclusion was reached where husband and wife had long lived separate under the belief that their marital relations had terminated. Such being the case, the courts were of the opinion that neither could be expected to consult with the other respecting conveyances of the wife's separate property, and that if she proceeded to dispose of it on the assumption that she was unmarried, the courts, so far as her conveyance was concerned, would treat her assumption as correct: *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Richeson v. Simmons*, 47 Mo. 20. This rule has been applied though the grantee in the deed was aware the grantor was a married woman. Thus, where a woman contracted marriage in England in 1855, left that country and her husband in 1863, and went to Cali-

fornia, where she lived apart from him and in meretricious relations with another man, passing as his wife and ignoring her former marriage, and conveying to her paramour in 1873 real property acquired by her in California executing a conveyance in the manner required for conveyances of unmarried women, it was held that she could not avoid such conveyance on the ground that the certificate of acknowledgment thereto was not in the form prescribed for married women. Mr. Justice Ross, in a concurring opinion, said: "I agree that the plaintiff should be regarded as a single woman. The property to which she asserts title was acquired by her in this state. Her husband has never been within the United States. For twenty odd years she has repudiated her marital relations, and conducted herself without regard to them. Under such circumstances, to permit her to fall back upon them and avoid her deed, on the ground that the certificate of the notary does not recite that she was examined 'separate and apart' from her husband, with whom she had no relations for more than twenty years, and who has never been in this country, seems to me to be beyond all reason": *Hand v. Hand*, 68 Cal. 137; 58 Am. Rep. 5.

In some instances, wives may be estopped from asserting any interest in the estates of their husbands, either upon the ground that there had been a substantial severance or dissolution of the marital relations, or that a wife had, by her absence and silence, permitted the husband to convey the lands to a purchaser in good faith and for value in ignorance of her existence and of her rights. Thus, both in Louisiana and Texas, it has been held where a husband and wife lived separate from each other for several years without having any more regard for each other than if they were unmarried, the one will be estopped from claiming his or her share in the marital property of the other: *Pickens v. Gillam*, 43 La. Ann. 350; *Wright v. Hay*, 10 Tex. 180; 60 Am. Dec. 200. Especially is this true when one of them, after deserting the other, has lived in adultery with a third person: *Wheat v. Owens*, 15 Tex. 241; 65 Am. Dec. 164; and where homestead rights exist, the wife surrenders her interest therein by abandoning her husband and home without legal excuse: *Farwell Brick etc. Co. v. McKenna*, 83 Mich. 283.

A somewhat remarkable series of opinions has been pronounced by the supreme court of the state of Washington, declaring that if a husband, after separating from his wife, goes into that state, and there conducts himself and acquires property as a single man, she in the meantime making no effort and showing no desire to assert her rights as a spouse, her relations to the community interests will be deemed to have been abrogated as to persons who deal with him in good faith and on the assumption that he is unmarried; and she will be estopped from maintaining any claim to land which her husband acquired in that state after the separation and subsequent conveyance to an innocent purchaser: *Nuhn v. Miller*, 5 Wash. 405; 84 Am. St. Rep. 868; *Sadler v. Nieaz*, 5 Wash. 182. The vice of these decisions, if they be vicious, is that they may, in effect, declare the wife to be estopped because she has not made her relation to the man known in the state wherein he has acquired property, when in fact

her failure to do so may not have been caused by any fraud or other wrong on her part, but solely by his wrong in abandoning her and securing another residence without leaving her with the means to pursue him into his new domicile and keeping on active exhibition therein her rights in him and his property.

ORTH v. ORTH

[145 INDIANA, 184.]

WILLS—TESTAMENTARY WRITINGS.—A letter from a husband to his wife informing her of the disposition of his property made by will, not attested or acknowledged, is not testamentary in its character.

WILLS—PRECATORY TRUST.—If a husband by his will makes his wife his sole beneficiary, a letter from him to her of the same date as the will informing her of the disposition made of his property, advising her in the management of the estate, expressing the hope that she will convey certain property to a person named, have a competence during life and sufficient to assist his children from time to time, as they may need it, and closing with the desire that she shall give what remains at her death to his children equally, does not create any enforceable trust in favor of such children.

WILLS—RECOMMENDATIONS, WHEN DO NOT CREATE A TRUST.—If there is doubt whether a testator intended by words of advice or recommendation to narrow an otherwise free and unfettered devise or bequest, the courts incline in favor of the absolute title of the devisee or legatee.

WILLS—TRUSTS EX MALEFICIO.—The violation of a parol promise made by the sole beneficiary under a will to carry out the wishes of testator expressed in a letter written by the latter to the former, is not such a fraud as creates a trust ex maleficio.

WILLS—PAROL PROMISE—STATUTE OF FRAUDS.—A parol promise made to a testator by the sole beneficiary under his will to convey certain property to a person named is void if it involves the transfer of property exceeding in value the limit fixed by the statute of frauds.

TRUSTS—EXECUTORY RESTING IN PAROL.—Equity does not enforce, in behalf of a mere volunteer, an executory parol trust.

WILLS—REVOCATION.—PAROL TRUSTS in personal property cannot be permitted to revoke a will contrary to the requirements of the statute upon the subject of such revocation.

WILLS—PRESUMPTION OF FRAUD.—The rule that one occupying a fiduciary relation to another, and thereby obtaining an advantage is presumed to have obtained it fraudulently, does not apply to a testamentary disposition made by a husband in favor of his wife.

WILLS—PRESUMPTION OF FRAUD.—A devise by a husband to his wife is not presumptively fraudulent, requiring equity to charge the devise with a trust in favor of those who may stand in the relation of heirs.

G. Burry, Palmer & Spencer, and Gould & Eldridge, for the appellants.

Wallace & Baird, for the appellees.

¹⁸⁴ HACKNEY, C. J. The late Honorable Godlove S. Orth, by his last will, devised and bequeathed to Mary Ann Orth, who was his second wife, all of his real and ¹⁸⁵ personal property, without condition, reservation, or limitation. Bearing the date of said will and accompanying the same was this letter from the testator to his said wife:

"To my Dear Wife: Among my papers you will find my will of this date. I give and bequeath to you all my property, real and personal. I do this because it will greatly facilitate the settlement of my estate, will tend to save unnecessary costs and expenses, and will give you, if properly managed, a competence during your life, and something for each of the children, Will, Mollie, and Hal thereafter.

"After the payment of all my debts, I trust you will have sufficient left to assist all my children as they may need from time to time, without, however, endangering your own support, and I have full confidence that you will act justly toward all.

"Unfortunately, as you know, I am heavily in debt, but, by prudent management, I think you can save our Benton county farms, or at least the 640 acres, being in section 12, and selling, if necessary, the two eighty-acre tracts in section 1. The two houses occupied by W. M. Orth and Jos. Ewing are now held by us jointly, and on my death will become your property without the will. I should like very much, and hope you will, as soon as you find you can safely do it, make a deed to my granddaughter, Lizzie Ray Orth, for the house now occupied by her father, this will furnish them with a home.

"Our land in Bollinger county, Missouri, is also held by us jointly, and after my death will belong to you without the will. Some of my creditors may want their money sooner than you can realize by sale of property; in such event, I advise you to borrow money, by giving mortgage on some of my property, but I would advise you not to mortgage your own property ¹⁸⁶ for any such purpose. Unless I am much mistaken, the rents from the city property and farms will always be more than sufficient to pay taxes and interest on my debts, but, of course, it will be good policy to sell property as fast as you can conveniently, without sacrifice, and apply proceeds to the payment of my debts. Whenever you can sell any of your own property, especially that which is unproductive, I advise you to do so, and apply proceeds to the payment of my debts, thus relieving the property, which by the will becomes yours, of the debts against the same. I do not think it necessary to administer on the estate, you can settle without

it I think. But should it become necessary, you can take out letters yourself, or join some good friend with you. You will need advice. Hal will, of course, be on hand, besides others whom you may regard as trustworthy. Do not pay my debts until a full examination, for it might so happen that claims will be presented through mistake or otherwise, or without proper credits allowed. In my papers you will generally find receipts and memoranda in reference to all my business affairs. Have all these carefully examined. In a word, act carefully, prudently, and under such good advice as you can procure; and act justly towards yourself and towards all my children, and I shall be content. My desire in this matter is that all my debts be paid, that you have a competence during your life, and then, what is left to give to all the children alike. Farewell.

GODLOVE S. ORTH."

In December, 1882, he departed this life, leaving surviving him his widow, said Mary Ann Orth, who elected to take under the will, Harry A. Orth, and Mary Orth McNutt, his children by said Mary Ann, and William M. Orth, a son by his former wife. Since the death of the testator, said Mary Ann Orth and William M. Orth have departed this life intestate; Harry ¹⁸⁷ A. Orth is administrator de bonis non, with the will annexed, of the estate of said testator, and is administrator of the estate of said Mary Ann Orth; William M. Orth left surviving as his only heirs the appellants, Eliza Gertrude Orth, his widow, and Lizzie Ray Orth, his daughter, and the appellant Spencer is administrator of said William's estate.

Said appellants instituted this suit, in eight paragraphs of complaint, against the appellees, Mary Orth McNutt and Harry A. Orth personally, and as administrator of said two estates of his father and his mother. Harry A. Orth and Mary Orth McNutt severally demurred to each paragraph of the complaint, stating as causes of demurrer that neither paragraph stated facts sufficient to constitute a cause of action, and that several causes of action were improperly joined. Harry A. Orth, in his capacity as administrator de bonis non, demurred separately to each paragraph of complaint, stating as causes of demurrer a want of sufficient facts, a want of jurisdiction over his person, and a want of jurisdiction of the subject matter of the action. Pending the demurrers, the plaintiffs dismissed their action as to the estate of Mary Ann Orth, and thereupon the court sustained said several demurrers to the several paragraphs of complaint. Upon that ruling arise the only questions for review.

The first paragraph of complaint alleged the execution of the will and of said letter, both of which were exhibited by reference, and alleged that Mary Ann Orth knew the contents of said letter, and promised said Godlove to carry out the requests and intention expressed in said letter; that said Godlove, during his last illness, would have made other provisions in favor of said William, but that Mary Ann, Harry A., and Mary O., conspired to deprive William ¹⁸⁸ of any interest in the estate, and did, by promises and protestations, dissuade said Godlove from making changes in his will, and that they did, during his last sickness, exclude from his room and bedside the friends of William, and persons who might secure a change in said will; that a few days before his death, said Godlove called to his bedside his said wife and his three children, and in the presence of each and all of them had said wife and said children, Harry A. and Mary O., to promise to carry out the wishes expressed in said letter. It is also alleged that parts of the estate were converted by Mary Ann Orth and parts were made over to and converted by said Harry A. and Mary O.; that Mary A., when executrix, and Harry A., as administrator de bonis non, made no inventory and no accounting to the court of the assets of the estate, or any disposition of the same. An accounting and partition are prayed, upon the theory that the letter and the oral promises created a trust in favor of William M. in the property of the estate of his father.

The second paragraph alleges substantially the same facts, but adds that after the death of Godlove S. Orth, his widow, Mary Ann Orth, stated to William M. Orth that she was intending and endeavoring to treat all the children alike, according to the expressed wishes of his father; that pursuant to that expressed intention and her promise, she procured a will to be written, which, to some extent, would carry out such wishes; that said Harry A. and Mary O., further contriving to defraud William of that portion of the estate of his father which, after the death of Mary Ann, would rightfully belong to him or his heirs, by importunities, and by appealing to the maternal feeling of said Mary Ann Orth in an improper manner, before and during her last sickness, postponed from ¹⁸⁹ time to time the execution of such will until Mary Ann Orth died without making provision for said William. By this paragraph damages are sought.

The third paragraph differs from the first in alleging a promise by Mary Ann Orth to William Orth, after the death of Godlove S. Orth, to carry out the wishes expressed in said letter, and frequent requests by William M. that she do so, and that she died,

having neglected to comply with that promise. Damages are claimed by this paragraph.

The fourth paragraph pleads the facts alleged in the second paragraph, but upon the theory of a trust, as in the first paragraph, seeks an accounting and partition.

The fifth paragraph alleges substantially the facts pleaded in the first, second, and third paragraphs, and demands an accounting and partition.

The sixth paragraph differs from the third in alleging that the promise of Mary Ann Orth to William M. to carry out the wishes of his father, as expressed in said letter, was induced by a threat of said William to sue her for the enforcement of his claim, and that by reason of her said promise, and in consideration thereof, he desisted from suing as he had intended. An accounting and partition were prayed.

The seventh paragraph alleged the facts of the sixth, and, instead of an accounting and partition, sought damages.

The eighth paragraph was the same as the sixth, omitting the allegation that William M. Orth withheld suit in consideration of the promise of Mary Ann Orth to provide for him, and that she had died without executing her will. In addition to the facts pleaded in the sixth paragraph, it was alleged that Harry A. and Mary O. wrongfully converted to themselves the property of Godlove S. Orth remaining at ¹⁹⁰ the death of Mary Ann Orth. The demand was for damages.

The complaint covers ninety pages of typewritten legal cap, and the paragraphs differ so slightly that we have deemed it advisable to state them briefly, rather than to set them out at length.

Our statute of wills (Rev. Stats. 1894, sec. 2746), provides that "no will except a nuncupative will shall affect any estate, unless it be in writing, signed by the testator, or by someone in his presence with his consent, and attested and subscribed in his presence by two or more competent witnesses." It would seem unnecessary to remark that this provision is wise in its purpose to require the solemn and almost sacred disposition of property by testament, to exclude unauthentic writings, the possible subjects of forgery, and evidence of parol declarations of devise and bequest, the possible subjects of false testimony. The letter of the testator, if it contained testamentary words, has not the attestation required by the statute to entitle it to recognition as his will, nor does it carry even the force of recognition by any reference from within the lines of the will. It is not acknowledged, as

required in the case of deeds, even if that should be sufficient, and has no other authentic protection from the rule guarding against forged instruments of title. We do not regard the letter as of a testamentary character: See *McCarty v. Waterman*, 84 Ind. 550; *Moore v. Stephens*, 97 Ind. 271. Indeed, we do not understand counsel to insist that by it William M. Orth became a devisee or legatee, but it may, possibly, be considered in determining the intention of the testator in the provisions made by his will: *Copeland v. Summers*, 138 Ind. 219. In so receiving it, however, we should be mindful of the rule that the authentic ¹⁹¹ provisions of the testament itself are recognized by the statute as the most worthy source of information as to the testator's intention, and that where the intention there manifested is without uncertainty or doubt, we should be slow to permit doubt or uncertainty to thrust itself into the will and thwart that clearly expressed and otherwise certain intention.

The only disposition of property, made by the will, was in the following language:

"I do hereby devise and bequeath to my wife, Mary Ann Orth, in fee simple, all and singular, my real estate, of whatsoever nature or description, situate in Tippecanoe, Benton, and White counties, Indiana, all of my real estate in the states of Iowa and Missouri, or wheresoever else situated and of which I may die seised or possessed.

"And I do further give, devise, and bequeath to my wife, Mary Ann Orth, absolutely, all of my personal estate, of whatever nature or description, which may be owned by me at the time of my death. I hereby grant to my said wife full power, either with or without administration on my estate, to collect all my debts and choses in action, and to do whatever may be necessary in the final settlement of my estate, hereby enjoining upon her to pay all just debts and liabilities as soon after my death as may be.

"Should administration on my estate be necessary or desirable, I hereby appoint my said wife executrix of this, my last will and testament, giving her authority to associate one or more persons with her in the execution of this trust.

"I desire all my dear children to know and feel that this disposition of my estate is, in my judgment, the best under all the circumstances surrounding it—knowing that they will find my said wife as much disposed to love and care for them, and to deal justly ¹⁹² by them, as I have always felt and acted toward them myself."

It would be difficult, if not impossible, to conceive or to re-

duce to words a more sweeping and unfettered disposition of property, or a clearer or more certain designation of the object of the bounty. Mary Ann Orth was given, in fee simple, all of the real estate, and was given, absolutely, all of the personal property. Considering the letter as if it followed these unambiguous declarations of intention to vest in the wife the fullest title known to the law, and we will determine its legal and equitable effect. We have already seen that it does not arise to the standard of a testament, and we are now to look at it to ascertain if it bespeaks the testator's intention to have encumbered the devise and bequest with a trust in favor of his children. Almost the first words of the letter, which is addressed to his wife, are: "I give and bequeath to you all my property, real and personal." She is advised of his financial embarrassment, and, in a practical, thoroughly businesslike course, she is advised how to take the best advantage of the embarrassment. In this advice the intention is repeated that her title and holding is unqualified, for he suggests that of her property, not received by devise, she sell that which is unproductive, paying his debts with the proceeds, and "thus relieving the property which, by the will, becomes yours." There is no word of command in the letter, but its tone is entirely advisory. True, there are expressions of hope, of confidence, and of request. The hope is that his indebtedness may not sweep away the estate and leave the wife without support during her life, without means to help his children from time to time, as they may need it, and without something which she may, at the end, give to his children. The ¹⁹⁸ confidence, that she will so help his children from time to time, and finally, "what is left give to all the children alike." The request, that she convey to William's daughter, Lizzie Ray Orth, as a home for William's family, a house and lot belonging to the wife independently of the will.

There is not a syllable expressing the intention to charge the estate devised with an enforceable, legal, or equitable trust in favor of the children. There is that which, from various expressions, denotes a confiding trust in the wife that she will deal fairly, justly, and equitably with his children. That trust raises but a moral obligation, and creates no interest in the property in favor of the children, and does not burden the absolute title given by the will to the wife. In 1 Lewin on Trusts, edition of 1888, page 135, it is said: "Where both objects and property are certain, yet no trust will arise, if the testator expressly declare that the language is not to be deemed imperative, or the con-

struing it a trust would be a contradiction to the terms in which the preceding request is given; or if, all the circumstances considered, it is more probable that the testator meant to communicate a mere discretion; . . . or if a testator give the property to his wife, 'well knowing her sense of justice and love of family, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of the children'; or 'to be used by her in such ways and means as she may consider best for her own benefit and that of my three children'; or 'feeling confident that she will act justly to our children in dividing the same when no longer required by her' or, 'in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease'; or 'to be at her ¹⁹⁴ disposal in any way she may think best for the benefit of herself and family'; or 'to his wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of his family, having full confidence that she will do so.' " We cite in support of the text the following decisions: *Harper v. Phelps*, 21 Conn. 257; *McCreary v. Burns*, 17 S. C. 45; *Colton v. Colton*, 21 Fed. Rep. 594; *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572; *Howard v. Carusi*, 109 U. S. 725; *Hopkins v. Glunt*, 111 Pa. St. 287; *McIntyre v. McIntyre*, 123 Pa. St. 329; 10 Am. St. Rep. 529; *Rose v. Porter*, 141 Mass. 309.

There should be no confusion of the expression of the testator of confidence that his wife, at her death, would provide for the children, with the absolute devises and bequests of the will so as to possibly imply a life estate rather than a fee simple in the wife. No such contention is made by the appellants, but the one inquiry arising from the letter is, Does it point a trust in the property devised, or bespeak the testator's intention to raise a trust in favor of his children? Very clearly, we think, it does not. But, while considering it as if a part of the will, suppose its terms were more obscure and doubtful than we have regarded them, and that they should make the question doubtful as to whether the testator intended to narrow the otherwise free and unfettered devise and bequest. Our duty would then be to disregard the doubt and adhere to the clearly expressed provisions as indicating the intention of the testator. As said in the recent case of *Ross v. Ross*, 135 Ind. 367: "Where an estate in fee is devised in one clause of a will, in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giv-

ing ¹⁹⁶ the estate in fee: *Bailey v. Sanger*, 108 Ind. 264; *O'Boyle v. Thomas*, 116 Ind. 243."

The case of *Fullenwider v. Watson*, 113 Ind. 18, involves the two questions as to considering the effect of words of recommendation, and excluding those merely casting doubt upon provisions otherwise clearly made. There the will gave to the wife, by decisive words, the personal estate, but followed the words of bequest with the following: "To have, use, and enjoy the same as she may choose, and to dispose of the same in such manner as she may desire; yet I request that if, at the time of her decease, any of the personal property shall remain undisposed of, it be given to the children of my son and the children of my daughter." This court said of the bequest: "We are very far within the authorities when we affirm the proposition that where a bequest of personal property, without limitation to life or a particular use, is made, and is accompanied by an absolute power of disposition, the first taker takes the whole interest. It has been for centuries the rule that, where the whole estate is absolutely devised, a repugnant condition must yield: *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425. But here there is no condition, for the words employed are words of recommendation, not words of condition or restriction, and the case is ^{be} in the rule declared by the adjudged cases: *Van Gorder v.* ^{be} 99 Ind. 404, and cases cited; *Stowell v. Hastings*, 59 Vt. 43. ^{be} Am. Rep. 748; *Howard v. Carusi*, 109 U. S. 725; *Knight v. Knight*, 3 Beav. 148; 2 Story's Equity Jurisprudence, sec. 1070."

Considered as a rule for ascertaining the intention of the testator, there is no room to distinguish between bequests of personal property and devises of real estate. The force of the letter, in the creation of a trust, certainly gains no strength by considering it apart from the will, where it must stand, and where, ¹⁹⁶ as we have said, the courts should be slow to accept it in the face of the statutes of wills, of trusts, and of frauds, as impairing the force of solemn testamentary provisions, made in conformity to the statutes. Appellants' learned counsel strenuously insist that they do not set up the letter as creating the trust upon which they rely, but insist that the trust which they would enforce, and for the violation of which they seek damages, is a trust *ex maleficio*, or a constructive trust, arising from the fraudulent conduct of Mrs. Orth subsequent to the execution of the will.

The position of counsel is stated by them in a quotation, supplemented by the authorities they cite, which we take from their

brief: "Where a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise, or undertaking, it is, in effect, a case of trust; and, in such a case, the court will not allow the devisee to set up the statute of frauds—or rather the statute of wills, by which the statute of frauds is now, in this respect, superseded; and for this reason the devisee, by his conduct, has induced the testator to leave him the property; and, as Lord Justice Turner says, in *Russell v. Jackson*, 10 Hare, 198, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute; but for the same end, namely, prevention of fraud, it ingrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent ¹⁹⁷ the party from applying the property to a purpose foreign to that for which he undertook to hold it": *Rockwood v. Rockwood* (1636), 1 Cro. Eliz. 164; *Chamberlaine v. Chamberlaine* (1678), Freem. Ch. 34; *Thynn v. Thynn* (1684), 1 Vern. 295, 296; *Devenish v. Baines* (1689), 1 Ch. Prec. 10; *Tham v. Litchford* (1705), 2 Vern. 506; *Drakeford v. Wilks* (1707), 3 Atk. 539; *Reech v. Kennegal* (1748), 1 Ves. Sr. 122, 123; 1 Amb. 67; 1 Wils. 227; *Barrow v. Greenough* (1796), 3 Ves. Jr. 151, 152; *Byrn v. Godfrey* (1798), 4 Ves. Jr. 6, 10; *Stickland v. Aldridge* (1804), 9 Ves. Jr. 516; *Paine v. Hall* (1812), 18 Ves. Jr. 475; *Chamberlain v. Agar* (1813), 2 Ves. & B. 259; *Podmore v. Gunning* (1836), 7 Sim. 644; *Russell v. Jackson* (1852), 10 Hare, 198, 204, 211; *Wallgrave v. Tebbs* (1855), 2 Kay & J. 313, 321, 322; *Tee v. Ferris* (1856), 2 Kay & J. 357; *Moss v. Cooper* (1861), 1 Johns & H. 352, 366; *Jones v. Badley* (1869), L. R. 3 Eq. 635, 652; *McCormick v. Grogan* (1869), L. R. 4 Eng. & Ir. App. 82; *Springett v. Jennings* (1870), L. R. 10 Eq. 487, 495; *Rowbotham v. Dunnett* (1878), L. R. 8 Ch. Div. 430, 436; *Boyes case* (1884), L. R. 26 Ch. Div. 531, 535; *Owing's case* (1826), 1 Bland, 370; 17 Am. Dec. 311; *Hoge v. Hoge* (1832), 1 Watts, 163, 215, 216; 26 Am. Dec. 52; *Barrell v. Hanrick* (1868), 42 Ala. 60, 73; *Caldwell v. Caldwell* (1870), 7 Bush, 515; *Dowd v. Tucker* (1874), 41 Conn. 197; *O'Hara v. Dudley* (1884), 95 N. Y. 403; 47 Am. Rep. 53; *Gilpatrick v. Glidden* (1888), 81 Me. 137; 10 Am. St. Rep. 245; *Graves v. Graves* (1890), 9 N. Y. Supp. 145; *Ragsdale v. Ragsdale* (1890), 68 Miss. 92; 24 Am. St. Rep. 256; *Larmon v.*

Knight, 140 Ill. 232; 33 Am. St. Rep. 229; Gaither v. Gaither, 3 Md. Ch. 158, 160; Church v. Ruland, 64 Pa. St. 432; Vreeland v. Williams, 32 N. J. Eq. 734; Glass v. Hulbert, 102 Mass. 24, 39, 40; 3 Am. Rep. 418; Browne on the Statute of Frauds, sec. 93; p. 3; ¹⁹⁸ Towles v. Burton, Rich. Eq. Cas. 146; 24 Am. Dec. 409; Jones v. McKee, 3 Pa. St. 496, 497; 45 Am. Dec. 661; McKee v. Jones, 6 Pa. St. 425; Schultz's Appeal, 80 Pa. St. 396; Williams v. Fitch, 18 N. Y. 546; Campbell v. Brown, 129 Mass. 23, 26; Socher's Appeal, 104 Pa. St. 609; Piper v. Hoard, 107 N. Y. 67, 82; 1 Am. St. Rep. 785, 789; Richardson v. Adams, 10 Yerg. 273; Hooker v. Axford, 33 Mich. 453; De Laurencel v. De Boom, 48 Cal. 581, 585; Kennedy v. Kennedy, 2 Ala. 571; Brook v. Chappell, 34 Wis. 405; Thomson v. White, 1 Dallas, 424; 1 Am. Dec. 252; Cox v. Arnsmann, 76 Ind. 210, 212, 213; Browne v. Browne, 1 Har. & J. 430.

If the position so assumed were correct, and if the authorities cited could be held to apply, under the statutory provisions in this state concerning wills, trusts, and frauds, questions upon which we now venture no opinion, it is, nevertheless, true that, upon the allegations of any paragraph of the complaint, the letter is read to define the limits and character of the trust. It is from the letter that the subject of the trust insisted upon is to be taken; it is from the letter that the objects of the trust must be learned; it is from the letter that the time and manner of performance of the trust shall be determined, if at all. No promise of Mrs. Orth to her husband is alleged which did not have reference to his wishes, as expressed in the letter. No promise of Mrs. Orth to William is alleged, which did not have reference to the wishes of his father as expressed in the letter. The alleged promises to William, after the death of his father, however, do not constitute an element in the creation of a trust, if a trust was created, but, from the standpoint of the appellants, may, possibly, be considered in determining whether Mrs. Orth violated the alleged promises to her husband.

The important question, involving the letter, is as ¹⁹⁹ we have said, that it must be accepted as defining the scope of the trust claimed. The oral promises constituting the alleged fraud, the essence of the trust *ex maleficio*, considered apart from the letter would be meaningless, since those promises were but generally to carry out the wishes expressed in the letter. The alleged oral promises, without the letter, do not define the extent of the property to be regarded as the subject of the trust, nor the interest to be held for the several alleged beneficiaries, nor the time when

the trust obligations should be discharged. In a word, there was nothing definite, in the conversation alleged, as to any element of a trust, unless, possibly, it was as to the persons hoped to be benefited. If we are correct in our conclusions that the letter raises no trust, and does not limit or qualify the absolute devise and bequest to Mrs. Orth; if it gives to the appellants no legal or equitable interest in the property, and does not supply the alleged trust, as appellants expressly affirm in their able briefs; and if it must be looked to as defining the trust claimed to arise from the alleged fraud of Mrs. Orth, we find that the same uncertainty and indefiniteness attends the alleged trust *ex maleficio* with the letter as without it. We apprehend that authority should not be required to support the proposition that a trust, whether declared or arising from conduct, which does not, with reasonable certainty, point the essential elements of a trust, is no trust at all.

The rule stated by Lewin on Trusts, page 56, is: "Nor will the trust be executed if the precise nature of the trust cannot be ascertained." We do not understand the appellants to maintain that, as a rule of equity, Mrs. Orth should have been punished, or that her children shall now be punished, to the extent of giving up all of the property devised, because of her fraud or their ²⁰⁰ fraud. Nor is it more reasonable that, because of fraud, if such it be, without being able to ascertain and define the nature and extent of the trust which the testator may have had in mind, a court of equity should affix the punishment, at a sum equal to one-third of the property devised, and confer it upon William's heirs. If we are unable to ascertain the nature and extent of the trust intended, we are powerless to enforce it, and are unauthorized to gauge it to meet the ordinary rules of equality. As already indicated, the letter creates no trust; the parol promises create no trust; and the letter and the promises together, so far from creating a trust, but constitute the promise to perform in the future a duty neither legal nor equitable. Does this breach of duty work such fraud and injustice as to require that equity shall construct a trust in behalf of the heirs of the testator? If it does, equity will be required, contrary to the views of the appellant, and contrary to our view of the effect of the letter, to go to the letter, and from it frame the terms and conditions of the trust, and supplement them with the oral promise creating it, and ingraft both upon the will to its overthrow. But we are not willing to concede that the fraud is such as to raise a trust *ex maleficio*. Such a trust, in its very nature, im-

plies the absence of an intention on the part of the parties to create a trust by their own expression; for it would be but to repeal the statute of trusts (Rev. Stats. 1894, sec. 3391), forbidding the creation by parol of a trust concerning lands, to permit the parties, after declaring a parol trust and violating it, to then plead that violation as the fraud calling for the equitable construction of that particular trust. "Constructive trusts include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, where there is no ²⁰¹ intention of the parties to create a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal declaration of the trust": 2 Pomeroy's Equity Jurisprudence, sec. 1044; Perry on Trusts, sec. 166; Pillow v. Brown, 26 Ark. 240; Hollingshead v. Simms, 51 Cal. 158; McLane v. Johnson, 43 Vt. 48; Thompson v. Thompson, 16 Wis. 94; Collins v. Collins, 6 Lans. 368; Griffith v. Godey, 113 U. S. 89; Lewin on Trusts, 180, note 1; Mescall v. Tully, 91 Ind. 96; Wright v. Moody, 116 Ind. 175.

There are, perhaps, cases where parol trusts, ineffectual under the statute, have been procured by such fraud and deceit as that equity will grant relief for the fraud without regard to the declared trust; but such cases do not proceed upon the idea that equity enforces the trust which is inhibited by the statute; but rather upon the idea that equity constructs a trust. If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property. Possibly, if the testator had, after the execution of his will, manifested a desire to create a specific legal trust in behalf of his children, and Mrs. Orth had, by fraud, dissuaded him, equity would have ridden over the fraud and established a trust of the terms of such legal trust. Here we have no showing that Mrs. Orth procured the will to be written in the present form, nor have we allegations of an intention on the part of the testator, subsequent to the execution of the will, to execute another and different will, including specifically or generally a trust of the character of that here claimed. Nor have we allegations of a desire on his part to execute any valid separate instrument declaring such a trust. It is alleged generally that Mrs. Orth "dissuaded the said Godlove ²⁰² from making changes in his said will in favor of the said William M. Orth, or making other provisions for him, which he would otherwise have done," but it is nowhere alleged that the

testator expressed a desire to and was by fraud dissuaded from making a trust, such as that here sought to be constructed upon equitable rules. While the complaint is probably subject to the objection of appellees' counsel, that it does not allege the acts constituting any fraud claimed to have been exercised, we need not condemn the pleading on that ground; but, giving the pleading the most favorable construction in behalf of the appellants, the fraud of Mrs. Orth consisted in failing to comply with the requests contained in the letter, having promised her husband that she would comply with them. This, we say, is not such fraud as equity would accept as sufficient to require the construction of the trust here insisted upon. In 27 American and English Encyclopedia of Law, page 52, it is said: "There is a sharp conflict among the authorities as to what constitutes such fraud as will justify the admission of parol evidence to establish a trust in favor of the grantor. The earlier English cases were very liberal in admitting such evidence; but the current of modern authority is to the effect that parol evidence is not admissible to show an agreement to hold property in trust where it is conveyed by a deed absolute on its face, unless the instrument was obtained by fraud or was made absolute by mistake. In other words, while the refusal to execute or acknowledge such trust may constitute fraud in a certain sense, it is not such fraud as will render parol evidence admissible to establish the trust. Any other rule would make the statute of frauds practically ineffective. But where there is fraud in obtaining the conveyance, or in the means used to secure its execution in the particular form in which it is drawn, or ²⁰⁸ where, by accident or mistake, it fails to express the real intention of the parties, parol evidence may be admitted for the purpose of affording relief to the injured party." To these propositions, many authorities are cited.

In Jackson v. Myers, 120 Ind. 504, a suit to enforce a parol promise to convey lands, it was said: "Conceding that he was morally bound to execute a conveyance without a demand therefor, his failure so to do would not constitute fraud. To so hold would be to abolish all distinction between fraud and breach of contract." In Fouty v. Fouty, 34 Ind. 433, a suit for like purpose, it was said: "Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and not a mere promise to do something afterward." Richter v. Irwin, 28 Ind. 26, presented a like question, and was decided in the same way. So in Peterson v. Boswell, 137 Ind. 211.

But it is insisted by appellants that there is a distinction be-

tween deeds and wills as to the fraud necessary to construct a trust. It is probably true, upon the English cases, but where a testator has, by his will, made an absolute devise, and, subsequently, has formulated, in writing or by parol, a trust which he desires to ingraft upon such devise, or desires to make a new will expressing such trust, and is, by the fraudulent representations and promises of the devisee, prevented or wrongfully dissuaded from doing so, equity would construct that trust and deny the devisee the fruits of the fraud perpetrated. This may be true as to a will, but could not be true as to a deed, because, in the first, such trust can be ingrafted, and in the last, all control has passed from the grantor. We have already shown that we have here no case parallel to that of the testator just supposed, nor have we any ²⁰⁴ reasons for concluding that the same conduct following the execution of a will should be more effective as a fraud and in raising a trust *ex maleficio* than if it had been exerted to procure the execution of a deed, and is followed, as in the case of the will, with the mere omission or refusal to execute the parol promise. That the parol promise of one to convey to another, in the event of a conveyance to him, will not, upon refusal to comply, take the case out of the statute of trusts, has frequently been decided by this court: *Peterson v. Boswell*, 137 Ind. 211; *Fouty v. Fouty*, 34 Ind. 433; *Montgomery v. Craig*, 128 Ind. 48; *Pearson v. Pearson*, 125 Ind. 341; *Wright v. Moody*, 116 Ind. 175; *Mescall v. Tully*, 91 Ind. 96; *Rooker v. Rooker*, 75 Ind. 571; *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 420.

In *Sands v. Thompson*, 43 Ind. 18, 28, this court quotes with approval the following extract from *Browne on the Statute of Frauds*, section 439: "The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, but which, by reason of the statute, the party is not bound to perform for want of its being in writing. This was early laid down by Lord Macclesfield, chancellor, in a case arising upon a promise of a defendant, about to marry, that his wife should enjoy all her own estate, to her separate use after the marriage, which promise, as one made 'upon consideration of marriage,' could not regularly be enforced. His lordship declared that, 'in cases of fraud, equity should relieve, even against the words of the statute, as if an agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this, or such like cases of fraud, equity would relieve; but where there was no fraud, only relying upon the honor, word,

or promise of the defendant, ²⁰⁵ the statute making those promises void, equity would not interfere': Irwin v. Hubbard, 49 Ind. 350, 355; 19 Am. Rep. 679; Hayes v. Burkam, 51 Ind. 130; Mescall v. Tully, 91 Ind. 96; Wallace v. Long, 105 Ind. 522; 55 Am. Rep. 222; Green v. Groves, 109 Ind. 519; Pearson v. Pearson, 125 Ind. 341; Stonehill v. Swartz, 129 Ind. 310.

Upon the assumption that the letter, with the parol promise to comply with the wishes therein expressed, constitutes a contract to provide for William M. Orth, by the will of Mrs. Orth, the case of Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, is pertinent, not only upon the question of fraud, but also upon the question of the recovery of damages by his heirs for a violation of any such contract. In that case, a child had gone into the family of Fette to live with and as a member of such family, upon the parol promise of Fette that if she would so live with his family during the lives of himself and his wife, "they would treat and deal with and toward her as their child; they would make her their heir, and, at their death, or at the death of the survivor of the two, they would will, bequeath, and give her the entire estate of which they were possessed." She remained in the family, complying with her part of the contract until Fette and wife had both died, they having made no provision, by will or otherwise, for the child. This court, speaking by Mitchell, J., said: "The evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff's ward by will may be conceded, but as the agreement to do so was never manifested in writing, signed by her, and as it involved an agreement for the sale of real estate, and for the transfer of personal property exceeding in value fifty dollars, such agreement was subject to the operation of the statute of frauds, equally with all other agreements for like sales. Because ²⁰⁶ the agreement was not withdrawn from the operation of the statute by part performance, it cannot be specifically enforced, neither can it be the foundation of an action for damages."

So, with relation to the obligation supposed to exist from the letter and parol promise to assist William from time to time, and to convey to William's daughter the house and lot in which he lived with his family. However, as to these elements of the alleged promises, there is no charge of violation by Mrs. Orth, and should be considered neither as supplying an element in the alleged fraud, nor of the claim for damages.

Another line of decisions in this state is probably violated by the claim of the appellants, and that is that equity will not en-

force, in behalf of a mere volunteer, an executory parol trust: *Noe v. Roll*, 134 Ind. 115; *Peterson v. Boswell*, 137 Ind. 211; *Stonehill v. Swartz*, 129 Ind. 310; *Pearson v. Pearson*, 125 Ind. 341; *Wright v. Moody*, 116 Ind. 175; *Gaylord v. Lafayette*, 115 Ind. 423; *Mescall v. Tully*, 91 Ind. 96; *Dunn v. Dunn*, 82 Ind. 42; *Fouty v. Fouty*, 34 Ind. 433; *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 420. If many of these cases were correctly decided, the case falls within the rule suggested.

However, we do not rest our decision upon this suggestion, but adhere to the rules which directly affect the principal questions in the case.

The judgment of the circuit court is affirmed.

OPINION ON PETITION FOR REHEARING.

HACKNEY, J. One contention on behalf of the appellants is, that at common law a parol trust in personal property was permitted, and that, as our statute of trusts relates to real estate alone, they have maintained their claim to a trust in the personal estate of the testator, alleged to have been of the value of ~~207~~ one hundred thousand dollars. It may be conceded that, at common law, a trust in personal property may be created by parol: *Bispham's Equity*, sec. 63; 1 *Perry on Trusts*, sec. 86; *Lewin on Trusts*, sec. 53; *Hill on Trustees*, sec. 57. Our statute of trusts and powers probably does not deny the common-law rule in this respect.

But in this case, the controversy is as to whether the testator, who made a plain and unequivocal devise of his personal estate to his wife, did, in any manner, not forbidden by law, revoke that devise and create a new disposition of said estate. Revocation cannot be made except by intentionally destroying the will, or by the execution of a writing, subscribed and attested in manner as required in the execution of wills: Rev. Stats. 1894, sec. 2729. Certainly a partial revocation or an amendment, by way of codicil, falls within this statutory rule. The rule with relation to precatory trusts, fortified by the authorities cited in the original opinion, recognizes no distinction between real and personal property. The rule which denies force to language relied upon to cut down an unequivocal disposition of property, unless it clearly and unmistakably discloses the testator's intention to do so, admits of no distinction between devises and bequests. The rule which forbids evidence in parol to contradict instruments of writing knows no difference between writings as to real and those as to personal property. To our minds it seems clear that no question arises in this case as to the power to create a trust in

personal property by parol. The question is as to a method of destroying the force of a valid testamentary disposition of such property.

If no will existed, it is doubtful if the letter and the promise of Mrs. Orth, as to the personal property, would avoid the statute of frauds and perjuries: Rev. Stats. ²⁰⁸ 1894, sec. 6635; Wallace v. Long, 105 Ind. 522; 55 Am. Rep. 222. But of this we need not decide.

It is further contended that the rule that one occupying a fiduciary relation to another and obtaining an advantage by reason of that relation is presumed to have obtained that advantage fraudulently applies in this case. We are not prepared to sanction the doctrine that a devise to the wife by her husband is presumptively fraudulent, and that therefore equity will charge the property with a trust in favor of those who may stand in the relation of heirs. The rule stated by the learned counsel for appellants exists, but it has never been applied, so far as our observation and researches have disclosed, to the case of a testamentary provision by a husband for his wife, in the absence of fraud, undue influence, or some positive advantage taken to induce the husband, against his free will, to make such provision. That a man shall make liberal provision for his wife is not unnatural, but is a duty. That Godlove S. Orth should have given his whole property, in his financially embarrassed condition, to his wife, in the hope that, by prudence and careful management, and the disposition of her separate property, she might save from the wreck something, first of all, for her maintenance, was not unnatural nor suggestive of undue influence or overreaching: See *Montgomery v. Craig*, 128 Ind. 48.

The questions to which we have referred were not argued upon the original hearing, nor was the further contention that the trust sought to be enforced was such as the statute of trusts and powers excepted from its operation as a constructive or implied trust. The latter contention we regard as in conflict with the position originally assumed, as disclosed by our former opinion. We do not, therefore, consider that contention.

²⁰⁹ Having again considered the questions originally passed upon, and finding no sufficient reason to reverse the conclusion then reached, the petition for a rehearing is overruled.

WILLS—WHAT INSTRUMENTS ARE TO BE DEEMED.—LETTERS: In *Magoohan's Appeal*, 117 Pa. St. 238, 2 Am. St. Rep. 680, a letter offered for probate as a part of the will of the testatrix was refused probate because it was not attested, as required by statute, nor referred to in the original will. It was not allowed to affect the

distribution of the estate in any way. For instances where letters have been given effect as wills, see *Scott's Estate*, 147 Pa. St. 89; 30 Am. St. Rep. 713, and cases cited in the extended note to *Burlington University v. Barrett*, 92 Am. Dec. 385. A letter written by a testator to his attorney, saying, "What I want is for you to change my will so that she may be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I do not know what ought to be done, but you do," discloses an animus testandi, and should be admitted to probate with the will to which it refers, for it, with such will, must be regarded as an instrument, constituting the last will of the testator: *Barney v. Hayes*, 11 Mont. 571; 28 Am. St. Rep. 495, and note.

WILLS—WHAT WILL CREATE A PRECATORY TRUST.—In determining whether a precatory trust is raised by a will, the essential point is, whether, looking at the whole contents of the instrument, it should be inferred that the testator intended to impose an obligation on his devisees or legatees to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to them to carry out such wishes or not at their discretion: *Murphy v. Carlin*, 113 Mo. 112; 35 Am. St. Rep. 699; *Boyle v. Boyle*, 152 Pa. St. 108; 34 Am. St. Rep. 629, and note; *McIntyre v. McIntyre*, 123 Pa. St. 329; 10 Am. St. Rep. 529, and note.

WILLS—PRESUMPTION OF FRAUD AND UNDUE INFLUENCE WHEN TESTATOR AND BENEFICIARY SUSTAIN FIDUCIARY RELATIONS WITH EACH OTHER—HUSBAND AND WIFE.—There is no legal presumption against the validity of any provision which a husband may make in his wife's favor, for she may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent: Extended note to *Richmond's Appeal*, 21 Am. St. Rep. 98. See, also, the extended note to *In re Hess' Will*, 31 Am. St. Rep. 676.

WILLS—REVOCATION—COMPLIANCE WITH STATUTE.—The revocation of a will cannot be accomplished except by the performance of some one of the acts designated by the statute: *Graham v. Burch*, 47 Minn. 171; 28 Am. St. Rep. 339, and extended note on "The Revocation of Wills."

TRUSTS—PAROL OF PERSONALTY AND OF REALTY.—A trust may be created by parol if it has to do only with personalty: *Kimball v. Morton*, 5 N. J. Eq. 26; 43 Am. Dec. 621; *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52, and note. But a trust in land cannot be raised by parol owing to the statute of frauds: *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471, and note; *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 420, and note.

TRUSTS—EX MALEFICIO—WHEN THEY ARISE.—A trust ex maleficio arises whenever a person acquires the legal title to property by means of an intentional, false, or fraudulent verbal promise to hold it for a certain specific purpose, as, for example, to convey it to another, or reconvey it to the grantor, and, having thus obtained the title, retains and claims the property as his own: *Rollins v. Mitchell*, 52 Minn. 41; 38 Am. St. Rep. 519, and note; *Larmon v. Knight*, 140 Ill. 232; 33 Am. St. Rep. 229; *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789, and note.

DAUGHERTY v. HERZOG.

[145 INDIANA, 255.]

NEGLIGENCE—DUTY TO INJURED PARTY.—An action for negligence does not lie unless the defendant was under some duty, not performed, to the party injured at the time and place where the injury was inflicted.

NEGLIGENCE—REMOTE CAUSE—LIABILITY OF CONTRACTOR.—A contractor who is guilty of negligence in reconstructing a building is not liable to a third party to whom he owes no duty, and who is killed by the falling of the building two years after its reconstruction and acceptance by the owner. Although the building falls by reason of negligent reconstruction, there is no casual connection between the injury and the negligence.

W. R. Wood, G. P. Haywood, and C. E. Lake, for the appellant.

R. P. Davidson, for the appellee.

255 **MONKS, C. J.** While passing along a sidewalk, on Main street, in the city of Lafayette, appellant's daughter was killed by the falling of the front wall of a building, which stood upon the street line adjacent to the sidewalk. This action was brought by appellant against appellee to recover damages for loss of services occasioned by her death. Appellee's demurrer was sustained to each paragraph of complaint, and, appellant refusing to plead further, judgment was rendered for appellee.

The facts alleged essential to the decision of the question presented are as follows: One O'Ferrall for many years had been the owner of the three-story brick building, on the north line of Main street, which caused the accident, consisting of two ground-floor business rooms, one of which was occupied by one Lohman as a drug-store. The other room becoming vacant, Lohman desired it also, and wished the two rooms thrown into one, by the removal of the partition brick wall. To this O'Ferrall consented **256** and thereupon O'Ferrall, or Lohman, or both, employed the defendant, Herzog, this appellee, who was a builder and contractor, by an independent contract, to remove the wall and remodel the building to Lohman's wishes. This work he completed and turned the building over to Lohman, who reoccupied it as a drug-store from 1890 until 1892, when the disaster occurred which took the life of the appellant's daughter. It is alleged that the appellee did his work unskillfully and defectively, put in iron posts not sufficiently secured upon the under wall, and did not sufficiently fasten and tie together the iron or steel beams resting on the tops of these posts, and in some other respects neg-

ligently did his work; and that because of this negligent and imperfect reconstruction of the building it fell.

The only error assigned calls in question the action of the trial court in sustaining the demurrer to the complaint. The rule is, that an action for negligence will not lie unless the defendant was under some duty to the injured party at the time and place where the injury occurred which he has omitted to perform: *Evansville etc. Ry. Co. v. Griffin*, 100 Ind. 221, 222; 50 Am. Rep. 783; *Indianapolis v. Emmelman*, 108 Ind. 530, 532; 58 Am. Rep. 65; *Faris v. Hoberg*, 134 Ind. 269, 274; 39 Am. St. Rep. 261; *Louisville etc. R. R. Co. v. Treadway*, 142 Ind. 475, 485. See extended note in *Presbyterian Church v. Smith*, 26 L. R. Ann. 504.

If appellee failed to repair the building in conformity with his contract, he was liable to respond in damages therefor to the other contracting party. But is he also liable to appellant for the injury to his daughter, sustained on account of the defective construction alleged, when neither appellant nor his daughter were parties to the contract?

²⁵⁷ Appellee was not liable under the contract, for the reason that such liability could only exist between the contracting parties. If liable at all, it can only be for the violation of some duty: *Faris v. Hoberg*, 134 Ind. 269; 39 Am. St. Rep. 261; *Evansville etc. Ry. Co. v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783; 1 *Shearman and Redfield on Negligence*, 4th ed., sec. 8.

The only person to whom appellee owed any particular duty was the one with whom he contracted: *State v. Harris*, 89 Ind. 363, 365, 366; 46 Am. Rep. 169.

Appellee was not in possession of the building, the repairs had been completed and accepted long before appellant's daughter was injured. The rule in this class of cases is thus stated in *Wharton on Negligence*, second edition, section 438: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. . . . Thus a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable to the city for his negligence, but he is not liable in an action on the case for damages. The reason sometimes given to sustain such conclusion is, that otherwise there would be no end to suits. But a better ground is, that

there is no causal connection, as we have seen, between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent ²⁵⁵ responsible agent, breaking the causal connection."

In *Winterbottom v. Wright*, 10 Mees. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with the postmaster general, and that because of its defective construction plaintiff sustained an injury; and the court denied recovery upon the ground that the coachmaker owed plaintiff no duty. Lord Abinger, in the course of his opinion, said: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." To the same effect was the statement of Justice Clifford, in *Savings Bank v. Ward*, 100 U. S. 195, that: "There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect."

In *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, it was held that the manufacturer and builder of a steam boiler is only liable to the purchaser for defective materials or for any want of care or skill in its construction; and if, after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction to the injury of a third person, the latter has no cause of action, on account of such injury, against the manufacturer.

In *Dale v. Grant*, 34 N. J. L. 142, it was held that an action would not lie in favor of a customer against a wrongdoer who stopped the machinery of a manufactory and prevented the proprietor from performing a contract, and thereby caused loss to the plaintiff to whom the manufacturer had agreed to furnish goods. The court said: "But the law does ²⁵⁹ not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*." The cases of *Winterbottom v. Wright*, 10 Mees. & W. 109, *Dale*

v. Grant, 34 N. J. L. 142, and Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638, were cited with approval by this court in Hoosier Stone Co. v. Louisville etc. Ry. Co., 131 Ind. 575, and State v. Harris, 89 Ind. 363, 46 Am. Rep. 169.

It was held in Curtin v. Somerset, 140 Pa. St. 70, 23 Am. St. Rep. 220, that a contractor for the erection of a hotel building, who uses improper material in its construction, and in other respects departs from the specifications embodied in his contract, so that when the building is completed it is structurally weak and unsafe, by which an accident occurs after it is accepted and possession taken, is liable to the owner therefor, but not to a guest of the hotel, for an injury caused to him by such defective construction. The court said: "In Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, the court held a dealer in drugs and medicine, who carelessly labels a deadly poison as a harmless medicine, and sells it so labeled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labeled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the ²⁶⁰ public, as before stated; his duty was to his employer. . . . If the contractor who erects a house, who builds a bridge, or performs any other work, a manufacturer who constructs a boiler, a piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned."

In Necker v. Harvey, 49 Mich. 517, the defendant manufactured and put up in the factory of a soap company an elevator, under a contract that it would lift at least two thousand pounds. The elevator fell, by reason of a defective shaft, in three days after it had been put in place, and injured a workman in the employ of the soap company. The court, by Cooley, J., said: "The statement of facts so far makes out no cause of action in favor of this plaintiff. It discloses a duty on the part of the defendant to construct an elevator which would lift two thousand pounds; but the duty was to the soap company, and not to anybody else. Nothing is better settled than that an action will not lie in favor of any third party upon a breach of this duty."

There is a class of cases, however, where the law imposes a duty to third persons, independent of the contract, as in sales of dangerous goods, poisonous drugs, or explosive oils: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Walton v. Booth*, 34 La. Ann. 913; *Callahan v. Warne*, 40 Mo. 131; *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298; *Wellington v. Downer etc. Oil Co.*, 104 Mass. 64; 2 Jaggard on Torts, sec. 261.

In this class of cases, the vendor owes a duty to the ²⁶¹ public, for the reason that the articles sold were necessarily and inherently dangerous to human life, and did not in any manner disclose their dangerous character. The cases cited by appellant fall within this class, and are, therefore, not in point.

It is clear, we think, from the authorities, that a contractor, in a case like the one in hand, is not liable for mere negligence to a third party, to whom he owed no duty. The conclusion we have reached is also fully sustained by *Heizer v. Kingaland etc. Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, and cases cited in 2 Jaggard on Torts, 908, note 424.

Judgment affirmed.

NEGLIGENCE—WHO MAY SUE FOR.—For an injury, however gross, there can be no recovery unless there exists, between the person inflicting the injury and the one injured, some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter: *Buckley v. Gray*, 110 Cal. 339; 52 Am. St. Rep. 88, and note. See, also, the extended notes to *Peabody Building etc. Assn. v. Houseman*, 33 Am. Rep. 760-766, and *Devlin v. Smith*, 42 Am. Rep. 815.

NEGLIGENCE—CONTRACTOR'S LIABILITY TO THIRD PERSONS.—A contractor who, in building a house, departs from the specifications embodied in his contract is liable to the owner for an inherent weakness in the building, by which an accident occurs after it is accepted and possession taken; but he is not liable for an injury to a third person between whom and himself no contract relation exists: *Curtin v. Somerset*, 140 Pa. St. 70; 23 Am. St. Rep. 220, and note. See, also, extended note to *Peabody Building etc. Assn. v. Houseman*, 33 Am. Rep. 760-766, and *Lancaster v. Connecticut etc. Ins. Co.*, 92 Mo. 460; 1 Am. St. Rep. 789.

STATE v. UNION NATIONAL BANK.

[145 INDIANA, 537.]

RECEIVERS—APPELLATE PRACTICE.—If, after a receiver is appointed, a judgment creditor appears by attorney and is permitted to and does intervene and move to set aside the order appointing the receiver and to dismiss the proceedings, and his motion is denied and motion for a new trial filed and overruled, he has a right to appeal.

RECEIVERS—JURISDICTION TO APPOINT.—If, in a proceeding for the appointment of a receiver, the defendant does not appear in person, is not served with summons, or given notice by publication, an answer filed by the attorney for plaintiff and signed by a nonresident attorney not admitted to practice in the court in which the action is pending, purporting to appear for the defendant therein, is not a legal appearance conferring jurisdiction and proceedings based thereon are void.

RECEIVERS—RIGHT TO APPOINT.—Generally, a receiver can be appointed only in cases already pending between the parties.

RECEIVERS—RIGHT TO APPOINT.—A receiver cannot be appointed for the property of an individual at the instance of a creditor when no action is pending, and the appointment of such receiver is the only relief sought.

RECEIVERS — APPOINTMENT — JURISDICTION.—To authorize the appointment of a receiver, the petitioner must show either a clear legal right in himself to the property in controversy, or that he has some lien upon, or property right in it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand. It is essential to authorize the exercise of such jurisdiction for the complainant to show that he has a present existing interest in the property.

RECEIVERS—APPOINTMENT—JURISDICTION.—A person whose only lien upon the property of another is that he holds a chattel mortgage thereon has no right to have a receiver appointed for such property without a suit to foreclose such mortgage.

W. A. Ketcham, attorney general, C. A. Korbly, and W. H. Watson, for the appellant.

Ryan & Thompson, for the appellees.

⁵³⁸ **HOWARD, J.** In May, 1896, and for a long time previous thereto, the appellee, Alexander G. Patton, was a resident of Columbus, in the state of Ohio, and was engaged in the business of manufacturing, under the name and style of the Alexander G. Patton Manufacturing Company. He had one factory at Columbus, Ohio, one at Muncie, Indiana, and one within the Indiana Prison South, at Jeffersonville.

Prior to Saturday, May 16, 1896, the state of Indiana had a suit pending in the Floyd circuit court against said appellee, and on said day there was a finding by said court in favor of the state in the sum of \$28,242.62. Judgment was entered on this finding on May 19th, and execution thereon issued on May 20th,

which execution came into the hands of the sheriff of Delaware county on May 21, 1896.

On Sunday, May 17, 1896, the appellee, Patton, at Columbus, Ohio, learned of the finding against him in the Floyd circuit court, and also that judgment had not as yet been rendered upon the finding. Early Monday morning chattel mortgages on the property at Muncie and Jeffersonville were prepared and executed by Patton. Those upon the Muncie property ⁵³⁹ were at once sent on to that city by Wilden E. Joseph and L. L. Rankin, book-keeper and attorney respectively for Patton, while Patton himself went to Jeffersonville.

The Union National Bank of Muncie, one of the appellees, held four promissory notes against Patton, and it was to secure this indebtedness that one of the chattel mortgages was intended. On the advice of counsel, renewal notes were made out for three of the old notes and the time extended. The remaining note was already sufficiently secured, and the bank preferred not to include that in the new notes to be secured by the mortgage. The bank had not expected to receive any mortgage as security for its indebtedness, but, after learning the situation, accepted the mortgage and then believed its debt secure.

Afterward, the cashier of the bank was called up and informed that it was thought better that a receiver should be appointed for the Patton property, and that the bank should make the application. Thereupon Ryan & Thompson, attorneys, who acted in relation to the matter of the renewal notes and chattel mortgage, were directed by the bank to go ahead and procure the appointment of a receiver for Alexander G. Patton.

The complaint for a receivership was then, on said eighteenth day of May, 1896, prepared and filed by said attorneys, the material parts of said complaint being as follows:

"UNION NATIONAL BANK OF MUNCIE	}	
v.		
ALEXANDER G. PATTON.		
"State of Indiana,	}	ss.
County of Delaware.		

"The plaintiff complains of the defendant, doing ⁵⁴⁰ business under the name and style of Alexander G. Patton Manufacturing Company, and says: said defendant, on the 18th day of May, 1896, by the name of Alexander G. Patton, executed and delivered to said plaintiff his certain chattel mortgage on the following personal property, situate and located in Dela-

ware county, Indiana, to wit [describing the property], to secure the payment of three notes of the date of May 18, 1896, executed by said defendant by the name of Alexander G. Patton, and payable to the order of the Union National Bank of Muncie, Indiana, plaintiff; one of which said notes is for the sum of \$214.00, due June 17, 1896, with eight per cent interest from date; one for \$1,410.48, due July 17, 1896, with interest at 8 per cent from maturity; and one for \$1,513.00, due October 18, 1896, with 8 per cent interest after maturity; all providing for the payment of attorneys' fees, and payable without any relief from valuation and appraisement laws, a copy of which is filed herewith, marked "B," and made a part hereof. And which said notes are renewals and similar notes for similar and the same amounts.

"Plaintiff avers that said indebtedness is for loans of money from said plaintiff, borrowed for and used in the operation of the business of said company.

"The plaintiff avers that, in the taking of said mortgage security aforesaid, plaintiff learned that there already existed a mortgage in full, which by its terms covered some parts and portions of the above mortgaged property, and that the property herein described as covered by the mortgage is inadequate to and wholly insufficient to secure the payment of said plaintiff's debts.

"That on this day, for the first time, plaintiff has learned said defendant is in imminent danger of insolvency; and plaintiff believes, from information secured ⁵⁴¹ by it this day, said defendant is insolvent and unable to pay his indebtedness.

"The plaintiff is informed that the defendant is indebted, in the sum of fifty or sixty thousand dollars, to a large number of creditors in various amounts, and is on the verge of being sued in numerous cases for parts of said sum, and writs will be levied, and much of said property will be wasted and dissipated.

"And plaintiff avers that it has just learned that the state of Indiana has recovered a judgment of some \$28,000.00 in the Floyd circuit court against said defendant, and an execution may be expected to come into the hands of the sheriff of Delaware county whereby all the property of said defendant, not already covered by liens, will be taken, and other creditors will be deprived of any funds from which any parts of their debts can be collected.

"That plaintiff is informed that said defendant has other personal property than such as is included in said mortgage, which

plaintiff could secure by the aid of the power of this court by the appointment of a receiver herein. The plaintiff is informed that a receiver either has been or will be appointed in the state of Ohio in suits pending against said defendant, to take possession of such property of defendant as may be found in said state. And the plaintiff avers that if the property covered by said mortgage should be taken by said execution from the said Floyd circuit court, it will result in great damage and detriment to the security of plaintiff's claim, and is in danger of being removed and materially injured.

"Wherefore plaintiff prays the court for the appointment of a receiver or receivers to take charge of the property of defendant and of the property covered by and included in said mortgage, to hold and protect the said mortgaged property for plaintiff, and to ⁵⁴² sell and otherwise dispose of all the property of the defendant for the benefit of his, said defendant's, creditors and this plaintiff, and to do and perform all the duties incident to such receivership.

"RYAN & THOMPSON,

"Attorneys for Plaintiff."

"Wilden E. Joseph, being first duly sworn, upon his oath says that he makes this affidavit for and in behalf of the plaintiff, and upon his said oath he further says that the matters and things in the above and foregoing complaint are true and correct.

"WILDEN E. JOSEPH."

"Subscribed and sworn to before me this 18th day of May, 1896.

JOHN E. REED,

"Clerk."

Ryan & Thompson prepared an answer to this complaint, which was signed by the said L. L. Rankin, and is as follows:

"UNION NATIONAL BANK OF MUNCIE, IND.)

v.

ALEXANDER G. PATTON.)

"State of Indiana,)
County of Delaware.) ss.

"Comes Alexander G. Patton, defendant in the above-entitled cause, and admits and confesses that the facts set forth in the complaint in this cause are true, and further says not.

"ALEXANDER G. PATTON,

"By RANKIN & RECTOR,

"His Attorneys."

Mr. Ryan, of the firm of Ryan & Thompson, filed this answer with the complaint in the Delaware circuit court; and thereupon, on said eighteenth day of May, 1896, the court "orders that a receiver be appointed as prayed for, and that John C. Johnson and Wilden E. Joseph be and they are hereby appointed as such receivers, to take charge and possession of all the ⁵⁴³ books, papers, property, and assets of every kind and description owned and possessed by the defendant, and apply the same, under the order and direction of the court, to the payment and liquidation of the debts of the defendant.

"And it is further ordered that said receivers be authorized and directed to, in their own name as such receivers, sue for and recover any and all claims and demands in law or in equity due the defendant, and take into their possession such real estate and personal property of said defendant as shall be in the state of Indiana, and title and right of possession thereto is vested in such receivers hereby, and such receivers to bring and maintain all suits necessary in relation to said trust.

"It is further ordered that John C. Johnson and Wilden E. Joseph execute their undertakings to John E. Reed, the clerk of this court, for the faithful performance of their duties as such receivers, each in the sum of \$65,000, and now said John C. Johnson tenders his said undertaking to the clerk of this court, with Abbott L. Johnson as surety thereon, which is approved by the court and said undertaking accepted and approved in open court, and in these words (H. I.); and now comes Wilden E. Joseph and tenders his said undertaking to the clerk of this court, with Edward Alcott, the Union National Bank of Muncie, Edward Alcott, cashier, and William Abbott as sureties thereon, which is approved by the court, and said undertaking accepted and approved in open court, and in these words (H. I.); and now comes John C. Johnson and Wilden E. Joseph, and each file their oath of office herein, which is in these words (H. I.). And day is given."

It was afterward conceded that Wilden E. Joseph was an interested person, and his appointment unauthorized, ⁵⁴⁴ by the provisions of section 1237 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1223), and he was accordingly removed; but the receivership itself, and John C. Johnson as receiver, were continued.

On May 23, 1896, the state of Indiana, having recovered the judgment referred to in the complaint for the receivership, appeared by the attorney general in the Delaware circuit court, and

asked leave to be permitted to intervene and move to set aside the order to appoint a receiver, and to dismiss the proceedings; which leave was granted on proper showing made, and thereupon the state filed its intervening petition to set aside the order appointing the receiver, and to dismiss the proceedings.

On June 2, 1896, the evidence was heard, and the motion of the state was taken under advisement; and on June 8, 1896, the motion and petition to set aside the receivership, cancel the order of appointment, and dismiss the proceedings, was denied. A motion for a new trial was also filed and overruled.

It is provided in section 1245 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1231), that in all cases in which a receiver is appointed or refused, the party aggrieved may, within ten days thereafter, appeal from the decision of the court to the supreme court, without awaiting the final determination of the case. We think the appeal of the state was taken in substantial compliance with the provisions of this statute. On being permitted to intervene, the state first sought relief in the court below by asking for the setting aside of the order of appointment; and then excepted to the adverse ruling of the court on its motion. This was the first legal opportunity the state had to object and except to the action of the court, and to deny the right to appeal from that ruling of the court would be, in effect, to deny any appeal. The appeal is, practically, from the ⁵⁴⁵ action of the court in the appointment of a receiver: See *Wabash R. R. Co. v. Dykeman*, 133 Ind. 56, 63. See, also, *Voorhees v. Indianapolis Car. etc. Co.*, 140 Ind. 220.

The first objection made to the validity of the appointment of the receiver is, that the court had no jurisdiction of the person of the defendant, Alexander G. Patton, for the reasons: (a) That no summons had been issued or publication made against said defendant; (b) That there was no appearance in person by him; and (c) That the attempted appearance for him by a non-resident attorney, not admitted to practice in the court below, could not constitute a legal appearance, so as to confer jurisdiction: Rev. Stats. 1894, sec. 1244 (Rev. Stats. 1881, sec. 1230).

It is provided in section 976 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 964), that "any court may permit an attorney who is not a resident of this state to practice law therein, during any term of such court, upon his taking an oath for the faithful discharge of his duties."

It appears that at the time the answer was filed in the receivership case, Mr. L. L. Rankin, who signed to said answer the

name of "Alexander G. Patton, by Rankin & Rector, his attorneys," had not been admitted to practice in the Delaware circuit court. We do not find it necessary, however, to consider the question so raised; for a more serious objection is, that whether Mr. Rankin had or had not a right to appear for Mr. Patton, it is not shown that he did in fact appear for him. The evidence, without objection or exception, discloses that while Mr. Rankin signed the name of the defendant to the answer, yet that the answer was written by Mr. Ryan, one of the attorneys for the plaintiff, and, further, that the answer was filed in court by Mr. Ryan.

⁵⁴⁶ In *Pressley v. Harrison*, 102 Ind. 14, which was a case in which Alfred Harrison brought suit against his partner, John C. S. Harrison, it appeared, as in this case, that no process was issued upon the complaint, and that the defendant did not appear, either in person, or by attorney, but that Alfred Harrison filed with his complaint a paper purporting to have been signed by John C. S. Harrison and to be an answer to the complaint. This court held that no appearance by the defendant was thus shown. "It is impossible," said Judge Mitchell, speaking for the court in that case, "to hold that signing and delivering to the plaintiff in the case the several papers above set out, and the presentation of them by him to the judge, constituted an appearance by the defendant, either to the action or to the proceedings before the judge. . . . One party to an adversary proceeding cannot do anything, nor can he be authorized to do anything by the other, which can give the court or judge jurisdiction over him except as the statute has enacted. As the statute does not authorize, and public policy forbids, one party to appear for the other, it must be held that where it appears, as here, that the only jurisdiction which the court or judge had over the defendant was such as was acquired through the agency of the plaintiff in appearing for him, its proceeding was without jurisdiction and void."

The case at bar is much weaker than the case of *Pressley v. Harrison*, 102 Ind. 14. Here the paper purporting to be an answer was not signed by the defendant himself, but by a stranger to the court, who professed to be an attorney of the defendant, and resident in the state of Ohio. And not only was there no appearance in court by the defendant in person, but even the individual who assumed to act for him did not appear.

In the former case, the only appearance for the defendant

⁵⁴⁷ was by the plaintiff; in this case the only appearance for the defendant was by the attorney for the plaintiff.

In *Pressley v. Lamb*, 105 Ind. 171, it was held that an appearance by defendant in person and the signing and filing of an answer by him would be such an appearance as would give the court or judge jurisdiction for the appointment of a receiver. In the case before us, it is not claimed that there was any personal appearance by the defendant; neither was there such appearance by anyone for him, other than the plaintiff's attorney.

It is also contended that the court had no jurisdiction of the subject matter of the receivership, for the reason that there was no cause pending between the parties, and the complaint was for the appointment of a receiver for the property of an individual and not of a corporation.

It was said in *Buikin v. Boyce*, 104 Ind. 53: "Whether a complaint may in any case be maintained when no other facts are stated upon which relief is asked, we need not decide in this case. Without doubt, the appointment of a receiver may be part of the relief asked in a complaint, in actions of the class in which receivers may be appointed: *Newell v. Schnull*, 73 Ind. 241. It may, however, admit of much question whether this can be the sole purpose of an action. In the case of *Hottenstein v. Conrad*, 9 Kan. 435, it was said: 'The appointment of a receiver is a provisional remedy. It is an auxiliary proceeding. It is not the ultimate end or object of a suit.' In *Chicago etc. Co. v. United States Petroleum Co.*, 57 Pa. St. 83, Agnew, J., said: 'The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of a sound discretion': *Pressley v. Harrison*, 102 Ind. 14; *High on Receivers*, sec. 6."

⁵⁴⁸ In *Beach on Receivers*, section 51, it is said: "That courts have no inherent power to appoint receivers except as an incident to a pending action, save in cases of idiots, lunatics, and infants."

So, also, in *High on Receivers*, section 17: "Ordinarily, unless perhaps in the case of infants or lunatics, a suit must be actually pending to justify a court of equity in appointing a receiver."

And in section 83, of the work last cited, it is said: "The usual practice, both in England and America, is to appoint receivers only upon bills filed for that purpose, and, as a general rule, the courts will not grant the relief merely upon petition, when no cause is actually pending and no bill filed to give the

court jurisdiction, unless in very special cases of emergency": See, also, 20 Am. & Eng. Ency. of Law, 17, 24, 30, 87.

In the case before us, there was no action pending between the parties. The debt of the defendant to the plaintiff was not yet due; and no proceeding whatever had been instituted for its collection. Unless, therefore, our statute gives some authority specially applicable to this case, the court could have no jurisdiction to appoint a receiver for the defendant's property.

Receivers are appointed under provisions of section 1236 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1222), in certain cases therein named. In all the cases named, except, perhaps, the fifth and seventh, it is plainly provided that there shall already be an action pending between the parties, in which action the receiver may be appointed as auxiliary to or in aid of the principal action. In the fifth case named, it would appear that a receiver may be appointed to take charge of the property of an insolvent or otherwise disabled corporation. And it was under this fifth clause that the two cases upon which appellee chiefly relies were ⁵⁴⁹ brought, namely: First Nat. Bank v. United States etc. Tile Co., 105 Ind. 227, and Supreme Sitting etc. v. Baker, 134 Ind. 293.

But even in the two cases cited, it is doubtful whether the appointment of a receiver was not merely in aid of the main object of the suits, namely an accounting by the officers and the proper application of the funds of the corporation. In the later case it is said by Olds, J: "As a rule, if not universally, the appointment of a receiver is ancillary to the main cause pending, as in case of the foreclosure of a mortgage, an action by a creditor against an insolvent corporation in which he asks judgment for his claim, the dissolution of a partnership or of a corporation, and many like cases." And it was further said in that case, referring to the case of First Nat. Bank v. United States etc. Tile Co., 105 Ind. 227: "We do not find it necessary to give the statute so broad a construction as given in this case, that a receiver may be appointed under the statute when the sole object sought is to take the property from the hands of the officers. In the case at bar, the object of the proceedings, as we hold, is to secure the accounting of the officers, the application of the funds to the proper objects of the corporation, and the office of a receiver is the means or force sought to aid in accomplishing this object."

But, even granting that, under our statute, where a case is not pending, a receiver may yet be appointed when a corporation has been dissolved, or is insolvent, or is in imminent danger

of insolvency, or has forfeited its corporate rights; still, that forms no justification for the appointment of a receiver for the property of an individual, as in the case before us. A corporation is a mere creature of the law, looking to its ⁵⁵⁰ franchise for the terms of its existence and of its conduct; and if this franchise be forfeited or in danger of forfeiture there is good reason why the law should at once take possession of the property of its failing creature and administer such property for the benefit of those entitled to it. But in the case of a natural person there remains an owner capable of keeping and using his property; and this property should not be taken from him, except by an action duly brought for that purpose. Before judgment is obtained, it may be necessary, in certain cases, by notice of lis pendens, by attachment, by restraining order, or otherwise, to prevent the debtor from disposing of his property before the termination of the suit; but the property should not be taken from him until a lien has first been acquired by judgment or otherwise; or, at least, until an action has been brought for the purpose of securing such lien. Unless, possibly, in cases provided for by the statute, the appointment of a receiver can only be made in aid of the main action; although such appointment may be a part of the relief sought by the complaint. Here it was the sole relief sought, no action being pending between the parties.

Finally, even if, in any case, it could be lawful to appoint a receiver to take possession of the defendant's property, such appointment could only be for the property covered by the lien of plaintiff's mortgage. In this case, the court attempted to put the receiver in possession of all of the property of the defendant, wherever found in the state, whether the plaintiff had any lien upon or title to it or not.

As said in *Steele v. Aspy*, 128 Ind. 367: "To authorize the interposition of the court by the appointment of a receiver, it was essential that the appellee should show either a clear legal right in himself to the property in controversy, or that he had some lien upon, ⁵⁵¹ or property right in it, or that it constituted a special fund out of which he was entitled to satisfaction of his demand. It was essential, to authorize the exercise of such jurisdiction, for the appellee to show that he had a present, existing interest in the property: High on Receivers, secs. 11, 12; Beach on Receivers, sec. 5; *Smith v. Wells*, 20 How. Pr. 158." See, further, High on Receivers, secs. 406, 407, 755; *State v. Ross*, 122 Mo. 435; *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009.

In the case before us, the plaintiff had no judgment or other general lien against the defendant's property. His only lien was that of his chattel mortgage; and, without a suit to foreclose that mortgage, he had no right to a receiver even for the property covered by that mortgage. Still less was there a right to a receiver for property not covered by plaintiff's chattel mortgage. The rights of judgment creditors could not thus be cut out by one who had no judgment or other lien upon the defendant's property.

From any point of view, therefore, it must be apparent that the court had no jurisdiction to appoint a receiver in this case.

The judgment is reversed, with instructions to sustain the motion of the appellant to set aside the order appointing receivers, and to discharge the receivership and dismiss the action.

RECEIVERS—RIGHT TO APPOINT—IN WHAT CASES WILL BE APPOINTED.—The appointment of a receiver rests largely in the discretion of the trial court. Speaking generally, before a receiver can be appointed, it is necessary that the plaintiff should have probable cause of action against the defendant, and that the benefit to be derived from such cause of action might be lost if the receiver were not appointed: *Fort Payne Furnace Co. v. Coal etc. Co.*, 96 Ala. 472; 38 Am. St. Rep. 109, and note. The pendency of a suit is essential to authorize the appointment of a receiver, save in the cases of infants and lunatics: Extended note to *Cortelyou v. Hathaway*, 64 Am. Dec. 482-495, citing numerous cases. A plaintiff seeking relief by appointment of a receiver must show that he has either a clear right to the property itself, some lien upon it, or that it constitutes a special fund to which he has a right to resort for the satisfaction of his claim. Where the applicant has no interest in the subject matter of the suit, he cannot have a receiver appointed: Extended note to *Cortelyou v. Hathaway*, 64 Am. Dec. 482-495. See, also, *Albany etc. Co. v. Southern Agricultural Works*, 76 Ga. 135; 2 Am. St. Rep. 26; *Chase's case*, 1 Bland. 206; 17 Am. Dec. 277.

RECEIVERS—APPOINTMENT OF—JURISDICTION — NECESSITY OF NOTICE TO OPPOSITE PARTY.—The appointment of a receiver of the property of a person, made without notice to him of the application therefor, is void though the statute of a state wherein the appointment is made is silent upon the subject of such notice: *Larsen v. Winder*, 14 Wash. 109; 53 Am. St. Rep. 864; *Hutchinson v. First Nat. Bank*, 133 Ind. 271; 36 Am. St. Rep. 537. The opposite party is, as a rule, entitled to notice of application for a receiver and to a hearing thereon: Extended note to *Cortelyou v. Hathaway*, 64 Am. Dec. 483.

APPEALS—WHAT JUDGMENTS MAY BE APPEALED FROM AND WHO MAY APPEAL.—As to when an appeal will lie, see note to *Davie v. Davie*, 20 Am. St. Rep. 173. As to who may appeal from a judgment or decree, see *Wiggin v. Sweet*, 6 Met. 194; 39 Am. Dec. 716, and note; also the extended note to *Wheeler v. Winn*, 91 Am. Dec. 194.

HUSSEY v. WHITING.

[145 INDIANA, 500.]

PARENT AND CHILD—CUSTODY OF CHILD.—Ordinarily, a father is entitled to the custody of his minor child, but, if the welfare of the child is retarded by such custody, an exception to the rule exists. The interests of society and the established policy of the law make the welfare of the child paramount to the claims of the parent.

PARENT AND CHILD—RIGHT TO RECLAIM CUSTODY OF CHILD.—An oral agreement, express or implied, made by a father that a third person shall have the custody of his child during infancy does not preclude the father from reclaiming such custody.

PARENT AND CHILD—RIGHT TO CUSTODY OF CHILD—HABEAS CORPUS.—If a child, six years of age and delicate in health, at the time of her mother's death, is then placed in the custody of her grandparents, who care for her until she is thirteen years old, furnishing her with every care and comfort, and who continue willing and anxious to so care for her at the time that the father takes and places such child with another relative kindly disposed toward her, but unable financially to furnish her with the care and comforts furnished by the grandparents, and which she requires by reason of her delicate health, the grandparents are entitled by habeas corpus to recover the custody of such child.

Neleker & Sims, for the appellant.

A. H. Lindley, for the appellee.

⁵⁰⁰ **HACKNEY, J.** This was a proceeding by habeas corpus for the custody of Ray Hussey, a little girl thirteen years of age, and was instituted by the appellee, ⁵⁰¹ her maternal grandfather, against her father, the appellant. The decree of the lower court was in favor of the appellee, and the appellant submits the case to this court, by his appeal, upon the evidence.

It may be fairly said that, by a clear preponderance of the evidence, either party entertains a deep affection for the child, and might reasonably be intrusted with her moral training. Since the death of her mother, some six years before the disagreement which resulted in this proceeding, she resided with her grandparents, who were possessed of a large, comfortable home, and lands of the value of twenty thousand dollars or more, and were willing and prepared to render every care and comfort necessary to the welfare of the child. During the period mentioned, the appellant continued, and still is, a widower, with little means above his indebtedness, but with an average income of fifty dollars per month from his business. Until he took the child from her grandparents he made his home with them, but his business, that of traveling salesman, required him to be absent from five to six days each week. He paid for his own

boarding and supplied most of the material for clothing the child, but her boarding and care, and the making of her clothing were supplied by her grandparents. The appellant and the child took up their home with the appellee, pursuant to a request from Mrs. Hussey, while upon her deathbed, that they should have a home with, and that the child should be raised by, the appellee and his wife. The parties differ as to the conversation at the time of this request, as to whether the appellant simply acquiesced in the request and the appellee's promise, or whether he declined to "give" the child to her grandparents. But there is no disagreement about the fact that the appellee and his wife cared for the child as a member of their family, and became greatly attached to her, ⁵⁸² and that the appellant took her from them, not by reason of any neglect or mistreatment of her, but because he and his mother in law, at times, disagreed and had bitter words as to his own relations to the household, and because he, without just cause, thought that the child was becoming estranged from him by the influence of her grandmother. When she was taken from the appellee's home, she was taken to the home of the appellant's married sister, who lived in the town of Princeton, where the appellee lived also. The sister, Mrs. Eby, owned and lived in a house of four rooms; her husband labored at one dollar and twenty-five cents per day; there were four members of her family and a boarder five days in the week when the appellant and his daughter took up their new abode with her. Mrs. Eby was a kind-hearted woman, affectionate with children, and favorably disposed toward the little girl; she performed all the duties of her household without a servant, and, while her circumstances were not the best, she was a fit woman to have the care and moral training of the child. Mrs. Hussey had died of consumption, and the child was delicate and evidently predisposed to that disease.

Ordinarily, the father is entitled to the custody of his minor children. This was the rule of the common law, and is affirmed by statute in this state, but, where the welfare of the child is retarded by the custody of the father, an exception to the ordinary rule exists. The interests of society and the established policy of the law make the welfare of the child paramount to the claims of a parent: *Jones v. Darnall*, 103 Ind. 569; 53 Am. Rep. 545; *Sheers v. Stein*, 75 Wis. 44; 5 L. R. Ann. 781, and note; *Joab v. Sheets*, 99 Ind. 328; *Schouler on Domestic Relations*, sec. 248; *United States v. Green*, 3 Mason, 482; *Bryan v. Lyon*, 104 Ind. 227; 54 Am. Rep. 309.

The oral agreement, express or implied, that the appellee ⁵⁸³ should have the custody of the child during her infancy would not preclude the appellant from reclaiming her custody: *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177; *Weir v. Marley*, 99 Wis. 484. The conclusion of the trial court, therefore, must have been reached upon the theory that the welfare of the child would be best promoted by remanding her to the custody of the appellee, and it remains for us to determine, upon the facts stated, whether that view of the case is supported.

Considering the delicacy of her health, the care and attention she requires on that account, the comforts of the spacious home of her grandparents, their relationship to, and affection for her, the understanding of her health, disposition, and habits, acquired during the six years they have had the care of her, present a very strong claim in favor of their continued custody of her. The father's situation and business afford her no home with him, and, at best, from his standpoint, he can but supply her a home and its comforts by purchase, and with but little of his society. The home which he claims to be not less conducive to the welfare of the child than that from which he took her is, no doubt, modest and reasonably comfortable under the circumstances, but certainly Mrs. Eby's obligations to her own immediate family, including her two children, would not afford her the time to bestow careful attention to the needs and wants of the child, and the crowded condition of her home of four rooms would certainly not be so conducive to the health of the child as that of her grandparents.

The conclusion of the trial court was not a mere discrimination between the luxuries of wealth on the one side and the modest comforts of an ordinary home on the other; nor was it a simple denial of the right of a father to have the care, custody, and training of ⁵⁸⁴ his minor child. It was a recognition of the fact that a child requiring unusual care could probably not receive it, and that her father sought to remove her, not to his own custody, but to that of another, whose situation in life was not so conducive to the health and general welfare of the child as with her grandparents.

The decree of the circuit court is criticised by counsel because of its having provided that the appellant should, "at proper times," be permitted to visit his child, without defining the phrase "proper times." The criticism, we presume, is made upon the assignment of error that "the court erred in overruling the appellant's motions to modify the judgment." There were

numerous motions to modify the judgment, severally filed, and severally overruled, some of which were properly overruled, and it is not even claimed in argument that all were improperly overruled. There is, therefore, no available error.

The judgment is affirmed.

PARENT AND CHILD—RIGHT TO CUSTODY OF CHILD.—A father is the natural guardian of his infant children, and, in the absence of good and sufficient cause, is entitled to their custody, care, and education: *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843, and note. When a child is not in the custody of its father, and he is seeking to recover it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if it is of years of discretion, and, if it is not, exercising its own judgment as to what will be best calculated to promote the interests of the child: *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843. See, also, *Cunningham v. Barnes*, 37 W. Va. 746; 38 Am. St. Rep. 57; note to *Marshall v. Reams*, 37 Am. St. Rep. 125.

PARENT AND CHILD—AGREEMENT AS TO CUSTODY OF CHILD.—A father may, by contract, release his right to the custody of his child to a third person; but the terms of such contract, to be effective, must be shown to be clear and distinct: *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48; *Cunningham v. Barnes*, 37 W. Va. 746; 38 Am. St. Rep. 57; *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843. But a parent is not estopped from reclaiming custody of a child, where he places it in the care and keeping of another, verbally agreeing that the latter might have its care and custody during minority: *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177, and extended note giving a general discussion of this subject.

PARENT AND CHILD—CUSTODY OF CHILD—HABEAS CORPUS.—The writ of habeas corpus is the proper remedy to ascertain and enforce the proper custody of an infant, and, when so used, the writ is of an equitable nature. The welfare of the child is the controlling element by which the court is to be guided in the exercise of its discretion: *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843; also, extended note to *Brooke v. Logan*, 2 Am. St. Rep. 183-187. See, also, *Cunningham v. Barnes*, 37 W. Va. 746; 38 Am. St. Rep. 57, and note.

LYNN v. ALLEN.

[145 INDIANA, 564.]

NOTICE BY PUBLICATION—NEWSPAPER OF GENERAL CIRCULATION.—A daily publication, newspaper, or journal, having a large general circulation and devoted to the general dissemination of legal news, and containing other matter of general interest to the public is a newspaper of general circulation for the purpose of service of notice by publication.

Pickens & Cox, for the appellant.

H. Taylor, for the appellees.

564 HOWARD, J. This was an action in attachment, 565 brought against the appellant by the appellee, Arthur W. Allen.

The appellant, who is a nonresident, entered his special appearance in the cause, and filed a plea in abatement, averring that there had been no service of process upon him, "other than the pretended service of publication in a daily paper called 'The Daily Reporter,' printed and published in the city of Indianapolis, said county," and "that said pretended service by publication is invalid and of no effect, for the reason the said 'The Daily Reporter' is not a newspaper of general circulation in said county."

Issue being joined on the plea in abatement, and the evidence being heard, the court found for the said appellee, and judgment was entered in his favor.

It is claimed that the publication of notice in "The Daily Reporter" was insufficient to give the court jurisdiction over the appellant, for the reason that the said Reporter is not a "newspaper of general circulation," as required by the statute: Burns' Rev. Stats. 1894 (Rev. Stats. 1881, secs. 318, 1279).

The evidence upon which the court found the publication sufficient under the statute, was, substantially: That "The Daily Reporter" is now, and was at the time of the publication of said notice, in general circulation throughout the city of Indianapolis, in Marion county, and state of Indiana, among judges, lawyers, bankers, collection, and commercial agencies, real estate dealers, merchants, manufacturers, and other professional and business men; that it is also on sale at public news-stands; that its circulation in the city of Indianapolis is about five hundred and fifty copies, and outside said city throughout the state, about two thousand five hundred copies daily; that its circulation is confined to no particular class or calling of the community, but is general among different classes; that it is published and circulated daily, except Sunday; that its columns are ⁵⁸⁶ devoted primarily to the dissemination of legal matters, including proceedings of the supreme and appellate courts of the state, and of the various federal, state, county, and city courts sitting at Indianapolis, giving a complete report, both of the pleadings filed in cases pending, and also of cases tried and the result of such trials, as well as publishing those upon the calendar for trial, and all new suits filed; that it also publishes the proceedings of the board of public works of said city, giving said board's action in all matters relating to street and other improvements, and assessments against real estate on account thereof, and all matters of interest in relation to real estate generally; that it gives daily a complete record of the deeds filed in the recorder's office of said county, also of mortgages, mechanics' and other

liens, assignments and sales of real estate by the sheriff under judicial process; that it also contains one or more columns devoted to the general news of the day of interest to general readers; also quotations of local securities of interest to newspaper readers generally; that it is the only newspaper published in said city containing a complete passenger timetable of all railroads entering and leaving said city; that legal notices like the one in the case at bar have been made and published in said newspaper, as well as legal notices advertising sheriff's sales of real estate, and sales by executors or commissioners, and notice of appointments of administrators and executors; that it also contains varied advertising matter, confined to no one calling or trade, but such as is found in newspapers of general circulation; that there is also published in it news and information of a general character, such as is published in other newspapers of general circulation, and of interest to the general reader.

A copy of "The Daily Reporter" was also filed as an ⁵⁸⁷ exhibit, and shows the general character of the paper to be such as is above set forth.

We think that the foregoing evidence shows, as the court found, that the publication in question is a "newspaper of general circulation," "printed in the English language and published in the county." Such notice would not, of course, authorize a personal judgment in the main action against appellant, who is a nonresident, but only a judgment in attachment against his property, and also support the proceedings and judgment against the garnishee defendant: 22 Am. & Eng. Ency. of Law, 135.

By a "newspaper of general circulation," the legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is, in greater or less degree, devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party, and especially devoted to the interests of such party, it would not therefore be a newspaper of general circulation. Yet such a newspaper is, to a large extent, read only by the members of the political party whose doctrines are advocated and expounded in its columns.

There is no doubt that where a publication is devoted purely to a special purpose it would be an unfit medium to reach the general public. A medical, literary, religious, scientific, or legal journal is professedly but for one class, and that class but a comparatively small part of the whole population; and it would be manifestly unjust, as well as against the letter and spirit of

the statute, to use such a journal for the publication of a notice affecting the property or personal rights of citizens in general. The newspaper before us, however, is no such professional or class journal. While it is a law publication, in a certain ⁵⁸⁸ sense, and of particular interest to the legal profession, yet its character, as shown by the evidence, makes it of general interest to the community at large, especially to that part of the community likely to be concerned with matters in courts and other public business. Indeed, it would seem that this newspaper is quite as likely as any party, or other paper of general circulation to reach the particular persons interested in the proceeding before the court; and, consequently, that the spirit of the statute is quite as well served as could be if the notice were published elsewhere. Its special purpose is to give the news of the courts, and to circulate this news generally amongst all those, who, whether of the legal profession or not, may be interested in such proceedings. We are, therefore, unable to see how the end proposed in the statute, namely, to reach by publication a party interested in a suit in court, could be better attained than by publication in this newspaper.

Wherever the question has been before the courts, the holding, so far as we have been able to learn, has been, that publications such as the periodical here under consideration, ephemeral in form, issued at short intervals, devoted to the general dissemination of legal news, and containing other matter of general interest to the public, are newspapers in the sense contemplated in statutes providing for the publication of legal notices to parties interested in proceedings before the courts: See *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441; *Kerr v. Hitt*, 75 Ill. 51; *Railton v. Lauder*, 126 Ill. 219; *Maass v. Hess*, 140 Ill. 576; *Lynch v. Durfee*, 101 Mich. 171; 45 Am. St. Rep. 404.

The case of *Beecher v. Stephens*, 25 Minn. 146, even if not overruled by subsequent decisions, does not seem to be in conflict with the other cases cited. In that case the *Northwestern Reporter*, a periodical devoted ⁵⁸⁹ almost wholly to the publication of the general laws of the state and of the decisions of the courts of Minnesota and Wisconsin, was held not to be such a newspaper as provided for by the statute concerning publication of legal notices. We have already seen that a purely professional journal, whether legal, medical, religious, or other like character, cannot be considered as a "newspaper of general circulation," so as to make it suitable for the publication of legal notices. Neith-

er, of course, would a publication of a legal notice in a Sunday paper be sufficient, even though the paper were not a religious journal: *Shaw v. Williams*, 87 Ind. 158; 44 Am. Rep. 756.

The purpose of the statute, namely, that notice may reach the party intended, should be kept in view. So it has been held that where the publication has been made by design in an obscure paper, with the obvious intent to avoid giving actual notice to the party in interest, the proceedings based upon such notice may be held voidable, even though the letter of the statute has been observed: *Webber v. Curtiss*, 104 Ill. 809; *Briggs v. Briggs*, 135 Mass. 306.

In the case before us, the newspaper circulates, to a great extent, among persons whose business it is to carefully watch the proceedings of the courts; and through such persons, if not directly, those interested are better enabled to receive knowledge of the matter before the court than if the notice were printed in a newspaper whose readers might not give so much attention to court proceedings.

We think the notice by publication in this case was good.

Judgment affirmed.

NOTICE—PUBLICATION OF—PUBLIC NEWSPAPER.—A statute requiring that execution sales of real estate shall be advertised in a public newspaper is complied with by publication in a weekly law journal containing both legal and general news of importance to the public, and having a large circulation among laymen and lawyers: *Pentzel v. Squire*, 161 Ill. 846; 52 Am. St. Rep. 878, and note. See, also, *Lynch v. Judge of Probate*, 101 Mich. 171; 45 Am. St. Rep. 404.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

PRUDENTIAL INSURANCE COMPANY v. JENKINS.

[15 INDIANA APPEALS, 297.]

INSURANCE—INTEREST IN LIFE.—An uncle who lives with and supports his thirteen year old nephew has no insurable interest in his life.

INSURANCE—INTEREST IN LIFE.—One who takes out insurance on the life of another payable to himself, and himself paying the premiums, must have an insurable interest in the life insured. Otherwise it is a wagering contract, and the mere fact of relationship does not constitute such insurable interest, unless there is a legal right of support arising from it.

C. L. Henry, B. McMahan, and J. A. Van Osdol, for the appellant.

E. F. Daily, for the appellee.

297 GAVIN, C. J. Appellant claims to be an insurance company, insuring the lives of children one year old and over, and adults up to seventy.

Appellee recovered judgment for one hundred and fifteen dollars, upon an alleged contract whereby appellant, in consideration of ten cents, which it afterward offered to return, insured the life of his nephew, a school-boy, thirteen years of age, without seeing the boy, without his **298** knowledge, and without any medical examination, so far as the record indicates, and after being informed that the boy had been exposed to diphtheria, which was then in the house where he lived.

The only interest which appellee had in the boy's life is that shown by the evidence, to wit, that he was the child of appellee's sister, and the statement, "We lived together; my sister owned the property, and I kept the boy."

It is well settled in Indiana that when one takes out an insurance policy upon his own life, and pays the premiums therefor, he

may name whom he will as the beneficiary: *Nye v. Grand Lodge etc.*, 9 Ind. App. 131, and cases there cited.

A different rule, however, prevails when one takes out an insurance policy upon the life of another, making it payable to himself, as here, and himself paying the premiums. In such cases, the beneficiary must have an insurable interest in the life insured, else it falls under the ban of the law as a wagering contract: *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; 46 Am. Rep. 185; *Amick v. Butler*, 111 Ind. 578; 60 Am. Rep. 722; *Nye v. Grand Lodge etc.*, 9 Ind. App. 131; *Corson's Appeal*, 113 Pa. St. 438; 57 Am. Rep. 479; *Riner v. Riner*, 166 Pa. St. 617; 45 Am. St. Rep. 693; *Warnock v. Davis*, 104 U. S. 775.

Just what is an insurable interest we will not undertake to define. Our supreme court has said it must be a "pecuniary interest": *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; 46 Am. Rep. 185; *Burton v. Connecticut etc. Life Ins. Co.*, 119 Ind. 207; 12 Am. St. Rep. 405.

In the latter case, quotations are made indicating that by pecuniary interest is meant that interest which arises from the reasonable expectation of benefit or advantage from the continuance of the life; but the mere fact of relationship is not sufficient, except, ^{see} perhaps, where there is a legal right of support arising from it.

The insurance of children who are helpless and under the control and authority of others is susceptible of such possibilities of evil that it should not be encouraged, and the evidence ought to establish an insurable interest most clearly and satisfactorily before a verdict should meet the approval of a trial court. The facts fall far short of establishing any relation of debtor or creditor.

We are satisfied, under the authorities, that the evidence here fails to disclose an insurable interest in the appellee, giving to that phrase the most liberal interpretation authorized by our decisions.

Judgment reversed, with instructions to grant a new trial.

INSURANCE—LIFE—INSURABLE INTEREST—WHAT IS.—An interest, to be insurable, must be an interest in favor of the continuance of the life and not an interest in its loss or destruction: *Holmes v. Gilman*, 138 N. Y. 869; 34 Am. St. Rep. 463, and note. To create an insurable interest in the life of another, kinship is not necessary. It is sufficient if the relationship between the insurer and the beneficiary is one of mere friendship, if the circumstances show that the loss of the life of the former will result in pecuniary loss to the latter: *Carpenter v. United States etc. Ins. Co.*, 161 Pa. St. 9; 41 Am. St. Rep. 880, and note.

INSURANCE — LIFE — INSURABLE INTEREST — NECESSITY OF.—Public policy does not allow anyone having no insurable interest to be the owner of a policy of insurance upon the life of a human being. The public has an interest, independent of the consent and concurrence of the parties, that no inducement shall be offered to one man to take the life of another: *Cheewis v. Anders*, 87 Tex. 287; 47 Am. St. Rep. 107, and note citing numerous cases.

SHICK v. CITIZENS' ENTERPRISE COMPANY,

[15 INDIANA APPEALS, 329.]

CORPORATIONS — CONDITIONAL SUBSCRIPTIONS.—An organized corporation may take subscriptions to its capital stock conditioned that they shall be valid and binding only in the event that a certain aggregate amount is subscribed.

CORPORATIONS—SUBSCRIPTIONS TO STOCK.—In an action to recover subscriptions to the capital stock of a corporation conditioned to be valid and binding only in case a certain aggregate amount of stock is subscribed, a complaint alleging a performance of this condition is sufficient without alleging that such subscriptions were made in good faith by solvent parties not under any disabilities. This latter fact is matter of defense, and must be specially pleaded.

CORPORATIONS — STOCK SUBSCRIPTIONS — ALLEGATION OF CORPORATE EXISTENCE.—In an action to recover a subscription to the capital stock of an existing corporation, the facts necessary to show a legal corporate organization need not be alleged.

CORPORATIONS—SUBSCRIPTIONS TO CAPITAL STOCK. In subscribing to the capital stock of an existing corporation, it is not necessary for the subscriber to sign and acknowledge the articles of incorporation.

CORPORATIONS—STOCK SUBSCRIPTIONS—PLEADING CORPORATE EXISTENCE.—In an action to recover a subscription to the capital stock of a corporation, made before its incorporation, the complaint must allege and the proof show that all the steps necessary to create a legal corporation have been taken.

CORPORATIONS—ORGANIZATION.—ALTHOUGH ARTICLES OF INCORPORATION mention some purposes not within the purview of the statute under which the corporation was organized, this does not vitiate the organization.

CORPORATIONS — STOCK SUBSCRIPTIONS — INSUFFICIENT DEFENSE.—In an action to recover subscriptions to the capital stock of a corporation, an answer alleging that the amount of stock required was never subscribed by solvent persons in good faith is not a sufficient defense as against a complaint alleging that such stock was subscribed, especially if such answer does not allege that any subscription was made by an insolvent person or in bad faith.

CORPORATIONS—FALSE REPRESENTATIONS BY PROMOTERS.—The fact that promoters of a corporation made false representations prior to its organization as to the purposes thereof is no defense to an action to recover on a subscription of its capital stock.

CORPORATIONS—SUBSCRIPTION TO STOCK—EXCESS OF CAPITAL.—Although promoters of a corporation secure sub-

scribers to its capital stock in excess of the amount prescribed in its charter, such fact is not a defense to an action to recover on such preliminary subscription, in the absence of averment and proof that such excess entered into the capital stock after incorporation, or that the subscription sued on is part of such excess.

J. F. Duckwall, J. N. and E. R. Templer, for the appellant.

J. W. Ryan and W. A. Thompson, for the appellee.

³³¹ DAVIS, J. The errors assigned in this court are: "1. The court erred in overruling appellant's demurrer to appellee's complaint; 2. The court erred in sustaining appellee's demurrer to appellant's plea in abatement; 3. The court erred in sustaining appellee's demurrers to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and twelfth paragraphs, separately and severally, of appellant's answer to the merits herein to the appellee's complaint, and to each of them separately; 4. The court erred in overruling appellant's motion for a new trial."

The fourth error has not been discussed, and, therefore, will be considered as having been waived. There was no demurrer to the complaint, but there was a separate demurrer to each paragraph of the complaint. No error, however, has been assigned on the ruling on the demurrer to either paragraph of the complaint.

Counsel for appellant insist that the circuit court erred in overruling "the separate demurrer to the first paragraph of the complaint," and also in overruling the "separate demurrer to the second paragraph of the complaint."

These rulings, as we have before observed, which were made in the lower court by Hon. Leander J. Monks, now one of the judges of the supreme court, have not been assigned as error in this court. It is doubtful whether any question is presented by the first error assigned. Giving this assignment the most liberal construction, it must fail, if either paragraph ³³² of the complaint is sufficient: *Noe v. Roll*, 134 Ind. 115; *Houk v. Hicks*, 11 Ind. App. 190.

The action is based on the following instrument, executed by appellant: "The undersigned, each for himself, subscribes and agrees to take and pay for the number of the shares of the capital stock of and in the Citizens' Enterprise Company, of Muncie, Indiana, in the number and amount set opposite to his or her name, respectively, and each agrees, and promises, to pay for the same, waiving valuation and appraisement laws, in installments, and not more than twenty-five per centum of the amount of his or her subscription, in intervals of not less than sixty days, as

shall be ordered by the board of directors of said corporation. None of such subscription shall, in any event, be valid or binding upon the subscribers, unless the full amount of two hundred thousand dollars shall have been subscribed of said capital stock. Signed, L. S. Shick, forty shares, one thousand dollars."

The theory of the first paragraph of the complaint is, that the subscription was made to appellee, then an existing corporation.

The only condition in the subscription is, that the subscription shall not "be valid or binding upon the subscriber, unless the full amount of two hundred thousand dollars shall have been subscribed."

That an organized corporation may take such conditional subscriptions to its capital stock, is well settled: Thompson on Corporations, secs. 1317, 1322.

It is properly averred, in the first paragraph, that before demand was made for payment, from appellant, of his subscription, the condition had been performed, in that two hundred thousand dollars had been subscribed. It is also alleged that the board of directors of the corporation, by resolutions, at intervals, duly ²²³ ordered appellant to pay in in installments forty per centum of his subscription, in pursuance of the terms of his subscription, and that he failed to pay any part thereof.

Counsel for appellant insist that this paragraph is defective, for failure to allege that the subscriptions to the amount of two hundred thousand dollars were made in good faith by solvent parties, not infants or married women. Our opinion is, that if any part of the subscriptions was made by insolvent parties, infants, or married women, or was not made in good faith, such fact is matter of defense. "Courts have admitted defenses of this kind sparingly and with great caution": Thompson on Corporations, sec. 1238. Such defenses, when available, should be specially pleaded, stating particularly wherein and by whom the subscriptions were not made in good faith, or were made by insolvent parties, infants, or married women.

Coffin v. Ransdell, 110 Ind 417, and Holman v. State, 105 Ind. 569, are neither in point on the question here involved.

In an action by a corporation, to recover upon a subscription to its stock, it is not necessary to aver every step taken leading up to and constituting its corporate organization. The facts necessary to show a legal organization need not be alleged: State v. Stout, 61 Ind. 143. "It is not necessary to set out the manner of the organization of the plaintiff, or its specific objects": Thompson on Corporations, sec. 1825.

The averment that the subscription was made to the appellee is sufficient, without a more specific averment that the appellee company is a corporation, and the same to which the subscription was made: *Shearer v. Peale*, 9 Ind. App. 282; *Lake Erie etc. Ry. Co. v. Griffin*, 8 Ind. App. 47; 52 Am. St. Rep. 465.

The point that there can be no recovery in this action, ³³⁴ because the complaint fails to show that appellant signed the articles of incorporation, is not well taken, as to the first paragraph of the complaint. It is not alleged that appellant signed the articles of association. The theory of the first paragraph is, that appellee was an existing corporation when appellant became a subscriber to its capital stock. The decision in *Coppage v. Hutton*, 124 Ind. 401, is, therefore, not in point. In subscribing to the capital stock of an existing corporation, it is not necessary for the subscriber to sign and acknowledge the articles of association: See *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298; *Butler University v. Scoonover*, 114 Ind. 381; 5 Am. St. Rep. 627; *Thompson on Corporations*, sec. 1152.

So far as objection has been made to the first paragraph of the complaint, it is sufficient. We are not required to determine the sufficiency of the second paragraph of the complaint.

It is next urged that the court erred in sustaining appellee's demurrer to appellant's plea in abatement. This plea is addressed to the entire complaint, and is a mere denial of the corporate existence of appellee, without pleading any facts, which, if true, would support such contention. Assuming that the denial of the corporate existence of appellee is a good plea of abatement, without pleading any facts to support such contention, the demurrer thereto was correctly sustained, unless the plea was applicable and sufficient as to both paragraphs. Waiving the question of the sufficiency of the plea in abatement, as to the first paragraph of the complaint, we will consider its sufficiency as applicable to the second paragraph. The theory of the second paragraph of the complaint is that the subscription was a preliminary one, made in advance of the incorporation; and the facts therein alleged show that all the steps necessary to ³³⁵ create a corporation under the provisions of the manufacturers' and mining act were afterward taken: *Rev. Stats. 1894*, secs. 5051, 5052.

In order to recover on the second paragraph of the complaint, it was incumbent on appellee to prove all the essential facts therein alleged necessary to create the corporation.

The mere fact that the articles of association mention some purposes not within the purview of the statute does not vitiate

the organization: Thompson on Corporations, sec. 229; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6; 16 Am. St. Rep. 298. Some of the purposes of the organization, alleged in the second paragraph of the complaint as being in the articles of association, are within the provisions of section 5051, supra, of the manufacturers' and mining act. The point that the objects of the corporation are so indefinitely stated that the supposed corporation can have no legal existence is not well taken.

It sufficiently appears from the allegations in the complaint that the articles of association provided for nine directors, who are therein named as such directors for the first year.

We have not referred to all the facts alleged in the second paragraph of the complaint, but, suffice it to say, before appellee could recover on this paragraph, the burden was upon appellee to prove its corporate existence, as therein alleged. In other words, in an action on a preliminary subscription, the complaint must show that all the steps necessary to create a legal corporation have been taken. The issue as to whether appellee was a corporation was tendered by the second paragraph of the complaint. Assuming the law to be that, ordinarily, the corporate existence of a plaintiff in an action can only be questioned by plea in abatement, the general rule has no application ³³⁰ where the burden is on the plaintiff to prove that all the steps necessary to create a legal corporation have been taken. The plea in abatement only denies the corporate existence of appellee. It tenders no defense, raises no other question. As we have before observed, the plea in abatement was not addressed solely to the second paragraph of the complaint. Neither is, nor could there be, any error assigned in this court on the refusal of the trial court to sustain the demurrer to the plea in abatement back to the second paragraph of the complaint: Indiana etc. Ry. Co. v. Foster, 107 Ind. 430; Stockwell v. State, 101 Ind. 1-16; Hunter v. Fitzmaurice, 102 Ind. 449; Peters v. Banta, 120 Ind. 416.

As it is conceded that appellee could only recover on the second paragraph of the complaint by proving, among other material allegations, its corporate existence, and, moreover, as the record in the case shows that the question sought to be raised by plea in abatement was presented by an answer in bar, we fail to see wherein appellant has been harmed by sustaining the demurrer to his plea in abatement.

This brings us to the third error assigned. The first and eleventh paragraphs of the answer are as follows:

"1. Comes now the defendant, and, for answer to the first

and second paragraphs of plaintiff's complaint herein, says that the supposed subscription sued on in the said paragraphs of the complaint, was executed by the defendant before the attempted incorporation of said Citizen's Enterprise Company, and before any incorporation of said company; that said company is not now, and was not at the time said cause was commenced, and never has been, a duly and lawfully authorized incorporation, under the laws of the state of Indiana, or elsewhere.

³³⁷ "11. And for a further and eleventh paragraph of answer to the first and second paragraphs of plaintiff's complaint, and each paragraph separately, the defendant avers that the pretended subscription by him made, as alleged in said complaint and both paragraphs thereof, was made, and ever since has remained, and now is, without any consideration whatever." The sufficiency of neither of these paragraphs is questioned in this court.

Judge Marsh, who succeeded Judge Monks, overruled appellee's demurrer to the foregoing paragraphs of appellant's answer, and sustained the demurrer to the other paragraphs of answer.

All the defenses admissible under the paragraphs to which demurrers were sustained were admissible under the first and eleventh paragraphs of answers to which demurrers were overruled.

The substance of the second, third, and fourth paragraphs of appellant's answer to both paragraphs of the complaint, is, that two hundred thousand dollars never was subscribed to appellee's capital stock by solvent persons, in good faith, but the fact that two hundred thousand dollars was subscribed to the capital stock, as alleged in the first paragraph of the complaint, is not controverted nor denied, and it is not alleged that a single subscription was made by an insolvent person, nor that any subscriber to the capital stock did not subscribe to the same in good faith. Conclusions only are stated. Facts are not pleaded. If any of the subscribers of the two hundred thousand dollar subscription were insolvent, or if any subscriptions were not made in good faith, if sufficient to constitute a defense, should have been specially pleaded.

The fifth, eighth, and tenth paragraphs of the answer to both paragraphs of the complaint allege, in substance, that appellant's subscription was taken ³³⁸ preliminary to the organization of appellee, by the promoters and agents of appellee falsely and fraudulently misrepresenting the purpose of the corporation to be formed. The alleged false representations did not relate to any existing fact. They were in reference to the objects and pur-

poses of the proposed organization. If the representation was such as a preliminary subscriber had any right to rely on, the facts alleged in relation thereto did not, in any event, constitute a defense to the first paragraph of the complaint. According to the averments in this answer, no corporation was in existence when appellant signed the instrument sued on. Appellee could not, prior to its incorporation, make false and fraudulent representation through agents, or otherwise, as to the purpose of the organization: *Fox v. Allensville etc. Turnp. Co.*, 46 Ind. 31; *Thompson on Corporations*, secs. 1137, 1393, 1431, 1432, 1438.

Counsel for appellant concede that no reversible error was committed by the court in sustaining the demurrer to the sixth paragraph of the answer, and, therefore, we are not required to consider its sufficiency.

The seventh, ninth, and twelfth paragraphs of answer are insufficient, because the mere fact that the promoters of appellee, before the incorporation, secured subscriptions to the capital stock beyond the prescribed amount, does not constitute a defense in behalf of appellant in an action to collect its subscription: *Beach on Private Corporations*, sec. 521.

There is no averment, in either of these paragraphs, that the alleged excess of subscriptions to the capital stock, or any of it, entered into the capital stock of appellee, when organized, or that appellant's subscription was any part of such alleged excess. In the next place, it is not alleged, in any of these paragraphs, ³³⁰ that appellant's subscription was not included in and necessary to the organization of appellee with a capital stock of two hundred thousand dollars. It may be conceded that a subscription to an organized corporation, in excess of chartered capital, cannot be enforced. Where the stock in a corporation has all been taken, no more can be issued, but the fact that the promoters of a corporation secured subscriptions to the capital stock, beyond the prescribed amount, is not conclusive that all the subscriptions were afterward accepted by the corporation. Some may have withdrawn their subscriptions. Others may have been canceled. For the distinction between subscriptions made prior to incorporation, and subscriptions made after incorporation, see *Beach on Private Corporations*, secs. 63, 64; *Thompson on Corporations*, secs. 1170, 1171. The different paragraphs of answer are pleaded in bar of the cause of action alleged in both paragraphs of the complaint.

We find no reversible error in the record.

Judgment affirmed.

Lutz, J., did not participate.

CORPORATIONS—SUBSCRIPTIONS TO STOCK—CONDITIONAL.—Unless forbidden by charter or statute, conditional subscriptions may be received by a corporation, and if so made are not binding until the condition is complied with: Extended note to *Parker v. Thomas*, 81 Am. Dec. 898, and extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 823. Subscriptions for stock upon condition that a specified amount of subscriptions shall be obtained, is a continuing offer to take, and pay for, the amount subscribed, upon the terms proposed; and whenever the specified amount of solvent subscriptions is obtained within a reasonable time, that is an acceptance of the offer by the corporation. The contract of each subscriber then becomes absolute and unconditional, and payable upon call of the directors: *Craven v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298; *Marysville Electric etc. Co. v. Johnson*, 100 Cal. 192; 50 Am. St. Rep. 34. See, also, *Denny Hotel Co. v. Schram*, 6 Wash. 124; 86 Am. St. Rep. 180.

CORPORATIONS—STOCK SUBSCRIPTIONS—ACTIONS TO ENFORCE—NECESSARY AVERMENTS IN COMPLAINT.—That plaintiff is a corporation need not be alleged when it sues in its corporate capacity: *Stein v. Indianapolis Building etc. Assn.*, 18 Ind. 237; 81 Am. Dec. 353; *Central Bank v. Knowlton*, 12 Wis. 624; 78 Am. Dec. 769, and note. While the weight of authority supports the above proposition, it is not unquestioned: Note to *Harris to Muskingum Mfg. Co.*, 29 Am. Dec. 375; *Holloway v. Memphis etc. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68, and note; also, see *Schloss v. Montgomery Trade Co.*, 87 Ala. 411; 13 Am. St. Rep. 51, and note.

CORPORATIONS—STOCK SUBSCRIPTIONS—ACTIONS TO ENFORCE—MATTERS OF DEFENSE—FRAUD.—It is settled that if a shareholder, whose subscription was obtained through the fraud of the company's agents has not been vigilant in discovering the fraud and in repudiating the contract, it will be no defense against the creditors of the corporation. This contract is governed by the rule that a contract obtained by fraud is voidable at the option of the injured party: Extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 824. See *Penobscot R. R. Co. v. White*, 41 Me. 512; 68 Am. Dec. 257; *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522. If a subscription for shares has been obtained by fraudulent means, it may be annulled by the subscribers at any time before other equities have intervened: *Bosher v. Richmond etc. Land Co.*, 89 Va. 455; 37 Am. St. Rep. 879; *Howard v. Turner*, 155 Pa. St. 349; 35 Am. St. Rep. 883.

CORPORATIONS—ORGANIZATION—ARTICLES OF INCORPORATION—STATEMENT OF PURPOSE.—If the purpose, as disclosed in the articles, is one not sanctioned by law, no corporation is created thereby. If, on the other hand, a lawful purpose is specified, but the articles assume for the corporation the existence of powers which it is not permitted to exercise, then this additional and unauthorized assumption may be treated as surplusage, and the corporation regarded as entitled to exercise the lawful powers only: Extended note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 178. See, also, *State v. International Investment Co.*, 88 Wis. 512; 43 Am. St. Rep. 920.

CALLAWAY v. MELLETT.

[15 INDIANA APPEALS, 386.]

APPELLATE PRACTICE—WAIVER OF ERROR.—If no objection to the sufficiency of the facts alleged is pointed out, an assignment of error that the trial court erred in overruling a demurrer to the complaint is waived on appeal.

APPELLATE PRACTICE—DUPLICITY IN PLEADING.—If the facts pleaded may be construed as proceeding upon different theories in the statement of a cause of action, the construction placed upon them by the trial court is the theory upon which they must be considered on appeal.

CARRIERS—RAILROAD TICKET—CONTRACT.—As between a passenger and a railroad conductor, the face of the passenger's ticket is conclusive evidence of his right to ride, and constitutes the contract between himself and the railroad company.

CARRIERS—RAILROAD TICKETS—EXEMPLARY DAMAGES.—One who, in good faith and without fault on his part, pays full fare and after inquiry accepts, in a poorly lighted station, an excursion ticket from the ticket agent, who assures him that it is good and will be accepted for his passage, has a right to board a train as a passenger, and if his ticket is rejected by reason of expired limitation, and he is ejected from the train for nonpayment of fare, he may recover exemplary damages.

CARRIERS—RAILROAD TICKETS.—If a purchaser accepts a railroad ticket which he knows, or by the exercise of ordinary care he could ascertain, is not good for passage under the rules and regulations of the carrier, he cannot insist on being carried thereon, and, in the event of being ejected for not having a valid ticket, recover damages for such expulsion.

S. O. Bayless and C. G. Guenther, for the appellant.

J. C. Blacklidge, C. C. Shirley, and B. C. Moon, for the appellee.

³⁸⁶ ROSS, J. The appellee sued and recovered judgment in the court below, in the sum of five hundred dollars, against Samuel R. Callaway, receiver of the Toledo, St. Louis, & Kansas City Railroad Company. Since perfecting this appeal, said Callaway has resigned as such receiver, and R. B. F. Peirce has been appointed in his ³⁸⁷ stead, and substituted as the party appellant herein.

Two specifications of error have been assigned in this court, the first being that "the court erred in overruling the demurrer to the complaint," and the second, that "the court erred in overruling the appellant's motion for a new trial."

No objection to the sufficiency of the facts alleged in the complaint to constitute a cause of action has been pointed out; hence, the first specification of error is deemed waived. Counsel do urge, however, that the facts alleged, and upon which this action is predicated, sound in both contract and tort, and are so blended

that it is impossible to determine upon which theory the complaint proceeds.

It is well settled that a complaint must proceed upon a single definite theory: *Pennsylvania Co. v. Clark*, 2 Ind. App. 146; *Hasselman v. Development Co.*, 2 Ind. App. 180; *Carter v. Lacy*, 3 Ind. App. 54; *Thompson v. State*, 3 Ind. App. 371; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Leeds v. Richmond*, 102 Ind. 372; *Moorman v. Wood*, 117 Ind. 144; *Jackson v. Landers*, 134 Ind. 529; and that the plaintiff must recover "secundum allegata et probata," or not at all: *Louisville etc. Ry. Co. v. Renicker*, 8 Ind. App. 404; *Boardman v. Griffin*, 52 Ind. 101; *Terry v. Shively*, 64 Ind. 106; *Thomas v. Dale*, 86 Ind. 435; *Cleveland etc. Ry. Co. v. Wynant*, 100 Ind. 160; *Bremmerman v. Jennings*, 101 Ind. 253; *Hasselman v. Carroll*, 102 Ind. 153; *Brown v. Will*, 103 Ind. 71; *Chicago etc. Ry. Co. v. Burger*, 124 Ind. 275.

"The object of pleading is to present, in a distinct and definite form, questions of fact for trial, and this object cannot be accomplished unless parties are required to state positively the facts upon which they rely, and in accordance with a distinct, definite, and ~~and~~ controlling theory. If ambiguous pleadings are tolerated, no issue can be framed which will present, in an intelligible form, questions for trial, and perplexity and confusion will necessarily result. It is no great hardship to require obedience to rules of pleading and logic, and not to do so will result in the evil of leaving disputants without a direct issue, and the court without the means of determining the competency or relevancy of evidence. In order to bring the parties to an issue, it is necessary to require them to make their pleadings conform to some definite theory, and to be sufficient upon that theory," says Elliott, C. J., in the case of *Western Union Tel. Co. v. Reed*, 96 Ind. 195. And, again, the same court, in the case of *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 13, says: "It is essential to the formation of issues, and to the intelligent and just trial of causes, that a complaint should proceed upon a distinct and definite theory. It would violate all rules of pleading to permit a complaint to be construed as best suited the exigencies of the case; to allow such a course of procedure would produce uncertainty and confusion, and materially trench upon the right of the defendant to be informed of the issue he is required to meet. The rule is, that the complaint must proceed on a distinct and definite theory, and upon that theory the case must stand or fall."

A complaint should not be so drafted that it is susceptible of more than one construction. It cannot be made elastic, so as to

bend or take form with the varying views of counsel: *Mescall v. Tully*, 91 Ind. 96; *Toledo etc. R. R. Co. v. Levy*, 127 Ind. 168.

In order that there may be no changing front, as it were, as the cause proceeds, the facts alleged should be so clearly stated and free from uncertainty or ambiguity, ³⁶⁹ that the theory upon which the pleading proceeds cannot be mistaken. But when the facts pleaded are such that they are susceptible of more than one construction, so that they may be construed as proceeding upon different theories in the statement of a cause of action, the construction placed upon them by the trial court will be the theory upon which they will be considered by this court on appeal: *Cleveland etc. R. R. Co. v. De Bolt*, 10 Ind. App. 174.

The theory upon which the complaint proceeds is, as we view it, to recover damages from the appellant, for a tortuous breach of its contract of carriage, resulting in the appellee's wrongful expulsion from its train.

There is little, if any, conflict in the adjudicated cases that, as between the passenger and the conductor, the face of the ticket is conclusive evidence of the passenger's right to ride: *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407; 46 Am. Rep. 481; *McKay v. Ohio etc. Ry. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913; *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419; *Frederick v. Marquette etc. Ry. Co.*, 37 Mich. 342; 26 Am. Rep. 531; *Shelton v. Railway Co.*, 29 Ohio St. 214; *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711; *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. L. 449; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499; *Hall v. Memphis etc. R. R. Co.*, 15 Fed. Rep. 57; *Weaver v. Rome etc. R. R. Co.*, 3 Thomp. & C. 270; *Pennington v. Philadelphia etc. R. R. Co.*, 62 Md. 95; *Johnson v. Philadelphia etc. R. R. Co.*, 63 Md. 106; *Peabody v. Oregon Ry. & Nav. Co.*, 21 Or. 121; *Vandusan v. Grand Trunk Ry. Co.*, 97 Mich. 439; 37 Am. St. Rep. 354; *New York etc. R. R. Co. v. Bennett*, 50 Fed. Rep. 496; *Jerome v. Smith*, 48 Vt. 230; 21 Am. Rep. 125; *Downs v. New York etc. R. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Mosher v. St. Louis etc. Ry. Co.*, 127 U. S. 390; *Boylan v. Hot Springs R. R. Co.*, 132 U. S. 146.

Under the earlier adjudications, it was held that a railroad ticket was merely a receipt, or token, evidencing ³⁷⁰ the payment of passage money, and showing that the purchaser had paid the toll entitling him to ride from one point to another: *Hibbard v. New York etc. R. R. Co.*, 15 N. Y. 455; *Dietrich v. Pennsylvania Street R. R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543;

Cleveland etc. R. R. Co. v. Bartram, 11 Ohio St. 457. The later holdings, however, are that the ticket is the contract between the purchaser and the railroad company: Sleeper v. Pennsylvania R. R. Co., 100 Pa. St. 259; 45 Am. Rep. 380; New York etc. Ry. Co. v. Bennett, 50 Fed. Rep. 496; Mosher v. St. Louis etc. Ry. Co., 127 U. S. 390; Boylan v. Hot Springs R. R. Co., 132 U. S. 146.

And our own supreme court, in the case of Terre Haute etc. R. R. Co. v. Fitzgerald, 47 Ind. 79, held that the terms expressed on the ticket constituted a contract between the company and the purchaser, and that he was bound thereby.

If a ticket is to be considered merely as a receipt, or voucher, for money paid in consummation of the passenger's part of a contract entered into, whereby the carrier agreed to transport him from one place to another, the right to demand passage upon its presentation must be limited to the person who paid the money and received the ticket, for it is with such person only that the carrier contracted. And the mere delivery of the ticket to another would not transfer the rights of the transferrer to the transferee, and the carrier would have no contract to fulfill with the latter, because he made no contract with him. The rights of one party under a contract cannot be thus transferred. True, the law imposes upon the railroad company the duty of accepting and carrying all proper persons who apply for passage from one station to any other station on its line, but it also permits the company to regulate, in its own way, the manner of receiving and carrying such applicant. The ticket is ³⁷¹ evidence of the terms and regulations upon which the company agrees to carry; and, when the passenger has accepted the ticket, he is bound by its terms as much as if he had, by formal agreement, entered into such contract with the company.

We must, therefore, give to a ticket a more extensive signification than a mere receipt or voucher. A receipt or voucher, strictly speaking, has none of the elements of a contract, for it does not require of the issuer the performance of any obligation or duty, it is simply evidence of payment or delivery: Krutz v. Craig, 53 Ind. 561. And this court, in Landers v. Fisher, 2 Ind. App. 64 (66), says: "A receipt proper is but the written acknowledgment of the person signing it that the money or property mentioned in it was delivered to him."

A mere receipt may be explained, controlled, qualified, or even contradicted by parol evidence: Pauley v. Weisart, 59 Ind. 241; Beedle v. State, 62 Ind. 26; Lash v. Rendell, 72 Ind. 475; Lan-

ders v. Fisher, 2 Ind. App. 64. But, when it is so drafted as to impose an affirmative obligation upon either party, it amounts to a contract, and must be construed, and the rights and obligations of the parties thereunder determined, by the law of contracts in general.

The custom of railroads, in the transportation of passengers, to use tickets which entitle the holder, except in special cases, to be carried upon the terms designated thereon, has become so much a part of the business itself as to be recognized as a part of the law of the land. The purchaser of a ticket does not, ordinarily, enter into any special negotiations by which the carrier undertakes to carry him, for the custom established by the carrier and those doing business with him has fixed the terms upon which he may be carried, and, if he accepts a ticket limiting the time ³⁷² within which he may use it for passage, or designating the train upon which it shall be used, he is bound thereby. This custom is established, and all seeking transportation are bound to take notice of it.

Of course, the contracts of carriage may be general or special. For instance, the carrier may offer a ticket good upon certain trains within a specified time and to be used only by the person purchasing it, and upon such terms as are embraced therein, such a ticket, unless it is the kind regularly issued to all patrons applying for passage, is special, and must be denominated as such. And when a passenger knowingly accepts a ticket containing limitations, and imposing upon him certain duties to make it available for passage, he is bound thereby. The ordinary ticket, entitling the holder to passage, embraces within its terms the duty which the law imposes upon the carrier to accept and carry, and general rules and regulations of the carrier, and the payment and acceptance of the fare necessary to entitle the purchaser to be carried. All of these elements are ingredient parts of the contract evidenced by the ticket issued by the carrier to the passenger.

It appears from the undisputed evidence in this case that the appellee applied to the appellant's ticket agent at Frankfort for a ticket entitling him to ride on appellant's train from Frankfort to Kokomo, and that he paid therefor the usual and ordinary amount required for a general passage ticket; that the agent gave him an unused coupon of an excursion ticket, but, when the ticket was given to him, he asked the ticket agent why he was giving him such a ticket, and the agent assured him that it was all right, and would be accepted by the conductor for his passage

from Frankfort to Kokomo. It also appears that the appellant's station, or depot, at Frankfort, ³⁷³ where the ticket was purchased, was so poorly lighted that appellee could not read what was printed or stamped on the ticket, but that, relying on the ticket agent's assurance that the ticket was all right, he accepted it, and, getting upon the first train going to his destination, tendered it to appellant's conductor, who examined it, and refused to accept it for passage, because it had, as shown on its face, become worthless for passage on account of the expiration of the limit designated thereon for its use.

When a purchaser accepts a ticket which he knows, or by the use of ordinary care he could ascertain, is not good for passage under the rules and regulations of the carrier, he cannot insist on being carried thereon; and, in the event he is ejected for not having a valid ticket, recover damages for such expulsion. There are cases holding that where the railroad company's ticket agent, by reason of his negligence, mistake, or inadvertence, has given the purchaser the wrong ticket, the purchaser may recover damages from the company if he is refused passage on his ticket, but those cases all proceed upon the theory that the passenger was wholly without fault. This rule is eminently proper and just to both parties, for the carrier should answer for the mistakes or negligence of its agents, to parties doing business with such agents, when the parties are free from fault.

The appellee, in good faith, and without any fault on his part, accepted from appellant's ticket agent at Frankfort, a ticket which such agent assured him would be accepted for his passage, and, having no means of ascertaining that the ticket was not good for that purpose, he took passage on appellant's train. Under such circumstances, the appellant is liable. Appellee paid for a ticket which would entitle him to ride on appellant's train from Frankfort to Kokomo, ³⁷⁴ and, when he saw that the ticket agent was giving him a ticket which he knew was not the ordinary ticket used, he asked the agent why he was giving him an excursion ticket, and the agent assured him it was good and would be accepted by the conductor for his passage. It was not only right and proper, but it was appellee's duty, when he saw and knew that the ticket tendered him was not the ordinary or regular ticket used for passage, to inquire of the agent why he gave him such a ticket, and he had a right to rely upon the representations of the agent that it was good and would be accepted by the conductor, unless he knew that the limit of its use had expired. There is no evidence that he had such knowledge; on

the contrary, it appears that he did not know it. He was, therefore, free from fault.

The only other question which has presented any serious doubt in our minds is, as to whether or not the appellee was entitled to recover in this action exemplary or punitive damages.

It is true that, in actions for breach of contract, exemplary or punitive damages are allowable only where the act complained of has been committed willfully and maliciously, or, in the absence of actual malice, where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness: *Philadelphia etc. Co. v. Orbann*, 119 Pa. St. 37; *Pittsburg etc. R. R. Co. v. Slusser*, 19 Ohio St. 157; *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202; *Patry v. Chicago etc. Ry. Co.*, 77 Wis. 218; *New York etc. R. R. Co. v. Bennett*, 50 Fed. Rep. 496.

And it is also true that while, as between the conductor and the appellee, under the rules, the latter had no right to insist on being carried on the ticket tendered, and yet, under the facts disclosed in this case, he was rightfully on the train, hence, was wrongfully ³⁷⁵ ejected; therefore, under the circumstances, the expulsion was wrongful.

We find no reversible error in the record.

Judgment affirmed.

Lotz, J., does not participate.

APPEAL—ASSIGNMENT OF ERROR—MUST BE DEFINITE.—An appellate court will decline to consider an indefinite and uncertain assignment of error: *National Fertilizer Co. v. Holland*, 107 Ala. 412; 54 Am. St. Rep. 101, and note. See *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196; 8 Am. St. Rep. 638, and note; and note to *Bohannon v. Combs*, 10 Am. St. Rep. 329.

CARRIERS—RAILROADS—TICKET AS EVIDENCE OF CONTRACT.—As between a passenger and a conductor, the ticket is conclusive evidence of the passenger's rights: *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913; *Mahoney v. Detroit Street Ry. Co.*, 93 Mich. 612; 32 Am. St. Rep. 528, and note. See, also, *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 842, 26 Am. Rep. 531, where it is said: "There is but one rule which can be safely tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon as the evidence of his right to the seat he claims."

CARRIERS—RAILROADS—SALE OF WRONG TICKET—EXPULSION FROM TRAIN—DAMAGES.—Where a railroad ticket agent sells the wrong ticket to a person who has asked for, and believes he has received, the right ticket, and who, having no money to pay an additional fare, is afterward ejected from the train by the conductor, he is entitled to recover damages of the railroad company: *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499, and note. See, also, note to *Van Dusan v. Grand Trunk Ry.*, 37

Am. St. Rep. 857. A company cannot urge the error of its agent as an excuse for disregarding its own ticket, nor as a ground for relief from damages for ejecting a passenger from its cars: Head v. Georgia etc. Ry. Co., 79 Ga. 358; 11 Am. St. Rep. 434. For a somewhat different conclusion see McKay v. Ohio River R. R. Co., 84 W. Va. 65; 26 Am. St. Rep. 913.

CARRIERS — RAILROADS — STATEMENTS OF AGENTS — WHEN PASSENGERS MAY RELY UPON.—In order that a passenger may recover damages resulting from his reliance upon statements made by the agents of a railroad company, he must be himself without negligence in believing the statements: *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345. See extended note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 570; *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499; also, see *Atchison etc. Ry. Co. v. Gants*, 28 Kan. 608; 5 Am. St. Rep. 780.

NICELY v. COMMERCIAL BANK.

[15 INDIANA APPEALS, 568.]

NEGOTIABLE INSTRUMENTS.—The essential requisites of a negotiable note are a date, an unconditional promise to pay money, a fixed time for payment, a definite amount to be paid, and a place where payment is to be made.

NEGOTIABLE INSTRUMENTS—COST OF COLLECTION.—
A stipulation in a note to pay costs of collection does not render it non-negotiable.

NEGOTIABLE INSTRUMENTS—EXCHANGE.—A stipulation in a note for the payment of "exchange" renders the sum to be paid indefinite and uncertain, and destroys the negotiability of the note.

T. Shockney, J. S. Engle, and W. C. Parry, for the appellants.

J. W. Thompson, J. Canaday, and F. C. Focht, for the appellee.

504 ROSS, J. The appellee sued the appellants upon the following written obligation, to wit:

"\$500.00 **Janesville, Wis., March 28, 1892.**

“On the 1st of June, 1893, for value received, we, the undersigned, jointly and severally, promise to pay to the order of Galbraith Bros., of Janesville, Wis., the sum of five hundred dollars, negotiable and payable at the Commercial Bank, Union City, Indiana, with exchange and cost of collection, with interest at 8 per cent per annum, payable annually from date.

**"D. J. NICELY,
JESSE A. BAKER,
A. J. BENNETT,
JAMES L. DOWNING,**

**T. J. MASON, JR.,
JOHN PUDERBAUGH,
D. A. PUDERBAUGH,
S. D. FULKS,
SIMON SNYDER."**

The complaint is in the usual form, upon an ordinary promissory note, with the additional allegations "that said note was duly transferred to this plaintiff by the written indorsement on the back thereof, for a valuable consideration, and before maturity of said note, and in due and regular course of business; and that at the time this plaintiff purchased and so took the assignment of said note, it had no notice or knowledge of any defense to the same, and that it had no notice or knowledge that the makers had, or claimed to have, any defense to the same." And it is also averred that the note sued on "was made and executed at the said city of Union City, Indiana, where the same is payable, and was not, in truth, and in fact, made at the city of Janesville, in the state of Wisconsin."

⁵⁶⁵ To the complaint the appellants filed an answer in three paragraphs, each of which alleged a failure of consideration. Demurrers were sustained to those answers, and the appellants abiding the ruling on demurrers, and refusing to answer further, judgment was rendered in favor of the appellee.

It is conceded by the parties, both the appellants and the appellee, that the only question presented on this appeal is whether or not the note sued on is governed by the law merchant.

The appellants contend that "the note in suit is not governed by the law merchant, because the clause in the note, 'with exchange and cost of collection,' makes it indefinite and uncertain as to amount when due."

Ordinarily, the essential requisites of a promissory note, to be negotiable by the law merchant, are: 1. A date; 2. An unconditional promise to pay money; 3. A fixed time for payment; 4. A definite amount to be paid; 5. A place where payment is to be made.

It is conceded by counsel for the appellants that it is apparently settled, not only in this state, but in many other jurisdictions, that provisions waiving the benefit of valuation or appraisal and exemption laws, and for the payment of attorney's fees, do not destroy their negotiability by rendering the amount to be paid uncertain, because, if the note is paid promptly at maturity, the contingency upon which they would arise does not become effective. But it is insisted that the agreement in the note sued upon to pay "exchange and cost of collection" does not depend upon the failure of the maker to pay, but that they are as much a part of his original promise to pay as the sum of money therein designated, and that, as the amount of "exchange and cost of collection" are ⁵⁶⁶ not stated, the obligation is uncertain as to the amount to be paid.

We think it is clear that the stipulation to pay "cost of collection" does not render the promise as to the amount uncertain, because no costs for collection could accrue if the note was paid promptly at maturity. The only stipulation which we are to consider in determining whether the note sued on is indefinite or uncertain as to the amount to be paid is that for the payment of "exchange."

Many cases hold that even though the principal sum to be paid is certain and fixed, if the obligation provides for "exchange on New York," that renders the sum to be paid indefinite and uncertain, hence the obligation is non-negotiable under the law merchant: *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Cazet v. Hirk*, 4 Allen (N. B.), 543; *Nash v. Gibbon*, 4 Allen (N. B.), 479; *Read v. McNulty*, 12 Rich. 445; 78 Am. Dec. 467; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504; *Fitzharris v. Leggatt*, 10 Mo. App. 527; *Flagg v. School Dist. etc.*, 4 N. Dak. 30; *Windsor Sav. Bank v. McMahon*, 38 Fed. Rep. 283, and the following cases hold that a stipulation in the obligation providing for "exchange on New York" does not destroy the negotiability of the obligation: *Smith v. Kendall*, 9 Mich. 241; 80 Am. Dec. 83; *Johnson v. Frisbie*, 15 Mich. 286; *Leggett v. Jones*, 10 Wis. 34; *Hastings v. Thompson*, 54 Minn. 184; 40 Am. St. Rep. 315.

In *Philadelphia Bank v. Newkirk*, 2 Miles, 442; *Saxton v. Stevenson*, 23 U. C. C. P. 503; *Hughitt v. Johnson*, 28 Fed. Rep. 865, *Culbertson v. Nelson*, 93 Iowa, 187, post, p. 266, it was held that the mere stipulation "with exchange" destroyed the negotiability of the obligation.

On the other hand, in *Hill v. Todd*, 29 Ill. 101, *Clauser v. Stone*, 29 Ill. 114, 81 Am. Dec. 299, *Bullock v. Taylor*, 567 39 Mich. 137, 33 Am. Rep. 356, *Orr v. Hopkins*, 3 N. Mex. 45, it held that a stipulation "with exchange" does not destroy the negotiability of the obligation. Daniels, in his work on Negotiable Instruments, section 54, says: "If there be added to the amount, 'with current exchange on another place,' the commercial character of the paper is not impaired, as that is capable of definite ascertainment. Exchange is an incident to bills for the transmission of money from place to place. Its nature and effect are well understood in the commercial world, and merchants, having occasion to use their funds at their place of business, sometimes make the currency at that point the standard of payments made to them by their customers at a different point. Exchange preserves the equivalence of amounts in value, and does not introduce such an element of uncertainty as destroys the negotia-

bility of the bill or note which embodies it in its terms." And the same author, at section 54, says: "It has been urged that an instrument payable 'with exchange' on another place cannot be regarded as a bill or note: 1. Because the fluctuations in the rate of exchange make it impossible to ascertain the amount payable when the bill is issued; and 2. Because if this were not so, evidence dehors the instrument would be necessary to ascertain the amount due at maturity. The words of the rulings as to the requisites of negotiable instruments would lead to these conclusions, and the doctrine of the text has been declared 'a slight modification of the general rule.' But reply may be made that instruments payable with exchange have been generally treated as commercial instruments by the business world and the courts"; and "the rule requiring precision in the amount of negotiable instruments applies rather to principal amount than to the ⁵⁶⁸ ancillary and incidental additions of interest or exchange."

Randolph, in his work on Commercial Paper, section 200, in speaking of the stipulations which do not affect the negotiability of notes or bills, says: "Another common addition, not in general affecting the negotiability of a bill of exchange, is a provision for exchange between the place of drawing and the place of payment."

In the case of *Hastings v. Thompson*, 54 Minn. 184, 40 Am. St. Rep. 315, the negotiability of notes containing a provision "for current exchange" was under consideration, and the court said: "The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded upon commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding in commercial circles. This was the very purpose of the statute of Anne placing promissory notes on the same footing as bills of exchange, and thus setting at rest a question upon which there has been some difference of opinion in the courts. Now, we think we are safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answer would, in almost every instance, be unhesitatingly in the affirmative. We have no doubt but that this is

the way in which such paper is generally looked upon and treated in commercial and other business ⁵⁶⁹ circles; and, if so, the court should, as far as possible, make their decisions conform to this general custom and understanding. We recognize the importance of simplicity and certainty in the terms and conditions of commercial paper; and appreciate the objections to permitting it to be loaded down with unnecessary 'luggage,' but we cannot see, under all the circumstances, and especially in view of what we believe to be the commercial usage, that any practical evil will result from permitting the addition of such a provision for the payment of current exchange on the principal amount. Nor are we disposed, as a rule, to extend the quality of negotiable paper to contracts for the payment of money beyond the strict limits of the already established rules of law; but to exclude from that category paper like that under consideration would be to exclude the very class of paper which ought to be held negotiable, if any promissory notes ought to be so held, paper given and taken in commercial transactions, properly so called; for rarely, if ever, would a provision for exchange be incorporated in any other."

But in *Culbertson v. Nelson*, 93 Iowa, 187, post, p. 266, the court, after reviewing the cases bearing upon the negotiability of promissory notes which contain provision for the payment of exchange, says: " 'A bill of exchange is an open letter by one person to a second, directing him, in effect, to pay absolutely, and at all events, a certain sum of money, therein named, to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to a bearer, and to the drawer himself': Daniel on Negotiable Instruments, sec. 27. And it is among the fundamentals that such an instrument must be certain as an engagement to pay, as to fact of payment, amount to be paid, and must be for payment of money only. ⁵⁷⁰ One of the most essential elements in it is, that it must be certain as to the amount to be paid. And this certainty must appear upon the face of the paper, and not from anything dehors the instrument. The maxim, 'Id certum est quod certum reddi potest,' does not apply, except the certainty required may be ascertained from the face of the paper. With these rules as our own guide, we think the agreement to pay a certain sum at a particular place, when the acceptor lives at a different one, 'with exchange,' introduces an uncertainty as to the amount to be paid, which destroys the character of the negotiability of the instrument as a bill of exchange. If it were true that there was, at all times, a definite and unchangeable rate of exchange, then there would probably be no

uncertainty in the instrument. But it is a fact well known to the business world that there is no such fixed and unchangeable rate. Indeed, the rate charged for exchange is oftentimes a financial barometer, indicative of the state of the money market. He who was an observer of the financial world during the year 1893 could not have failed to observe the varying rates charged for exchange during the panic which was upon us at that time. Moreover, it is well known that rates of exchange vary in the different localities, and oftentimes in the same locality. Here, then, an element of uncertainty is introduced into this bill of exchange, and the amount to be paid by the acceptor will never be known until he applies for his draft, at such point as he may happen to be, when the instrument is due. Again, neither the state of the money market, condition of the bank and its account with the correspondent, nor the rate of exchange in the particular locality, can be determined until the time for payment arrives. In all the cases affirming the negotiability of instruments of this kind, these facts are practically ⁵⁷¹ conceded, and the only answer offered is, first, that a custom has lately grown up among banks to treat such instruments as negotiable, and that such custom should be regarded and recognized. It is sufficient to say, in reply, that we have never understood that the customary understanding of the law, no matter how general, changed the law itself. There would be some force in the position, if it appeared that there was a uniform custom in the business to charge a fixed and certain rate of exchange between all places, depending simply upon the amount called for by the bill. But such is not the case. It has also been said, second, that the amount of exchange, when any is charged, is so inconsiderable that such a provision ought not to destroy the character of the instrument. We cannot lend our approval to this doctrine. It is exceedingly unsafe to permit innovations upon well-settled rules of law. To do so would lead to 'evils we know not of.' We had better endure the hardships incident to a strict construction of the rules applicable to commercial paper, than tolerate an innovation which may lead to untold evils. It is of the utmost importance to the business world that the fixed rules with reference to commercial paper shall be preserved in their rigor and integrity. Another argument in support of the character and negotiability of such paper is, that when the acceptor is called upon to pay exchange upon a particular place, it is no more, in effect, than a requirement that the paper be paid at the place on which the exchange is to be paid. But this is clearly unsound. As said by Mr. Justice Corliss, in

Flagg v. School Dist., 4 N. Dak. 30: "There is a marked difference, both to debtor and creditor, with respect to the amount to be paid and received, between cases where the paper is payable at one place, with exchange on another, and cases where the paper is payable, without exchange, at the last-named ⁵⁷² place. Suppose, when the money is payable in this state, the creditor wishes to use the money here. He is doubly benefited by the provision to pay here, with New York exchange. Had the paper been payable in New York, without exchange, he might be compelled to pay exchange on some western point to bring the money to this state. But, by having it paid here, he saves this sum, and, in addition, places in his pocket the amount of New York exchange paid him by the debtor. In times of great financial fright, like those through which we have been passing, the difference might be equal to a considerable sum. Nor is the effect the same upon the debtor. Should his money be in New York, he must pay the cost of bringing it west, and also pay the creditor the further cost of sending it back, although the creditor may not desire it remitted, whereas, had the debt been payable in New York, without exchange, he would have saved both of these items of exchange." We have, as we think, sufficiently answered all arguments, worthy of the name, made in support of the negotiability of such instruments. And, while we do not think them utterly devoid of strength, our judgment is, they are untenable."

And, in the case of **Windsor Sav. Bank v. McMahan**, 38 Fed. Rep. 283, the court says: "The contract evidenced by the note binds the maker thereof to pay the installments of interest and principal, with exchange on New York, and the latter provision is just as much a part of the contract as are the provisions touching the principal sum and interest. Resolving the contract into its several parts, we find it to be a contract for the payment of the principal sum of fourteen thousand dollars in five years from date, for the payment of four hundred and ninety dollars every six months as interest, and for the payment on each installment of interest, and also on the principal sum when paid, of ⁵⁷³ the current rate of exchange between Council Bluffs, Iowa, and New York. The party is bound to pay this current rate of exchange as a part of the contract. The amount thereof is left wholly dependent upon what rates may be when the several payments come due, and there is no legal or business rule by which the amounts may be ascertained until the day of payment arrives. It is difficult to conceive of any other provision that could have been in-

incorporated into this note that would have rendered the amount to be paid more uncertain than this one touching the payment of exchange. True, the fluctuations in the rate of exchange may not have been very great, yet this could not have been foreseen with certainty when the note was executed. When the note was signed, it was impossible to know whether the rate of exchange to be paid upon the principal sum when it matured five years thereafter would be one-tenth of one per cent or one per cent. Therefore, it is clear that, unless we abandon the rule of requiring certainty in the amount to be paid at maturity as an essential element in negotiable paper, this note cannot be held negotiable under the principles of the law merchant. Counsel cite a number of cases wherein it has been held that provisions waiving the benefit of appraisement or exemption laws, or for the payment of attorney's fee and the like, do not destroy the negotiability of the note containing them. These provisions do not affect or render uncertain the amount to be paid at the maturity of the paper. If the note is promptly paid at maturity, these provisions do not come into effect. They are intended to define the rights of the parties in case the note is not paid, and the holder is obliged to resort to legal means for the collection thereof. They are held to be provisions outside the contract of payment of the note, and not affecting it. In the case at ⁵⁷⁴ bar, the obligation to pay exchange is part of the contract of payment, and cannot be separated therefrom. When each payment of interest matured, as well as when the principal came due, the maker of the note was bound to pay the amount of exchange according to the then current rate, as well as the amounts of the interest and principal. Paper, to be negotiable under the law merchant, must define by its terms what the obligation of the maker is, so that, as it passes from hand to hand in the business world, it may be ascertainable from the face of the instrument what is demandable from the maker. If there inheres in the contract of payment an element of uncertainty of such a nature that, as each payment is made, it is necessary, in order to determine the sum that must be paid to fully discharge the contract, to make inquiry touching an extrinsic fact, and ascertain by such inquiry what the rate of exchange is at a given point between that place and New York, it certainly seems that such an instrument is not a 'courier without luggage,' but, on the contrary, is hampered by the absolute necessity, imposed by its own terms on the maker, of ascertaining, as each payment matures, what the exchange upon the interest or principal amounts to at the rate then prevailing at the place of payment."

While we are impressed with the reasoning contained in many of the cases cited, wherein it is held that promissory notes containing stipulations of this character should be held to be negotiable, if those who deal therein accept them as such, that the law merchant is simply the general custom, accepted and acted upon by common consent of those trading and doing business together so, if paper passes from hand to hand, in the general routine of business, and is accepted as negotiable, the law should recognize it as such, nevertheless, we are bound to take notice of the ⁵⁷⁵ fact that the negotiability of such obligations is quite often disputed, and, when questioned, the holdings of the courts as to their negotiability are inharmonious. The line of cases holding that the provision "with exchange" introduces into the obligation an element of uncertainty which destroys its negotiability seems to meet the approval of at least a majority of this court; and, inasmuch as we have no precedents on the question in this state, we will follow that line of the adjudications.

The judgment is, therefore, reversed, with instructions to overrule the demurrers to the answers.

NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—ESSENTIALS OF.—A promissory note is a written engagement to pay absolutely and unconditionally a certain sum of money: *Kendall v. Parker*, 103 Cal. 319; 42 Am. St. Rep. 117, and note. The sum must be payable at all events and at a time specified therein, or at a time which must certainly arrive: *Dorsey v. Wolff*, 142 Ill. 589; 84 Am. St. Rep. 99, and note.

NEGOTIABLE INSTRUMENTS—STIPULATION AS TO COSTS OF COLLECTION—EFFECT OF.—As to whether or not a stipulation in a note to pay costs of collection destroys its negotiability, there is a conflict of authority. The affirmative of the proposition is held to by *First Nat. Bank of San Diego v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94, and *Kendall v. Parker*, 103 Cal. 319; 42 Am. St. Rep. 117. The negative is supported by *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461, and note; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273; 48 Am. St. Rep. 381; and cases cited in note to *Kendall v. Parker*, 42 Am. St. Rep. 121. For a discussion of the question, see *Witherspoon v. Musselman*, 14 Bush, 214; 29 Am. Rep. 404, and extended note.

NEGOTIABLE INSTRUMENTS—STIPULATION AS TO EXCHANGE—EFFECT OF.—An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained but depends upon extrinsic evidence, is not a negotiable instrument: *Dorsey v. Wolff*, 142 Ill. 589; 84 Am. St. Rep. 99, and note. Yet it was held in *Hastings v. Thompson*, 54 Minn. 184, 40 Am. St. Rep. 815, that a stipulation for the payment of the current rate of exchange on a place other than the place of payment, inserted in a note for a certain sum of money, does not render it non-negotiable. The latter case is opposed by *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742, and note, *Read v. McNulty*, 12 Rich. 445, 78 Am. Dec. 467, and *Culbertson v. Nelson*, 93 Iowa, 187, post, p. 266.

CASES
IN THE
SUPREME COURT
OF
IOWA.

PHILLIPS v. DIPPO.

[98 IOWA, 25.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT.—WAIVER of presentment for payment, protest, and notice of nonpayment, contained in the body of a note, is effectual as against an indorser thereof in blank who is also the payee.

W. H. Stivers, for the appellant.

V. Drahos, for the appellee.

25 **ROBINSON, J.** The note in suit was made payable to defendant or bearer, and contains the following: "The makers, indorsers and guarantors of this note . . . hereby waive presentment for payment, notice of nonpayment, protest, and notice of protest, and diligence in bringing suit against any party thereto." Before the maturity of the note, the defendant wrote his name thereon, and transferred it, and it is now owned by the plaintiff. The grounds of the demurrer are, that the defendant is an indorser of the note, and the petition fails to show that the note was duly presented for payment, that payment was refused, and that the defendant was notified of the nonpayment.

26 The question we are required to determine is, whether the waiver of presentment for payment, protest, and notice of nonpayment, contained in the body of the note, is effectual as against an indorser in blank, who was also the payee. It is contended by appellant that such an indorsement is a new, independent written contract between the indorser and indorsee, with conditions implied by law, and that it has no reference to a provision in the note of the character of that in question. It was said in **Davis v. Miller**, 88 Iowa, 114, that "an indorsement constitutes

a new agreement with the indorsee, by which the indorser agrees that the instrument will be paid at maturity, and, if it is not so paid upon proper demand, that he will pay it if duly notified of the default"; and it was held that the blank indorsement of a negotiable promissory note payable by its terms at a designated place did not require the indorser, when his liability became fixed, to pay the note at that place. The reason for that conclusion was, that such indorsements are governed by the law of the place where they are made, and create obligations which are to be performed there, or generally, and not at a place specified. In other words, it was held that implied obligations created by the blank indorsement relate to the time and amount, but not to the place, of payment. There was nothing in the body of the note under consideration in that case which referred in terms to the indorser. None of the authorities relied upon by the appellant are applicable to this case, for the reason that in none of them did the instrument in question contain a provision in any respect like the one we have set out. The part of that which referred to indorsers and guarantors was without force as between the maker and payee, and was designed to take effect only if the note should be indorsed. When the defendant wrote his name on the back of the note, ⁸⁷ and transferred it without in any manner qualifying the effect of the indorsement, he necessarily became a party to the agreement of waiver, and was not entitled to the demand and notice which an ordinary indorsement in blank requires. And this result does not in any manner depend upon the fact that he was the payee of the note. It is said in Tiedeman on Commercial Paper, section 363, that "if the waiver is put in the body of the instrument, it enters into and forms a part of the contract of everyone who signs his name to the paper, whether as drawer or indorser." In 2 Daniel on Negotiable Instruments, section 1092, the law is stated as follows: "Sometimes the waiver is embodied in the instrument itself, and in such cases the waiver enters into the contract of every party who signs it, whether as drawer, maker, acceptor, or indorser. Thus, when the words 'presentation and protest waived,' or 'notice and protest of non-acceptance and nonpayment waived,' are written in the bill, they are binding, not only upon the drawer, but also upon the indorsers, who are in effect new drawers, and who become parties to the waiver in becoming parties to the bill. Clearly, this is the case where such waiver expressly includes the drawer and indorsers." The rule of these authorities has support in the following cases: *Lowry v. Steele*, 27 Ind. 170; *Bryant v. Lord*, 19 Minn. 405;

Farmers' Bank v. Ewing, 78 Ky. 266; 39 Am. Rep. 231; **Bryant v. Merchants' Bank**, 8 Bush, 43; **Smith v. Lockridge**, 8 Bush, 431. See, also, **Woodward v. Lowry**, 74 Ga. 148; **Studebaker v. Ryan**, 46 Kan. 273.

We conclude that the demurrer was properly overruled, and the judgment of the district court is affirmed.

NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—EFFECT OF.—One who, being the payee of a note, indorses it before it is signed and delivers it to the maker to sign, so as to enable him to obtain money for their joint benefit, is estopped from denying the authority of the maker to sign it in the name of a partnership of which he is a member: **Montgomery v. Crossthwait**, 90 Ala. 553; 24 Am. St. Rep. 832; **Moore v. McKenney**, 88 Me. 80; 28 Am. St. Rep. 753, and note. See, also, **Parshley v. Heath**, 69 Me. 90; 81 Am. Rep. 246; **Farmers' Bank of Ky. v. Ewing**, 78 Ky. 264; 39 Am. Rep. 231. In the latter case there was printed on the back of a note: "The indorsers waive presentment, protest, and notice of dishonor." The payee indorsed his name in another place entirely disconnected from the memorandum, and the note was transferred. Held, that the memorandum was part of his contract.

MANN v. CORRINGTON.

[98 IOWA, 103.]

HOMESTEADS—EXCHANGE OF.—A homestead right may exist in vacant land for which a former homestead has been exchanged, or which has been purchased with the proceeds of such homestead, and is held in good faith for use as a home. The homestead character of such land is not affected by the fact that it cannot be improved, and a dwelling-house erected thereon, from the proceeds of the former homestead.

C. C. and C. L. Nourse, for the appellant.

J. L. Dana and J. A. McCall, for the appellee.

¹⁰⁸ **ROBINSON, J.** On the thirty-first day of August, 1891, the plaintiff conveyed to the defendant and his wife four lots in Mann's first addition to Oak Park, and received in payment a mortgage on the lots for five hundred dollars, and a conveyance of property in the town of Nevada, which the grantors then occupied as a homestead. After the transaction was closed, the defendant visited Des Moines, and, while there, signed an instrument in writing, of which the following is a copy:

"Des Moines, Iowa, Oct. 14, 1891.

"This memorandum will witness that L. M. Mann agrees to convey ¹⁰⁹ to Benton Corrington, by a good warranty deed, the west forty-two (42) feet of lot one (1) of Bates addition to North

Des Moines, Iowa, and the east ten (10) feet of lot one (1), Hedges addition to North Des Moines, Iowa. Said Corrington is to assume the payment of a mortgage for \$1,000.00, and interest from July 1, 1891, at 7½ per cent interest; and said Benton Corrington agrees to give a mortgage, which shall be second to the \$1,000.00 above described, to said L. M. Mann, on said described property for \$1,200, to be paid as follows: \$400 in one year, \$400 in two years, and \$400 in four years, with eight (8) per cent interest, payable semi-annually. Said Corrington is to convey, by a good warranty deed, lots 91, 92, 93, and 94, of L. M. Mann's First addition to Oak Park, subject to a mortgage of \$500.00 and interest. This conveyance to be made to L. M. Mann or order, and both parties are to furnish abstracts of title at the expense of each. This contract is to be fulfilled and completed at Des Moines, Iowa, said deeds to be passed on or before twenty (20) days."

This action was brought to recover the sum of three thousand seven hundred dollars, as damages alleged to have been caused by the failure of the defendant to do what the instrument required of him. The defendant denies that he is in any manner indebted to the plaintiff, and alleges that the writing upon which a recovery was sought was to take effect and be in force only in the event that his wife should approve it; that it was not so approved; and that, on the day after it was signed by the defendant, he and his wife notified the plaintiff by mail that she disapproved it, and would not execute the instruments necessary to carry it into effect; and that the negotiation was at an end. The defendant further alleges that the four lots in question were obtained by himself and his wife in exchange for their homestead, for the purpose of being used as a homestead, and have ¹¹⁰ always been held for that purpose. The jury were instructed to first determine whether the lots in question were held by the defendant and his wife as a homestead, and, if they were so held, to return a verdict for the defendant. The jury returned a special finding to the effect that the lots were held for homestead purposes, and a general verdict for the defendant.

1. Section 1990 of the code provides that a conveyance or encumbrance of a homestead by the owner "is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." If the lots in question were impressed with the homestead character when the writing in suit was signed, it was of no validity, for the reason that its provisions were not separable, and it must be held valid or invalid as a

whole. It is not questioned that the lots subject to the mortgage were obtained in exchange for the homestead of the defendant and his wife. A homestead once acquired may be exchanged for another, and, when that is done, the homestead privileges and rights attach to the new as they formerly did to the old homestead: Code, secs. 2000, 2001. In this case, the lots had not been occupied by the defendant and his wife, and were unimproved when this writing was signed; and they had the right to remain in their old homestead in Nevada until the first day of November. Both testified that they obtained the lots for the purpose of building on them, and making them their homestead; and, while there is evidence which tends to show that they were ready to abandon their purpose, yet the jury were warranted in finding that they had not done so. It is said, however, that a homestead must include the house used by the owner as a home, and that the homestead right cannot attach to unimproved lots. It is well settled that, as a general rule, a mere intention to occupy property as a home ¹¹¹ does not give to it the character of a homestead before it is actually occupied for that purpose: *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493; *Elston v. Robinson*, 23 Iowa, 209. But that rule applies especially to the original acquisition of a homestead. It is not of universal application to new homesteads acquired in exchange for old ones. Thus, in *State v. Geddis*, 44 Iowa, 537, it was said that as the statute gives an absolute right to the owner of a homestead to exchange it for another, without providing how it shall be done, a reasonable construction to effect the object of the statute must be adopted. It was further said that "the length of time intervening between the sale of the old and the acquiring of the new, is not essentially a controlling circumstance. A considerable lapse of time may not be inconsistent with an honest intention to change the homestead." In that case, a homestead had been sold, a mortgage on it had been taken to secure the larger part of the purchase price, the mortgage was foreclosed, and the premises were sold under the decree of foreclosure. Redemption from the sale was made by paying the required amount to the clerk of the court about two years and a half after the original sale of the homestead; yet this court held that, as the intention to change the homestead was properly shown, the money thus paid was exempt from garnishment in the hands of the clerk. In *Cowgell v. Warrington*, 66 Iowa, 666, it was held that the law would secure to the owner of a homestead a reasonable time in which to exchange it for another, and in support of that conclusion it was said: "If the

homestead rights did not attach upon the purchase, and creditors or others could, upon contract of the husband, wrest it from the wife and family, it would be impossible for a change in the homestead to be made without the wife exposing to hazard her homestead rights. But this the law will not permit, for the statute which ¹¹² authorizes the change of homestead does not contemplate that, by attempting to exercise the rights conferred by it, the homestead itself may be lost." This case also recognizes the distinction between the acquiring of an original homestead and the obtaining of another by exchange: See, also, Robb v. McBride, 28 Iowa, 386; Furman v. Dewell, 35 Iowa, 170; Benham v. Chamberlain, 39 Iowa, 358; Thompson on Homesteads and Exemptions, sec. 247. In First Nat. Bank v. Hollinsworth, 78 Iowa, 575, it was said that there must be actual occupancy to give the homestead character. The case involved a change from one homestead to another, and one of the questions determined was when the homestead character was transferred from one to the other. The facts in that case distinguish it from those in which there has been an exchange of homesteads and a reasonable delay in occupying the new one. It is said that the case of Givans v. Dewey, 47 Iowa, 414, is decisive of this. In that case it appears that Givans had acquired and occupied a homestead. At the time of the purchase, he executed a mortgage on the premises to secure a part of the purchase price. He was unable to discharge the mortgage and retain all of the premises, and, to save a part of them, he transferred to the holder of the mortgage, in payment of it, the south part of the premises, which included the house. The north part was retained by Givans, and some improvement made on it, with the purpose of occupying it as a homestead at some future time. It was held that the homestead character did not attach to the part reserved. That case did not decide that the homestead character would not attach to premises until they were actually occupied as a home. On the contrary, it was intimated that the owners of a homestead might sell it and, with a part of the proceeds, buy vacant land, and hold it exempt while erecting thereon a house. What was ¹¹³ said in regard to the right of the owner to invest money not obtained from a homestead in the erection of a house was not necessary to a determination of the case. In Lay v. Templeton, 59 Iowa, 684, it appeared that the defendant had sold a homestead for fifteen hundred and twenty-five dollars, of which he received in money only two hundred dollars, the remainder being applied in payment for debts due to the purchaser and to others. About a

month after the sale, the defendant contracted for the purchase of two lots for the sum of three hundred and twenty-five dollars, of which he paid one-fourth in cash, and was to pay the remainder in one, two, and three years. He immediately commenced the erection of a house on the lots, and moved into it about three months after the sale of his former homestead. Of the two hundred dollars in money received for the latter, a part was applied in paying for the lots, and a part in improving them. The remainder of the money which went to the acquisition of the new homestead was obtained from the sale of personal property of the defendant. It was held that the new homestead could not be subjected to the payment of a debt contracted before the first homestead was obtained, but before it was sold. The right of the owner to use means not obtained from the sale of the old homestead, but not in excess of them, was recognized and applied, following *Benham v. Chamberlain*, 39 Iowa, 358. The case of *Givans v. Dewey*, 47 Iowa, 414, was referred to and distinguished. We conclude that the homestead right may exist in vacant land for which a former homestead has been exchanged, or which has been purchased with the proceeds of such a homestead, when the land was thus obtained, and is held in good faith for use as a home. And the homestead character of the land will not be affected by the fact that it cannot be improved, and a dwelling-house erected thereon, ¹¹⁴ from the proceeds of a former homestead. That in such a case an interest in the new homestead might be subjected to the payment of debts contracted before the house was erected may be true, but that is a question not involved in this case. If the lots in controversy were obtained by the defendant and his wife in good faith for the purpose of improving and occupying them as a home, and that purpose had not been abandoned when the writing in suit was signed, the homestead character was attached to the lots, and the writing was void. The evidence was sufficient to sustain both the special finding and the general verdict of the jury.

2. The wife of the defendant testified upon cross-examination that she and her husband had been living in and near Nevada for about sixteen years. She was then asked the question, "You have several farms there, have you not?" An objection to this question was sustained, and of that appellant complains. We think the ruling was right. The purpose of the question was not shown, and it did not appear to be relevant to any issue in the case.

3. The conclusions we have announced dispose of all questions

discussed by counsel which were involved in the special finding, and it is unnecessary to determine any others, for the reason that, even if error was committed by the district court on other branches of the case, it could not have been prejudicial.

The judgment of the district court is affirmed.

HOMESTEAD—INTENTION TO OCCUPY—WHEN SUFFICIENT.—It is generally held that there must be both possession and occupancy of the premises in order to stamp them with the character of a homestead: Extended note to Pryor v. Stone, 70 Am. Dec. 347. See, also, notes to Cameron v. Gebhard, 34 Am. St. Rep. 838, Davis v. Witherell, 90 Am. Dec. 180, and Woodbury v. Warren, 48 Am. St. Rep. 817. A reference to the notes cited will show a conflict of authority on this question which is due largely to the lack of uniformity in the laws of the different states under which homesteads are created. The purchase of land with the intention to build upon and occupy it as a homestead, but without such building or occupation, has been held sufficient to create a homestead in Cameron v. Gebhard, 85 Tex. 610; 34 Am. St. Rep. 832; Reske v. Reske, 51 Mich. 594; 47 Am. Rep. 594; Woodbury v. Warren, 67 Vt. 251; 48 Am. St. Rep. 815, and note; also, Deville v. Widoe, 64 Mich. 593; 8 Am. St. Rep. 852.

SWEARINGEN v. LAHNER,

[93 IOWA, 147.]

MORTGAGES AND NOTES SECURED THEREBY EXECUTED AT THE SAME TIME and as one transaction are to be construed together, and, so far as possible, as one instrument.

MORTGAGES—RIGHT TO FORECLOSE.—If a note secured by mortgage provides that it shall become due at the option of the holder upon default in interest, and the mortgage provides that such note shall become due in thirty days after such default, the mortgagee has a right to proceed to foreclose upon the expiration of such thirty days; and a tender of the interest, long after its maturity, but before the commencement of the suit to foreclose, does not bar nor defeat the latter action.

MORTGAGES—FORECLOSURE—ELECTION.—If a mortgage provides that the note secured thereby shall become due and payable in thirty days after default in the payment of interest, the mortgagee has a right upon the expiration of thirty days from such default to proceed to foreclose his mortgage. Bringing such suit is a sufficient election to exercise his option, and is all the notice required, nor would a delay of seven months in executing such option defeat it unless the mortgagor was prejudiced thereby.

Suit to foreclose a mortgage. Decree of foreclosure and defendants appealed.

Woodward & Cook, for the appellants.

D. W. Clements & Son and Cardell & Nichols, for the appellee.

149 DEEMER, J. The notes on which the suit is predicated contain the following condition: "And, in case of nonpayment of interest when due, the whole sum of principal and interest to become due and collectible at the holder's option." The mortgage made to secure them has this stipulation: "And it is hereby further agreed that, if the said Anton Lahner allows the taxes to become delinquent upon said property, or permits the same, or any part thereof, to be sold for taxes, or if he fail to pay the interest on said note **149** promptly as the same becomes due, the note secured hereby shall become due and payable in thirty days thereafter, and the mortgagee, their heirs or assigns, may proceed at once to foreclose this mortgage; and, in case it becomes necessary to commence proceedings to foreclose the same, then the said Anton Lahner, in addition to the amount of said debt, interest, and cost, agrees to pay the mortgagee herein named, or to any assignee of the mortgagee herein, a reasonable attorney's fee for collecting the same, which fee shall be included in judgment in such foreclosure case." Unless these provisions caused the notes to mature because of nonpayment of interest, and authorized the foreclosure of the mortgage, then the debt is not due; and it is upon the theory that such nonpayment did not mature the note until some election was exercised by the mortgagee, and notice thereof given to the mortgagor, that the answer of all of the defendants except the administrator was based. This answer also alleged that the defaulted interest was tendered before the commencement of this suit.

We have, then, these two propositions for determination: 1. Was the holder of the note required to make an election, declare the notes due for the failure to pay interest, and give notice thereof to the mortgagors before commencing his suit? And 2. Did a tender of the interest due long after its maturity, but before the commencement of the suit, bar plaintiff of his right to foreclose for nonpayment of interest? The interest became due on the notes in suit March 1, 1893, and was not paid, and no effort made to make payment, until September 23, 1893, when, it is alleged in answer, the defendants tendered the amount, with interest thereon to that time. This the plaintiff refused to accept, and on October 14th, without further notice, commenced this suit. Some **150** courts have held that contracts in notes, and mortgages given to secure them are separate and independent, and each contract must be construed with reference to its own particular terms: *White v. Miller*, 52 Minn. 367; *McClelland v. Bishop*, 42 Ohio St. 113; *Railway Co. v. Sprague*, 103 U. S.

756. Should we adopt this rule, then it is clear from the authorities cited that the stipulation in the mortgage itself authorizes the remedy sought to be obtained in this case. Plaintiff, in his petition, does not ask for a personal judgment. He could not obtain it if he did, for the maker of the notes is dead. The defendants are the administrators and the heirs at law of the maker of the note, and are made parties to cut off their equity of redemption. True, plaintiff asks to have the claim established as a general claim against the estate of the deceased, but the court, in passing the decree, did not so order. The decree simply directed the sale of the real estate to pay the judgment. So that, on defendants' theory of the case, we think the court was right in sustaining the demurrer. But the decided weight of the opinion in this country is that a note and mortgage executed at the same time and as one transaction are to be construed together, and, so far as possible, construed as one instrument: See *Noell v. Gaines*, 68 Mo. 649; *Chambers v. Marks*, 93 Ala. 412; *Wheeler etc. Mfg. Co. v. Howard*, 28 Fed. Rep. 741; *Shoonmaker v. Taylor*, 14 Wis. 313; *Stanclift v. Norton*, 11 Kan. 218; *Mallory v. West Shore etc. R. R. Co.*, 3 Jones & S. 174; *Lantry v. French*, 33 Neb. 524. And this is the rule adopted by this court in *Clayton v. Whitaker*, 68 Iowa, 412; *Sloat v. Bean*, 47 Iowa, 60; *Dobbins v. Parker*, 46 Iowa, 357; *Dean v. Ridgway*, 82 Iowa, 757; *German Bank v. Griffin*, 54 Iowa, 749; *Kramer v. Rebman*, 9 Iowa, 114. The ¹⁵¹ notes in suit leave it optional with the holder whether he will declare the whole amount of principal and interest due upon nonpayment of interest when due; and the mortgage provides that, if the mortgagor fails to pay interest on the notes promptly as the same becomes due, the notes secured shall become due and payable in thirty days thereafter, and the mortgagee, his heirs or assigns, may proceed at once to foreclose the mortgage. The only inconsistency here relates to the option plaintiff may exercise, and the time within which it may be exercised, if required at all, after thirty days. But as, by the terms of either the notes or the mortgage, the plaintiff had the right, at the time he commenced the suit, to elect to treat both the principal and interest due, and proceed to foreclose, it is not necessary for us to put a construction upon these two stipulations. Stipulations such as are found in these notes and in the mortgage under consideration are not regarded in the nature of a penalty or forfeiture, and, for that reason, viewed with disfavor by the courts, but as agreements for bringing the notes

to an earlier maturity than expressed upon their face, and are to be construed and the intention of the parties ascertained by the same rules as other contracts: *Hoodless v. Reid*, 112 Ill. 105; *Wiltzie on Mortgage Foreclosures*, sec. 37; *Jones on Mortgages*, secs. 76, 1181; *Kramer v. Rebman*, 9 Iowa, 114, and authorities heretofore cited. So it has been held that, after the happening of the contingency which matures the note, the mortgagee cannot be compelled to accept the interest due, and yield his claim for the whole amount: *Jones on Mortgages*, secs. 1179-1186, and cases before cited. Courts of equity have no power to relieve against the default and its consequences: *Malcolm v. Allen*, 49 N. Y. 448; *Bennett v. Stevenson*, 53 N. Y. 508; *Morling v. Bronson*, 37 Neb. 608; *Whitcher v. Webb*, 44 Cal. 127. Applying these rules to the case ¹⁵² at bar, it is clear, not only that the notes were due when the action was commenced, but that, whether due or not, plaintiff had the right, under the express provisions of the mortgage, to foreclose against all having any interest in or claim to the land; and that the tender of the unpaid interest, six months after the note matured and the right to foreclose accrued, will not defeat the action: See, also, as supporting our conclusions, *Smalley v. Renken*, 85 Iowa, 612; *Watts v. Creighton*, 85 Iowa, 154; *Hale v. Patton*, 60 N. Y. 233; 19 Am. Rep. 168.

There remains but one question: Was plaintiff required to give defendants notice of his election before bringing suit? This precise question has never been presented to this court, although many suits of the same nature, where no notice of election had been given, have passed through without question. The supreme court of Nebraska has held in the case of *Morling v. Bronson*, 37 Neb. 608, that no notice other than the bringing of the suit is required. So, also, in California, it is held that no notice or demand is necessary: *Hewett v. Dean* (Cal., Jan. 20, 1891), 25 Pac. Rep. 753; *Sichler v. Look*, 93 Cal. 600. These cases, it seems to us, announced the true rule. The case is plainly one of contract, and plaintiff had the right, at any time after thirty days from default in payment of interest, to exercise his option, and declare the whole amount of principal and interest due, provided the mortgagor is in no way prejudiced by his delay. Bringing the suit is a sufficient election, and is all the notice required.

2. It is also insisted on the part of appellants that this election must be exercised within a reasonable time, or the plaintiff will

be deemed to have waived the right. It seems to us the question does not fairly arise on this record. There is no pleading of waiver or estoppel, and nothing to show that ¹⁵³ defendants have in any manner been injured by plaintiff's delay in bringing suit, and thus declaring the notes due. If the question did fairly arise, we would be loath to hold that a delay of seven months would estop plaintiff from declaring the principal sum due. The cases of *Hall v. Delaphine*, 5 Wis. 206, 68 Am. Dec. 57, and *Berrinkott v. Traphagen*, 39 Wis. 219, are not in conflict with the rule here announced, because they relate to forfeitures. No doubt, if the provisions we have quoted were to be treated as penalties or forfeitures, there would be much force in defendants' position. But as they are not to be so treated, but rather as agreements between the parties, then lapse of time is only material on the question of waiver or estoppel; and, as neither waiver nor estoppel is pleaded, we need not discuss further. The cases of *Basse v. Gallegger*, 7 Wis. 442, 76 Am. Dec. 225, and *Marine Bank v. International Bank*, 9 Wis. 57, are somewhat in conflict with the rules here announced, but they are clearly contrary to the decided weight of authority, and we decline to follow them: See *Harper v. Ely*, 56 Ill. 179; *Johnson v. Van Velsor*, 43 Mich. 208; *Heath v. Hall*, 60 Ill. 344.

3. The administrator insists that the court was in error in sustaining the demurrer to his answer. It is sufficient to say in this connection that the claim was not established against the estate of which he is administrator, and no order was made upon him. There is a judgment ordered, but, as we understand the record, it is simply a judgment in rem, subjecting the property, by special execution, to the payment of plaintiff's claim. No prejudice resulted from the sustaining of the demurrer. This disposition of the case renders it unnecessary that we dispose of the motion submitted to strike the assignment of errors. We reach the conclusion that the decree should be affirmed.

MORTGAGES AND NOTES SECURED THEREBY CONSTRUED AS ONE INSTRUMENT.—When a mortgage is given to secure the payment of several notes described therein, such mortgage and notes must be construed as one instrument or contract: *Schultz v. Plankinton Bank*, 141 Ill. 116; 33 Am. St. Rep. 290, and note. See, also, note to *Heburn v. Warner*, 17 Am. Rep. 91.

MORTGAGES—RIGHT TO FORECLOSE UNDER A POWER OF SALE—DELAY AS WAIVER.—A mortgagee having an option, by the terms of the mortgage, to foreclose immediately upon default in the payment of any installment of interest payable annually, does not, by a delay of eight months before making a demand and bringing an action after an installment has become due, waive the de-

fault in the payment of interest, or his right of option to foreclose for such default: *Glas v. Glas*, 114 Cal. 566; 55 Am. St. Rep. 90. Such a power of sale is valid, and a sale under it will be held good if the conditions are conformed with: *Carson v. Blakey*, 6 Mo. 273; 35 Am. Dec. 440; but the court will closely scrutinize sales made thereunder: *Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636, and note.

CULBERTSON v. NELSON.

[93 IOWA, 187.]

NEGOTIABLE INSTRUMENTS—"EXCHANGE" AS AFFECTING NEGOTIABILITY.—A bill of exchange drawn for a certain sum with "exchange" is not negotiable for want of certainty in the amount to be paid.

NEGOTIABLE INSTRUMENTS.—The use of the words "to order" or "for value received" in a bill or note does not show an intent to make it a negotiable instrument, if it contains other words inconsistent with its negotiability.

Flickinger Brothers and McCrary & Craig, for the appellant.

Wherry & Walker and Wright & Baldwin, for the appellee.

¹⁸⁸ **DEEMER, J.** This is another case where the unsuspecting has been imposed upon by the patent-right swindler, and, in its facts, is somewhat similar to the case of *First Nat. Bank v. Zeims*, 93 Iowa, 140. In this case the patent was on a water heater or feed cooker, and in the *Zeims* case it was on a fence. The lower court made a finding of facts from which he drew certain conclusions of law, which were as follows: "1. That the draft in controversy was obtained of the defendant through fraud and misrepresentation of the payee therein, Thomas E. Hall, and is wholly without consideration; 2. That the draft contained the words 'with exchange,' and, by reason thereof, is not a negotiable instrument; 3. That, the draft not being negotiable, the fraud and failure of consideration can be pleaded against it in the hands of this plaintiff; 4. The plaintiff, holding the draft, is subject to the same equities and defense that the original payee would hold it. The court is not called upon ¹⁸⁹ to decide whether or not plaintiff stands in a different position than the original payee in the draft, and whether or not he could recover if the draft had been a negotiable instrument. Wherefore, it is ordered, adjudged, and decreed by the court that the plaintiff's petition be dismissed, and the defendant have judgment against the plaintiff, W. L. Culbertson, for the costs in this action, taxed at forty-one dollars and seventy-five cents, and that execution issue therefor."

The following is a copy of the draft upon which the action is predicated:

Dec. 9, 1889.	Thomas E. Hall, Business Manager.	No. 10,062.
Accepted and	Hall & Company.	Kansas City. Mo.
payable at	Willits, Ia., Dec. 9, 1889.	
Council Bluffs,	October first, after date, pay to the order of	
Ia.	Thomas E. Hall nine hundred dollars (\$900), with	
John Nelson.	exchange, and eight per cent. interest from date, if	
	not paid when due. Value received, and charge to	
	the account of	
	To John Nelson,	Hall & Co.,
	Willits, Iowa.	By Thos. E. Hall.

There was ample testimony to sustain the findings of the court below that the draft was obtained through fraud and misrepresentation, and was and is wholly without consideration. Indeed, counsel do not challenge these findings. The error of the court, if any, is in his conclusions of law. The appellant contends that the draft is a negotiable instrument, and is not subject to the defenses lodged against it in the hands of a bona fide holder; while the appellee insists that it is not negotiable, and therefore subject to these defenses, because of uncertainty in the amount to be paid, for that it includes "exchange." It is to be regretted that this question, which is of so much moment to the business interests of the country, is in so unsettled a condition. If there is any branch of the law which ¹⁹⁰ should be reduced to a certainty, it is that relating to commercial paper. After long usage, the custom of traders finally ripened into the law merchant, and this law gave to notes and bills of exchange their present character, in which they, in a sense, become a part of the circulating medium of the whole country; and it is exceedingly important that state lines do not mar the symmetry of the rules governing such paper. However, we find the question presented has been variously decided by the different courts of the country; and, if there is anything at present uncertain, it is the negotiability of such an instrument. The following cases affirm the negotiability of such paper: *Smith v. Kendall*, 9 Mich. 242; 80 Am. Dec. 83; *Johnson v. Frisbie*, 15 Mich. 286; *Leggett v. Jones*, 10 Wis. 35; *Morgan v. Edwards*, 53 Wis. 599; 40 Am. Rep. 781; *Bradley v. Lill*, 4 Biss. 473; *Price v. Teal*, 4 McLean, 201; *Wittle v. Hide etc. Bank*, 7 Tex. Civ. App. 616; *Hastings v. Thompson*, 54 Minn. 184; 40 Am. St. Rep. 315; *Grutacup v. Woulluisse*, 3 McLean, 581. On the other side of this question are the following cases: *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Read*

v. McNulty, 12 Rich. 445; 78 Am. Dec. 467; Savings Bank v. Strother, 28 S. C. 504; Palmer v. Fahnestock, 9 U. C. C. P. 172; Saxton v. Stevenson, 23 U. C. C. P. 503; Bank v. Newkirk, 2 Miles, 442; First Nat. Bank v. Bynum, 84 N. C. 24; 37 Am. Rep. 604; Russell v. Russell, 1 MacAr. 263; Fitzharris v. Leggett, 10 Mo. App. 529; Hughitt v. Johnson, 28 Fed. Rep. 865; Windsor Sav. Bank v. McMahon, 38 Fed. Rep. 283; Flagg v. School Dist., 4 N. Dak. 30; Bank v. Goode, 44 Mo. App. 129; Caset v. Kirk, 4 Allen (N. B.), 543; Nash v. Gibbon, 4 Allen (N. B.), 479. Turning to the text-writers, we find that Randolph, in his work on Commercial Paper, at section 200, Daniel, in his treatise on Negotiable Instruments, at section 54, and Tiedeman on Commercial Paper, at section 280, affirm the negotiability of ¹⁹¹ such papers; while Benjamin's Chalmers on Bills and Notes, at page 18, Parsons on Notes and Bills, at page 38, and perhaps others, deny it. Some of the cases cited relate more particularly to the question as to whether instruments in form of promissory notes, with such a stipulation, are promissory notes under the statute of Anne (1705), or not, and some of them to the negotiability of such instruments. The only English case we have been able to find, having any bearing upon the case, is Pollard v. Herries, 3 Bos. & P. 335, where an instrument "payable in Paris, or, at choice of bearer, at Union Bank in Dover, or at payee's usual place of residence in London, according to the course of exchange upon Paris," was declared on, and treated as a promissory note. Here is most deplorable uncertainty. Probably, the greater number of cases deny the negotiability of such instruments. And, if the weight of authority were to be determined by the number of cases, no doubt it would be found to be on the negative side of the question. But such is not the true method of determining the preponderance. It becomes our duty, then, to try and untangle this maze, and solve the puzzle upon principle, in the light of the better-reasoned cases.

"A bill of exchange is an open letter by one person to a second, directing him in effect to pay absolutely, and at all events, a certain sum of money, therein named, to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to bearer, and to the drawer himself": Daniel on Negotiable Instruments, sec. 27. And it is among the fundamentals that such an instrument must be certain as an engagement to pay, as to fact of payment, amount to be paid, and must be for payment of money only. One of the most essential

elements in it is, that it must be certain as to the amount to be paid. And this certainly must appear upon the face of the ¹⁸² paper, and not from anything dehors the instrument. The maxim, "Id certum est quod certum reddi potest," does not apply, except that the certainty required may be ascertained from the face of the paper. With these rules as our own guide, we think the agreement to pay a certain sum at a particular place, when the acceptor lives at a different one, "with exchange," introduces an uncertainty as to the amount to be paid, which destroys the character and negotiability of the instrument as a bill of exchange. If it were true that there was at all times a certain, definite, and unchangeable rate of exchange, then there would probably be no uncertainty in the instrument. But it is a fact well known to the business world that there is no such fixed and unchangeable rate. Indeed, the rate charged for exchange is oftentimes a financial barometer, indicative of the state of the money market. He who was an observer of the financial world during the year 1893 could not have failed to observe the varying rates charged for exchange during the panic which was upon us at that time. Moreover, it is well known that rates of exchange vary in the different localities, and oftentimes in the same locality. Here, then, an element of uncertainty is introduced into this bill of exchange, and the amount to be paid by the acceptor will never be known until he applies for his draft at such point as he may happen to be when the instrument is due. Again, neither the state of the money market, the condition of the bank and its account with its correspondent, nor the rate of exchange in the particular locality, can be determined until the time for payment arrives. In all the cases affirming the negotiability of instruments of this kind, these facts are practically conceded, and the only answer offered is, first, that a custom has lately grown up among banks to treat such instruments as negotiable, and that such custom should ¹⁸³ be regarded and recognized. It is sufficient to say, in reply, that we have never understood that the customary understanding of the law, no matter how general, changed the law itself. There would be some force in the position, if it appeared that there was a uniform custom in the business to charge a fixed and certain rate of exchange between all places, depending simply upon the amount called for by the bill. But such is not the case. It has also been said, second, that the amount of exchange, when any is charged, is so inconsiderable that such a provision ought not to destroy the character of the instrument. We cannot lend our approval to this doctrine.

It is exceedingly unsafe to permit innovations upon well-settled rules of law. To do so would lead to "evils we know not of." We had better endure the hardships incident to a strict construction of the rules applicable to commercial paper, than tolerate an innovation which may lead to untold evils. It is of the utmost importance to the business world that the fixed rules with reference to commercial paper shall be preserved in their rigor and integrity. Another argument in support of the character and negotiability of such paper is that, when the acceptor is called upon to pay exchange upon a particular place, it is no more, in effect, than a requirement that the paper be paid at the place on which exchange is to be paid. But this is clearly unsound. As said by Mr. Justice Corliss in *Flagg v. School Dist.*, 4 N. Dak. 30: "There is a marked difference, both to debtor and creditor, with respect to the amount to be paid and received, between cases where the paper is payable at one place, with exchange on another, and cases where the paper is payable, without exchange, at the last-named place. Suppose, when the money is payable in this state, the creditor wishes to use the money here. He is doubly benefited by the provision to pay here, with New York¹⁰⁴ exchange. Had the paper been payable in New York, without exchange, he might be compelled to pay exchange on some western point, to bring the money to this state. But, by having it paid here, he saves this sum, and, in addition, places in his pockets the amount of New York exchange paid him by the debtor. In times of great financial fright, like those through which we have been passing, the difference might be equal to a considerable sum. Nor is the effect the same upon the debtor. Should his money be in New York, he must pay the cost of bringing it west, and also pay the creditor the further cost of sending it back, although the creditor may not desire it remitted, whereas, had the debt been payable in New York, without exchange, he would have saved both of these items of exchange." We have, as we think, sufficiently answered all arguments, worthy of the name, made in support of the negotiability of such instruments. And, while we do not think them utterly devoid of strength, our judgment is, that they are untenable.

The decisions cited in support of the negotiability of such instruments are all based upon one or the other of the arguments we have attempted to answer. Some of them, however, we do not regard as authorities for the position they are cited to sustain. In the case in 9 Michigan there was a strong dissenting opinion by Justice Campbell, which we regard as stating the

better law. In addition to this, the note in that case was dated in New York, and payable in New York, "with current exchange on New York." The words quoted were superfluous and surplusage. The court correctly decided the case, but, to our minds, gave a wrong reason: See *Hill v. Todd*, 29 Ill. 101, and *Clauser v. Stone*, 29 Ill. 114, 81 Am. Dec. 299, which are directly in point on this last proposition. The case in 15 Michigan simply followed the one in 9 Michigan, ¹⁹⁵ the opinion being written by the Justice Campbell who dissented in the first case. In a much later case, *Cayuga Co. Nat. Bank v. Purdy*, 56 Mich. 6, that court said: "The modern tendency to interpolate into such instruments engagements and stipulations not recognized by the law merchant, affecting certainty as to amount due, . . . should be discountenanced, and held to destroy their negotiability, and deprive them of the character of promissory notes. And they should be relegated to the domain of ordinary contracts." The remarks of the court in the Wisconsin cases were clearly obiter, and so recognized in *Morgan v. Edwards*, 53 Wis. 599, 40 Am. Rep. 781. Neither case is an authority on the question. The case in 4 Bissell is, in its arguments and illustrations, so manifestly unsound that no further attention need be given it. The case from Minnesota (*Hastings v. Thompson*, 54 Minn. 184, 40 Am. St. Rep. 315), is the only one to which we have access which is supported by argument of any force. But we cannot accede to the doctrine there announced. It is said, however, by appellant's counsel, that we have recognized the negotiability of such instruments in the cases of *Sperry v. Horr*, 32 Iowa, 184, and *First Nat. Bank v. Dubuque etc. Ry. Co.*, 52 Iowa, 378; 35 Am. Rep. 280. We do not think so. In the first case, we call attention to the conflict in the authorities on the subject, and expressly refrain from deciding the question. In the last case cited, the question was neither involved nor decided.

It is further insisted that the clause is similar in its nature to a stipulation to pay an attorney's fees for collection, and that, as we have held a note with such a stipulation negotiable, a fortiori, should we hold the bill in suit negotiable. The distinction between the two provisions is accurately pointed out in the case of *Sperry v. Horr*, 32 Iowa, 184. In that case it is said: "The agreement for the payment of attorney fees in no sense ¹⁹⁶ increased the amount of money which was payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not

become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection, than to the sum the maker is bound to pay": See, also, *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273; 48 Am. St. Rep. 381. The distinction between such an agreement and one to pay a certain amount, with exchange, is so marked that we need not do more than rest upon this quotation.

Lastly, it is insisted that our statutes have changed the rules of the law merchant. The sections of the code relied upon are as follows:

"Sec. 2082. Notes in writing made and signed by any person promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange according to the custom of merchants."

"Sec. 2085. Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor, or money to be due to another are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words 'order' or 'bearer,' alone, will not manifest such intent."

The first section is a re-enactment of the statute of Anne, before referred to, giving to promissory notes the same character as bills of exchange under the law merchant. It has no application to this case. Section 2085 has been in force ever since 1851, and it has ¹⁹⁷ uniformly been held that a bill of exchange or promissory note, to be such, and to be possessed of the attributes of negotiability under the law merchant, must be certain as to payor, payee, amount, time, and place of payment: *Smith v. Marland*, 59 Iowa, 649; *Gordon v. Anderson*, 83 Iowa, 224; 33 Am. St. Rep. 302; *Bank v. Taylor*, 67 Iowa, 572; *Woodbury v. Roberts*, 59 Iowa, 348; 44 Am. Rep. 685; *Hollen v. Davis*, 59 Iowa, 444; 44 Am. Rep. 688; *Miller v. Poage*, 56 Iowa, 96; 41 Am. Rep. 82. So it has been held that a note payable "in currency," or "in current funds," is not prima facie negotiable: *Rindskoff v. Barrett*, 11 Iowa, 172; *Huse v. Hamblin*, 29 Iowa, 501; 4 Am. Rep. 244. So we think that, even should it be held that this statute is applicable to the case, yet certainty in amount is essential to establish the character and negotiability of a bill or note. Such a holding in no way conflicts with the rule announced in the case of *Council Bluffs Iron Works v. Cuppey*, 41

Iowa, 104. It may further be added, in this connection, that if the words "with exchange" appearing in the instrument in suit destroy its negotiability under the law merchant, then there is nothing to indicate that it was the intention of the defendant to make it negotiable, except the use of the word "order"; and this, under the statute, will not, alone, manifest such intention. The use of the words "value received" is not indicative of an intention on the part of the acceptor to make the bill negotiable. Lord Denman said in the case of *Hatch v. Traves*, 11 Ad. & E. 702: "The words 'value received' express only what the law must imply from the nature of the instrument, and the relations of the parties apparent upon it": See, also, *Osgood v. Bringolf*, 32 Iowa, 265; *Daniel on Negotiable Instruments*, sec. 108; *Townsend v. Derby*, 3 Met. 363; *Arnold v. Sprague*, 34 Vt. 402; *People v. McDermott*, 8 Cal. 288; *Hughes v. ¹⁹⁸Wheeler*, 8 Cow. 77; 1 *Parsons on Notes and Bills*, 193. See, also, as directly in point, *McCartney v. Smalley*, 11 Iowa, 85, and *Peddycord v. Whittam*, 9 Iowa, 471. "Where a bill is drawn payable to the order of a third person, the use of the words 'value received,' in the body of the bill, is ambiguous. They may mean either value received by the acceptor from the drawer, or by the drawer from the payee. But the latter is the more natural and probable construction, for, as said by Lord Ellenborough, it is more natural 'that the party who draws the bill should inform the drawee of a fact which he does not know, than one of which he must be well aware': *Daniel on Negotiable Instruments*, sec. 108.

We think the lower court was right, both in its findings of fact and conclusions of law.

Affirmed.

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—STIPULATION FOR EXCHANGE AS AFFECTING.—The doctrine of the principal case, that a stipulation in an otherwise negotiable instrument for the payment of exchange destroys its negotiability, is upheld by *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742, and note; *Read v. McNulty*, 12 Rich. 445; 78 Am. Dec. 467; *Nicely v. Commercial Bank*, 13 Ind. App. 563; ante, p. 245. The contrary is held by *Hastings v. Thompson*, 54 Minn. 184; 40 Am. St. Rep. 315, and *Smith v. Kendall*, 9 Mich. 241; 80 Am. Dec. 83.

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—USE OF WORDS "FOR VALUE RECEIVED" AND "TO ORDER."—To make an instrument negotiable the words "for value received" are not necessary: *Franklin v. March*, 6 N. H. 364; 25 Am. Dec. 462; *Hubble v. Fogartie*, 8 Rich. 413; 45 Am. Dec. 775. See, also, extended note to *Currier v. Lockwood*, 16 Am. Rep. 43, discussing this subject, and the note to *Woolley v. Sergeant*, 14 Am. Dec. 421.

MOHLER v. SHANK.

[93 IOWA, 278.]

MARRIAGE AND DIVORCE—DIVORCE OF INSANE PERSON.—The guardian of an insane person cannot maintain an action for divorce on behalf of his ward, and a decree in such action is void.

MARRIAGE AND DIVORCE—VOID DIVORCE—ESTOPPEL.—A woman who accepts the benefits of a void decree of divorce, and remarries before the death of her former husband, cannot, upon his death, claim any part of his estate.

C. E. Richards and S. McPherson, for the appellant.

J. M. Junkin and Harl & McCabe, for the appellees.

274 ROTHROCK, J. 1. The two causes involve the same questions, and they will be disposed of in one opinion. The facts are not the subject of dispute, and are, in substance, as follows: Anthony Shank and Mary A. Temple (now Mohler) were married on the first day of January, 1865, at the city of Red Oak, in Montgomery county. They lived together as husband and wife, in said county, until the year 1873, when said Anthony Shank, upon inquest duly held, was adjudged to be insane, and was placed in the insane hospital at Mt. Pleasant, in this state, where he was under treatment as a patient until the year 1881, when he was removed to Mercy Hospital, at Davenport, where he remained until his death, which occurred in 1892. He was insane from the time he was so adjudged until his death. Soon after his removal to Mt. Pleasant, his wife was appointed his guardian by the circuit court of Montgomery county. Afterward, and in 1881, she was, by order of the proper court, removed from said guardianship, and another guardian was appointed. Her removal was ordered on the ground that she mismanaged the property of her ward. A judgment for some two hundred dollars was rendered against her and the sureties on her bond, as money due from her in the matter of said guardianship. In the month of January, 1884, T. H. Alexander, then guardian of said Anthony Shank, commenced a suit for divorce in the circuit court of Montgomery county against the said Mary A. 275 Shank, in behalf of his ward, based upon the ground of adultery. An original notice was duly served upon the defendant in that suit, and she appeared to the action, and filed a demurrer, one ground of which was that the court had no jurisdiction of the subject matter of the suit, for the reason that the alleged adultery occurred after the plaintiff became insane, and that a guardian could not procure a divorce for an insane

person. The demurrer was duly submitted to the circuit court, and was overruled. The defendant excepted to the ruling, and elected to stand on her demurrer. A default was entered against her, for want of an answer, and evidence was introduced, and a decree of divorce was entered of record. Before the decree was entered, the parties to that suit made and signed the following agreement:

"ANTHONY SHANK, by Guardian }
 v. }
MARY A. SHANK. }

ACTION FOR DIVORCE.

The parties hereto agree as follows: 1. That if said court, or the supreme court, on appeal, shall hold or decree that plaintiff, Anthony Shank, is entitled to a decree of divorce from the bonds of matrimony between the said Anthony Shank and Mary A. Shank, then the plaintiff shall immediately pay to the defendant four hundred dollars, and shall also pay off and discharge the bills of Mohler, Brown & Co., for three hundred and thirty-one dollars, and H. Roberts & Son, for seventy dollars, against said Mary A. Shank, and shall fully release and discharge defendant and her bondsmen by reason of all acts of the defendant; and during the pendency of this action in this court, or the supreme court, the said judgment in circuit court against defendant and her bondsmen shall bear no interest, and a final decree in this case in favor of plaintiff shall cancel said judgment, of itself; 2. Said payments so made shall be in full of any and all claims, of any and every kind, for alimony, both temporary and permanent, and said decree of ²⁷⁶ divorce, and the decree for said payments, aforesaid shall be a bar absolute against defendant, barring and estopping defendant from ever claiming any dower or other interest in the property or estate of Anthony Shank, either while he is living, or after his decease, and shall also fully settle all allowances made by this court heretofore to Mary A. Shank or her attorneys, and the same shall be canceled; 3. This case shall be prosecuted with the utmost diligence to a conclusion, and, if said decree of divorce shall be denied, then this agreement shall be void.

Witness our hands, January 30, 1884.

(Signed) ANTHONY SHANK,
By T. H. Alexander, Guardian.
MARY A. SHANK.

The decree of divorce recognized this agreement, and it contained the following provisions in reference to the property

rights of the parties: "It is further decreed that the defendant is hereby forever barred and estopped and cut off from having or claiming any right to dower or other estate, or to any part of the property, either real or personal, of the said Anthony Shank, that he now has or may hereafter acquire, or to his said estate or property, or any part thereof, that he may own at the time of his death; that plaintiff has all the rights of an unmarried man. It is further ordered that, as alimony, both temporary and permanent, in full therefor, that plaintiff pay in cash to defendant four hundred dollars; that plaintiff pay a bill contracted by defendant with Mohler, Brown & Co., of three hundred and thirty-three dollars, and a like bill, of seventy dollars, to H. Roberts & Son, and that a judgment of two hundred and eleven dollars, rendered by this court at late January, 1884, term, in a case wherein T. H. Alexander, guardian of Anthony Shank, was plaintiff, and Mary A. Shank, E. Temple, William Painter, and William Archer were defendants, be and the same is hereby satisfied in full, ²⁷⁷ and canceled, and all other claims of defendant for support are hereby barred; and that execution issue therefor." The amounts provided for in the agreement and decree were promptly paid to the defendant, and the judgment satisfied in full, so that the defendant was allowed and received something more than one thousand dollars. There is no claim made that there was not sufficient cause for a divorce. On the contrary, it is conceded that Mrs. Shank (now Mrs. Mohler) was delivered of a bastard child on the seventh day of August, 1881, more than two years before the action for divorce was commenced; and on the twenty-second day of July, 1884, a marriage license was duly issued to Mary A. Shank and J. L. Mohler, and they were married on the same day. Mrs. Shank-Mohler testified as a witness, in part, as follows: "There were no children born to Anthony Shank and me. There was a child born August 7, 1881. That child was not Anthony Shank's child. This child that I have just spoken of was the child of my present husband, J. L. Mohler."

2. The appellee founds her claim to a distributive share of the estate upon the ground that when Anthony Shank died she was his lawful widow. In other words, the contention in her behalf is, that the decree of divorce is absolutely void, because the circuit court had no jurisdiction to entertain the divorce proceeding and enter a decree; the husband in whose behalf the jurisdiction of the court was invoked being at the time insane, and his guardian having no lawful power or authority to commence or maintain the action for divorce. It is

conceded that the suit was commenced in the proper county, that service of the original notice was duly had, and that the defendant therein appeared. No question is made as to the form of the decree, and as to the reasonableness of the amount of alimony allowed the defendant; and, although the ²⁷⁸ defendant entered into marital relations with Mohler long before the death of Shank, she insists that she is the widow of Shank. She does not attack the decree directly, and demand that it be set aside and vacated; but she insists that it is void, and should be disregarded by the court, because no right can be predicated thereon by the lawful heirs of Shank. The heirs of Shank maintain that the decree is not void, that there was no defect as to the party plaintiff, and that the guardian had the legal right to maintain the action for divorce. The statutes of this state on the subject of divorce and guardianship are referred to in argument as sustaining this view. It is unnecessary to cite the sections of the code relied upon by counsel. They contain no such authority, neither expressly nor by implication. On the contrary, we think that they plainly imply that such a proceeding is not authorized. Section 2222 of the code requires that the petition for divorce "must be verified by the oath of the plaintiff." It is true that this requirement is not jurisdictional: See *McCraney v. McCraney*, 5 Iowa, 232; 68 Am. Dec. 702; *Ellis v. White*, 61 Iowa, 644. But the fact that the statute requires the oath of the plaintiff, and provides for no substituted verification, as in other cases, tends strongly to show that the legislative intent was that an action for divorce should be prosecuted by the injured party, in his or her personal capacity. Other features of the statute are called to our attention, which, it is urged, indicate the legislative intent that the guardian of an insane person may maintain an action for divorce. We do not regard it as necessary to discuss that line of argument. We think that the want of such authority is so apparent as to leave no reasonable ground for debate. It was held in *Douglass v. Douglass*, 31 Iowa, 421, that where a husband willfully deserted his wife ²⁷⁹ while he was sane, she was entitled to a divorce, notwithstanding he became insane during the statutory period of two years. And in *Wertz v. Wertz*, 43 Iowa, 537, it was held that insanity occurring after marriage does not constitute ground for divorce. These cases do not control the question now under consideration. It is true that in the *Douglass* case a divorce was allowed against a party who was insane when the decree was entered. But the cause for divorce had its inception while the party was sane. It may further be

said that the question whether the action may be maintained where the defendant is insane involves materially different considerations than in a case where the person in whose behalf the action is sought to be maintained is a guardian of an insane person. The marriage contract, by which two persons assume the relation of husband and wife for their joint lives, is a personal status, or condition entered into by the parties alone. No guardian or parent or next friend can, by any means known to the law, effectuate a marriage between his ward or child and another. The relation depends upon the free and voluntary consent, and the active and affirmative will, of the parties. And it appears to us that a guardian of an insane person has no more right to maintain an action to dissolve the marriage relation of his ward than he has to manage and control his will in the matter of entering into the relation. The wrongs which may be committed by a husband or wife are not, of themselves, sufficient to dissolve the bonds of matrimony. The injured party, if insane, may, upon recovering his or her reason, condone the wrong, or continue the marriage relation notwithstanding the delinquencies of the other party. If Anthony Shank had recovered his reason, and, upon returning to his home, found that his wife had committed adultery, and was the mother of an illegitimate child, it would have been his ²⁸⁰ right to condone the wrong, or put her away by an action for divorce. In the absence of some statutory authority, no other person could exercise that right for him. As he was insane, and never restored to sanity, the circuit court had no jurisdiction to entertain an action for divorce, commenced in his behalf by his guardian: *Birdzell v. Birdzell*, 33 Kan. 433; 52 Am. Rep. 539; *Worthy v. Worthy*, 36 Ga. 45; 91 Am. Dec. 758; *Bradford v. Ahend*, 89 Ill. 78; 31 Am. Rep. 67; 2 Bishop on Marriage and Divorce, sec. 306 a. Counsel for appellants, so far as the question of jurisdiction depends on authority, rely mainly on the case of *Baker v. Baker*, 6 Prob. Div. 12. It is to be conceded that the English law of divorce is much like our own statute, and that in the cited case it was held that a guardian of an insane person might maintain an action for divorce in behalf of his ward. We have given the case a careful examination, and have to say that we cannot bring ourselves to approve the rule therein announced.

2. We come now to a consideration of the question as to the effect or force of the decree for divorce under the admitted facts of the case. We have found that the decree was void. It has often been said that a void judgment is no judgment; that it may

be attacked directly or collaterally. Freeman, in his work on Judgments, uses this language: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void." This is true, in a general sense; yet, notwithstanding, a party to such a judgment may voluntarily perform it, by paying the amount adjudged against him, and, when paid, no inquiry will be made as to the validity of the judgment; or he may perform the acts required by a void ²⁸¹ decree, or accept its benefits, and thereby estop himself from questioning the decree. In other words, a party to a void judgment or decree may be estopped from attacking it either directly or indirectly. Suppose a judgment is for a money demand, justly due, and the record shows that it was rendered without having jurisdiction of the person of the defendant by the service of process upon him, and he voluntarily satisfies the judgment. That is an end of the controversy. In the case of *Arthur v. Israel*, 15 Colo. 147, 22 Am. St. Rep. 381, the wife, without cause, deserted her husband and home, and lived for years in adultery, and afterward learned that a divorce had been procured by her husband; and she caused a marriage ceremony to be performed with her paramour, and continually lived and cohabited with him until the death of her husband. It was held that she could not take advantage of the fact that the decree of divorce was void, for want of service of process, and successfully assert against the heirs her right under the statute to the estate of the deceased husband, as his widow. The case at bar presents more cogent reasons for the application of the doctrine of estoppel. In this case the wife was not ignorant of the application for divorce, when it was made. She was made a party, and appeared in the action; and after the decree was entered she accepted the alimony which she agreed to receive, and procured a license, and married her paramour, long before the death of Anthony Shank. She accepted all the benefits of the decree, without reserve, and recognized its validity by contracting and consummating a marriage with Mohler. There could have been no more complete acceptance of the benefits of the decree. In the cited case, the court said: "We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as ²⁸² if she had received the proceeds of a void judgment for money. By her subsequent marriage with

Israel during Arthur's lifetime, she accepted, so far as was within her power, the benefits or privileges of the divorce decreed. The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance, in this respect, of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law. That at the time of her marriage with Israel she understood the decrees to be valid is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow. Besides, had she believed them void, her obliquity would be even deeper than it is; because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage." In *Ellis v. White*, 61 Iowa, 644, where plaintiff procured a divorce and alimony upon petition which she afterward claimed did not give the court jurisdiction, it was held that, whether the court had or had not jurisdiction, she, having accepted the benefits of the decree, could not be heard to question the jurisdiction of the court to render it. The same principle is announced in *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623, and in *Odiorne's Appeal*, 54 Pa. St. 175; 93 Am. Dec. 683. And a like rule is to be found in the cases of *Stephens v. Stephens*, 51 Ind. 542; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Richeson v. Simmons*, 47 Mo. 20; *Baily v. Baily*, 44 Pa. St. 274; 84 Am. Dec. 439; *Bourne v. Simpson*, 9 B. Mon. 454. This exception to the doctrine that a judgment or decree entered without jurisdiction is absolutely void is founded upon the plainest principles of justice. As applied to the case at bar, it is but the enforcement of the legal maxim that the law will not permit a person to take advantage of his own wrong.

²⁸³ We can discover no reason why Mrs. Mohler should be allowed to masquerade in a court of justice as the widow of Anthony Shank, and at the same time claim that she was the wife of Mohler for about eight years before Shank died. Both the law and good morals forbid it. Having accepted the divorce as valid, in the way she did, she should be held to be estopped from maintaining any claim to any part of the estate of her former husband. The conclusion we have reached in this case on the question of estoppel is not directly supported by decisions of this court, but it appears to us that it is in harmony with modern legislation upon the relation of husband and wife: See Code, c. 2, tit. 15. The rights of a wife in her property, and her capacity to contract with reference thereto, are plainly conferred

upon her. Section 2213 is as follows: "Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried." She cannot enter into a contract to divorce herself from her husband. But we discover no reason why the law of estoppel may not be applied to her acts in a case like this.

The decree in the suit in equity, and the order sustaining the claim for a distributive share in the estate, are reversed.

Deemer, J., took no part in the decision of this case.

MARRIAGE AND DIVORCE—DIVORCE OF INSANE PERSON AT INSTANCE OF GUARDIAN.—It is now established by the weight of authority, both in this country and in England, that a suit for divorce may be prosecuted by or against the guardian or committee of an insane person, where the act for which the divorce is sought was committed by the defendant before he or she became insane: Extended note to *Kimball v. Kimball*, 82 Am. Dec. 200, which discusses the opposing authorities. See, also, *Crump v. Morgan*, 3 Ired. Eq. 91; 40 Am. Dec. 447, and note. Contra, *Worthy v. Worthy*, 36 Ga. 45; 91 Am. Dec. 758.

MARRIAGE AND DIVORCE—DIVORCE—EFFECT OF REMARRIAGE.—A party against whom a decree of divorce has been granted cannot, after his subsequent marriage with another, prosecute an appeal. By his marriage after divorce he admits the legality of the divorce proceedings. This principle will evidently apply where, after a divorce, the libelee or defendant marries and then seeks to vacate or annul the decree of judgment: Extended note to *Greene v. Greene*, 61 Am. Dec. 465. See note to *Brown v. Grove*, 9 Min. St. Rep. 826; also, *Carr v. Carr*, 92 Ky. 552, 36 Am. St. Rep. 614, and *Simpkins v. Simpkins*, 14 Mont. 386; 43 Am. St. Rep. 641.

RHOADES v. LEACH.

[98 IOWA, 337.]

NEGOTIABLE INSTRUMENTS—ALTERATION OF NOTE BY ADDITION OF NAME AS MAKER.—The addition of the name of another maker to a note after its delivery discharges the prior makers not assenting thereto, and the person so signing the note makes it his own, and he is liable thereon, although one of the released makers is dead and another has allowed judgment to be taken against him.

I. C. Fenninger and Taylor & Evans, for the appellant.

Luke & Johnston, for the appellees.

³³⁷ ROTHROCK, J. The issue presented by the answer was founded upon the following facts: The plaintiffs are dealers in buggies, and had in their employ a traveling salesman, named Kelly. Kelly appeared at the farm of J. C. Leach, and had a

buggy with him, which he proposed to sell to Leach. Leach did not purchase the buggy, but made a contract by which he exchanged his old buggy for the new one, and gave the promissory note in suit for the agreed difference of the value of ³³⁸ the two vehicles. The note was signed by J. C. Leach, and said E. E. Leach, and by Gillett, the appellant. J. C. Leach has since died insolvent. E. E. Leach is his son, and Gillett is his nephew. The transaction occurred in the year 1886. It is averred in the answer that the exchange of the buggies was a transaction wholly between Kelly, the agent of plaintiffs, and J. C. and E. E. Leach; and that after the sale or exchange "was fully consummated, and the buggy delivered to the said Leach, and without any agreement whatever between the said Leaches and the plaintiffs that a surety would be required or given, he, the defendant, at the request of the plaintiffs, signed said note, without knowing the contents of the same, and that he signed the same without any good or valuable consideration whatever." There is no claim by the plaintiffs that they are not bound by the acts and declarations of Kelly at the time the transaction occurred. He died before the trial in the district court. The jury found, in answer to special interrogations submitted at the request of the plaintiffs, that Gillett signed the note after J. C. Leach took possession of the new buggy, and that his signature was affixed without the knowledge or consent of said Leach. It is urged in behalf of appellant that there was not sufficient evidence to authorize the finding that Leach took possession of the buggy, and that thereby the transaction was closed before Gillett signed the note, and counsel for appellees insist that the evidence did not support the finding that he signed the note without the knowledge or consent of Leach. The evidence is set out in full, the most of it by question and answer; and our examination of it satisfies us that the special findings ought not to be disturbed. The evidence was amply sufficient to sustain them.

³³⁹ 2. In connection with the special findings, the jury returned a general verdict for the defendants. The main point discussed by counsel for appellant is, that the court erred in overruling a motion for a judgment for the plaintiff on the special findings, notwithstanding the general verdict. Counsel state their proposition in this language: "It is the settled law of this state that the addition of the name of another maker to a note after its delivery, without the consent of the original parties, will discharge such prior makers not consenting thereto. But such additional maker will be held liable thereon as on a new note for

a sufficient consideration." The cases of *Dickerman v. Miner*, 43 Iowa, 508, *Hamilton v. Hooper*, 46 Iowa, 515, 26 Am. Rep. 161, and *Berryman v. Manker*, 56 Iowa, 150, are cited and claimed to be absolutely conclusive of the question. It is stated in argument that judgment upon the note was rendered against E. E. Leach; and it does not appear that J. C. Leach during his life at any time repudiated the note, or denied liability thereon; and that there was no loss or disadvantage to the payee of the note, because no advantage was taken by the previous signers of the note of their legal discharge from liability by reason of the signature of Gillett. The cited cases are in exact line with the claim made by plaintiff's counsel. The cases are placed upon the ground that the addition of another name to a note is a material alteration, which will discharge the original parties not consenting thereto, and without inquiry whether the alteration is injurious or beneficial to them, and that the person so executing the note makes it his own, and that it is, in effect, the execution of a new note. And this rule was followed in the late case of *Browning v. Gosnell*, 91 Iowa, 448, which, as we understand, is, in principle, precisely the same as ³⁴⁰ the case at bar. It is to be conceded that there is a conflict of authority on the question: See 1 Am. & Eng. Ency. of Law, 506. It is needless to review the cases. We do not feel at liberty to disturb the repeated decisions of this court without more controlling considerations than the facts in this case present. When the alteration was made, the other signers of the note were by that act discharged from liability, and we think the fact that one is dead and another allowed judgment to be entered against him in no manner affected the obligation undertaken by Gillett when he signed the note. The cases make no such an exception.

We doubt whether it was the duty of the court to ignore the general verdict, and enter up a judgment for the plaintiffs, founded on the special findings. But the instructions given to the jury, and instructions asked by plaintiff and refused, to which exceptions were taken by the plaintiff, in effect raise the same question, and for the errors therein contained the judgment of the district court is reversed.

ALTERATION OF INSTRUMENTS—NEGOTIABLE INSTRUMENTS—WHAT ALTERATIONS AVOID.—The addition to a joint and several note, signed by two persons as makers, of the name of another person, without the assent of one of the makers, is a material alteration avoiding the instrument: *Brownell v. Winnie*, 29 N. Y. 400; 86 Am. Dec. 314, and note; also, *Wallace v. Jewell*, 21 Ohio St. 163; 8 Am. Rep. 43. See, also, extended note to *Woodworth v. Bank of America*, 10 Am. Dec. 270, and *Erickson v. First Nat. Bank*, 44 Neb. 622; 48 Am. St. Rep. 753.

MERCHANTS' NATIONAL BANK v. CITIZENS' STATE BANK.

[93 IOWA, 650.]

GUARANTY OF DRAFT.—A guarantor of a draft is not liable thereon if the drawer rightfully refuses to accept the draft.

Wright & Baldwin, for the appellant.

Flickinger Brothers, for the appellee.

650 ROBINSON, J. In December, 1889, B. Arentz was engaged at Ocala, Florida, in the business of buying and selling oranges, and O. W. Butts was in the wholesale fruit and commission business in Council Bluffs, Iowa. Butts had ordered of Arentz a carload of oranges, which was shipped from Ocala to Council Bluffs, the bill of lading being taken in the name of Arentz. He drew a draft on Butts for five hundred and sixty dollars, the price of the oranges, payable to the plaintiff, a banking association organized under acts of Congress, and doing business at Ocala, Florida, at thirty days after sight. 651 Before the plaintiff took the draft, it required a guaranty of payment by a bank in Council Bluffs. Arentz notified Butts of the demand, and he induced the cashier of the defendant, a corporation of this state, to sign and send to the plaintiff a telegram, of which the following is a copy:

“Council Bluffs, Iowa, Dec. 11, 1889.

“To Merchants' National Bank, Ocala, Fla:

“Will guaranty Butts' draft for car oranges from B. Arentz.

“CITIZENS' STATE BANK,

“CHAS. R. HANNAN, Cashier.”

When the telegram was received, the plaintiff purchased the draft, taking the bill of lading, which was attached to it, and forwarded them for collection. The oranges arrived in Council Bluffs in bad order, and Butts refused to receive them, and refused to accept the draft. The defendant refused to pay the draft. Arentz is insolvent, and this action is brought against the bank on its guaranty. The answer of the defendant alleges that the guaranty was of the solvency and ability to pay of Butts; that the oranges were never delivered to him, and that he never accepted the draft, nor became a party to it; that the defendant is a corporation, and had no power to enter into a contract to guarantee the payment of a draft; and that there was no consideration for the guaranty. In a reply, the plaintiff alleged that it was

usual and customary for the defendant and for banks, where it was doing business, to make such guaranties; that, at the time the one in question was made, an arrangement had been entered into between the defendant and Butts by which he was to hold the defendant harmless on the guaranty, and that it had money and other property in its possession which belonged to him, of a value exceeding its possible liability on the guaranty; that by reason of these facts, the defendant is estopped to assert that the guaranty was executed without authority and without consideration. The appellant contends that ⁶⁵² the guaranty was authorized by the articles of incorporation of the defendant; that if it was not, the plaintiff was a good faith purchaser of the draft for value, and, as such, is entitled to protection; that as the reply was not assailed, an estoppel must be regarded as sufficiently pleaded; that the court erred in excluding evidence which tended to prove an estoppel, and erred in taking the case from the jury.

The appellant may be right in its claim in regard to these matters, and not be entitled to recover in this action. If it be conceded that the guaranty was valid, the question which remains to be determined is, whether it created any liability under the facts which the evidence tends to establish. As has been stated, the draft was for a carload of oranges, which were never received by Butts. The bill of lading was taken in the name of the shipper, Arentz, was transferred to the plaintiff, and was pinned to the draft when it was presented to Butts for acceptance. This must have been done to secure the payment of the draft. There was never any actual or constructive delivery of the oranges to Butts: *Forcheimer v. Stewart*, 65 Iowa, 596. They were worthless when they reached Council Bluffs. It was the duty of the consignor to deliver them in merchantable condition, and it cannot be claimed, under the evidence, that Butts was ever under any obligation to receive them. Therefore, he was not liable by reason of his refusal to accept the draft. The form of the undertaking of the defendant was that he would "guaranty Butts' draft for carload of oranges from B. Arentz." It was not to be a guaranty of Arentz' draft, nor of a draft drawn on Butts, and not accepted by him, but of one on which he was liable, drawn for a car of oranges. In view of the admitted facts in this case, the conclusion is irresistible that the defendant did not undertake to guarantee ⁶⁵³ the payment of anything for which Mr. Butts should not be liable. Its liability was not intended to be extended beyond his, and the form of the guaranty was suffi-



FIRST NATIONAL BANK v. WOODMAN.

[98 IOWA, 668.]

STATUTE OF LIMITATIONS—NEW PROMISE—EVIDENCE.—If letters are relied upon as containing a new promise arresting the operation of the statute of limitations, but leave doubt as to what debt is meant, parol evidence is admissible to show what debt is referred to, although the letters do not state the amount due.

STATUTE OF LIMITATIONS—NEW PROMISE—MORTGAGE NOTE AND LIEN.—An admission or new promise that suspends the operation of the statute of limitations on a mortgage note will keep alive the lien of the mortgage given to secure the indebtedness.

STATUTE OF LIMITATIONS—NEW PROMISE—MORTGAGES—PRIORITY.—If a mortgage, an action on which is apparently barred by the statute of limitations, remains uncanceled of record and has actually been revived by a new promise, the lien of such mortgage, in the absence of equities to the contrary, is superior to subsequent mortgages on the same property to secure antecedent debts.

Hubbard & Dawley, for the appellant.

Woodin & Son, J. P. Talley, N. B. Raymond, and C. H. Mackey, for the appellees.

670 GRANGER, J. 1. It will be seen from the statement of facts that the Kane debt, which is that of appellant, is barred by the statute of limitations, **671** because more than ten years elapsed after the maturity of the last note before action, and also before the mortgages of the banks and Redhead, Norton, Lathrop & Co. were taken. If the statute of limitations is available for these mortgages, the judgment is correct, unless the cause of action on the note and mortgage of Mrs. Howe had been revived. The revivor is claimed because of certain letters from the debtor, Howard, to Treat, who was at all times the agent for Mrs. Howe. The letters are as follows:

"J. B. Treat, Esq:

Inclosed find draft for \$50, for which please acknowledge receipt. The balance will be sent soon.

Yours respectfully,

J. Q. HOWARD."

"J. B. Treat: · **Sigourney, Iowa, Dec. 8, 1886.**

Inclosed find draft for \$45.20, balance of interest on notes to July 1, 1886. Please excuse delay, as I have been waiting on

sale of produce from farm, but will wait no longer, and therefore send you the amount to-day.

Yours respectfully,

J. Q. HOWARD."

"J. B. Treat, Esq:

Sigourney, Iowa, Dec. 6, 1887.

Inclosed find draft for \$45.20, to pay balance of interest.

Thanks for waiting.

Yours respectfully,

J. Q. HOWARD."

"J. B. Treat, Esq:

Sigourney, Iowa, June 6, 1888.

Inclosed find draft for \$50.00, to pay interest on note. Will pay balance as soon as I can.

Yours respectfully,

J. Q. HOWARD."

"J. B. Treat, Esq:

Sigourney, Iowa, June 14, 1888.

Inclosed find \$45.20 draft, to pay balance of interest on notes to July 1, 1888.

Yours respectfully,

J. Q. HOWARD."

"J. B. Treat, Esq:

Sigourney, Iowa, Nov. 18, 1889.

I hope to be able soon to pay the interest. I am very sorry that it has not been paid. Now, I expect money from different parties. It may not come for six ^{or} weeks, and it may come any day. I will have to ask your favor to wait a little longer. Will certainly send it as soon as I can, some or all of it; and I hope also, if possible, to pay the principal, if successful in my projects.

Yours respectfully,

J. Q. HOWARD."

A difficulty with these letters seems to be in knowing to what debt they refer. That they refer to a debt evidenced by a note is not to be doubted. That fact appears from the language of the letters, but the letters do not identify the particular note or notes in a way to say, from the letters themselves, that they amount to an admission or promise as to a particular debt. Appellant offered to show by Mr. Treat, who received the letters and applied the payments, to what debt they referred. His testimony shows that he resides in Monroe, Wisconsin, where Mrs. Howe resided in her lifetime; that he was administrator of her husband's estate, and negotiated, on behalf of Mrs. Howe, the purchase of the Kane notes and mortgage; that she paid the full

face value for them; that except for one month, until delivery for this suit, they were in his possession, as the agent for Mrs. Howe; that they were the only notes held by him, made by Howard; and that he received the letters offered in evidence, and applied the remittances contained in them on the notes in suit. By this testimony, the identity of the notes, referred to in the letters, is conclusively established. But it is said the testimony is not competent for such a purpose. That such testimony is competent has support in *Wise v. Adair*, 50 Iowa, 104, *Stout v. Marshall*, 75 Iowa, 498, and *Miller v. Beardsley*, 81 Iowa, 720. It is conceded that these cases so hold, but it is urged that the holdings are erroneous, and in conflict with *Parsons v. Carey*, 28 Iowa, 431, and *Collins v. Bane*, 34 Iowa, 385. We see nothing in either of those cases not in entire harmony with the rulings in the ⁶⁷² other cases. The question considered in *Parsons v. Carey*, 28 Iowa, 431, is as to the effect of a particular payment in arresting the operation of the statute of limitations. That is not the question we are considering, nor do the cases said to embody the erroneous rule treat the question as to the effect of a payment on the statute of limitations. While the letters relied on as containing the requisite admissions and promises to revive the cause of action are, mostly, those of remittances, it is not the fact of payment that is relied on, but the statements in the letters signed by the party. In *Collins v. Bane*, 34 Iowa, 385, we think the rule of the three cases said to be erroneous has express recognition or sanction. In that case, in commenting on the admissibility of parol evidence to explain a letter relied on as reviving the cause of action, it is said, upon the authority of 1 Greenleaf on Evidence, sections 277, 282, 290, that it is a well-settled rule that parol evidence "is admissible to show the subject matter referred to, the person intended, and the surrounding circumstances of the author of the instrument." The rule thus stated is liberal. It permits parol evidence to show the person, the subject matter, and the surroundings. Nothing more was done by Treat in this case. At least, his testimony is not important to a greater extent. What was doubtful in the letters was the subject matter—the debt. *Collins v. Bane*, 34 Iowa, 385, refers to *Penley v. Waterhouse*, 3 Iowa, 418, where a similar rule is recognized. It is, however, said as to the *Penley* case that the holding was under a different statute. The statutes, then and now, differ only in this: that the present statute requires that the admission or promise to arrest its operation shall be in writing, signed by the

party. If, as the statute then was, extraneous evidence could be used to enable the jury to apply the particular verbal statements relied on to revive the action, we do not see why they may not as well be used under the ⁶⁷⁴ present law for the same purpose. That seems to have been the thought in the Collins case, which, being under the present statute, refers to the Penley case, as sustaining the conclusion announced. Appellee quotes from the Collins case the fifth division of the opinion, as follows: "The plaintiff introduced the defendant as a witness, and he testified that the debt referred to in the letters written by him was the note in controversy, etc. This testimony the court also rejected as incompetent. There was no error in so doing. The statute requires the admission to be in writing; parol evidence is not competent to prove it." This is relied upon as holding a different rule from that of *Wise v. Adair*, 50 Iowa, 104, and other cases. Such a construction of the language quoted would place it in conflict with other parts of the opinion. But, it may be said, what does it mean? We think it means this: that, as testimony from the defendant, or party to be bound by the promise or admission, it would amount to a verbal admission or promise by him. The concluding words of the quoted division show our conclusion to be correct. It is there said: "The statute requires the admission to be in writing; parol evidence is not competent to prove it." That is the only argumentative language in support of the ruling, and leaves no doubt as to the reasoning of the court. Such testimony from other witnesses could not be considered as admissions or promises. The authorities outside of this state are in conflict, but we think the weight of them, and the reasoning, support the holding in this state. We think the testimony is proper for consideration.

2. We are next to determine whether or not the letters, aided by verbal proofs, are sufficient to revive the cause of action as between the maker of the notes (Howard) and appellant. With the verbal testimony to show to what "notes" and "debts" the letters refer, ⁶⁷⁵ we think there is no room for doubt on the question of admissions that the notes were not paid as late as November 18, 1889. That these different letters, upon the same subject, may be considered, see *Collins v. Bane*, 34 Iowa, 385. The last letter is a plain acknowledgment that both interest and principal are unpaid. In *Nelson v. Hanson*, 92 Iowa, 356, 54 Am. St. Rep. 568, this court considered the different holdings upon facts sufficient to revive a cause of action, and they need

not be again noticed. It is said that, conceding the letters were written with reference to the notes in suit, there is no admission of the amount due thereon. There had been, before the sale of the notes to Mrs. Howe, an indorsement of forty-nine dollars on the principal of the notes. No other payments appear except those of the interest to July 1, 1888. It is urged that the payment of forty-nine dollars is not proof that other payments have not been made on the principal. That is true, but the admissions are clear that some of the principal is due; and, if so, the cause of action survives for whatever is due, and that is to be settled by averments and proof. These are notes that on their face, when a cause of action exists, *prima facie* fix the amount due thereon; and, if less is claimed to be due, the question is to be adjusted upon issues formed for that purpose. It is not as it is in case of an account where there is no instrument fixing the amount of the debt. The admission or promise, when made, is as to the note; that is, it is an admission that the note is unpaid, or is a promise to pay it. That is an admission or promise as to whatever is actually due. The obligation is the same as if the action had not been barred. It is simply a revivor of the cause of action on the notes.

3. Another question in the case is as to the effect of the revivor upon the subsequent mortgagees. ⁶⁷⁶ An admission or promise that will suspend the operation of the statute will keep alive the lien of the mortgage given to secure the indebtedness: *Clinton Co. v. Cox*, 37 Iowa, 570; *Mahon v. Cooley*, 36 Iowa, 479. On the face of the notes of appellant, the last one would mature, allowing for the days of grace, February 4, 1877, when the cause of action would accrue. The parties extended the time for payment to January 1, 1878, when the statute of limitation commenced to run. The notes of the plaintiff were made February 1, 1888, and those of Redhead, Norton, Lathrop & Co. March 7, 1888, with mortgages to secure the same. The revivor of the cause of action took place as early as December 3, 1886, if not earlier. In *Miller v. Beardsley*, 81 Iowa, 720, it is said: "In the absence of proof to the contrary, the payment of interest warrants the conclusion that there is an indebtedness for the principal." In this case there is no proof to the contrary. The letter of December 3, 1886, contains a remittance of forty-five dollars and twenty cents, balance of interest to July 1, 1886. With the testimony showing the reference of the letter to the notes in suit, the revivor is established. The other letters add to the conclu-

siveness of the fact. At the time that the mortgages of plaintiffs and Redhead, Norton, Lathrop & Co. were taken, there actually existed a cause of action, but, by the records, the cause seemed to be barred; that is, the period of limitation had run. Did that condition of the record impose on parties taking new mortgages any duty as to inquiry, or were they justified in assuming that the operation of the statute had not been arrested? In determining the question, all laws bearing on the subject should be considered. The law on the subject of limitation of actions as clearly provides for the arrest of the operation of the statute as it does for it to run. Now, when these appellees saw the ⁶⁷⁷ condition of the record, what did it suggest to them in view of the law? It seems to us it suggested this: The cause of action to foreclose the Kane mortgage is barred, unless the operation of the statute by which it would be barred has, in some of the ways provided by law, been arrested, or the action has been in such a way revived. It is not a provision of the law that the fact of the revivor of a cause of action, to render it valid shall be made a matter of record. The revivor takes effect by virtue of the admission or promise in writing. It is a provision of our law that "the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation." The fact of such an absence, which would arrest the running of the statute, would not, of course, be indicated by the record. In *Brown v. Rockhold*, 49 Iowa, 282, the question of the statute of limitation is considered, and the case deals with the fact of nonresidence from the state by the defendant, the statutory period having fully run; and, treating alone of the effect of such absence, it is said: "To enable a party to insist by demurrer upon the statutory bar, the pleading must show on the face thereof that the cause of action is within the statute." The legal effect of the holding in that case is that the party pleading facts to take the case out of the operation of the statute need not plead all the facts to show that the action is not barred, but that, until the facts do appear, the law favors a right of action. In *Kerndt v. Porterfield*, 56 Iowa, 412, which is a similar case, except that the second mortgage in that case was given before the period of limitation had run, this language is used: "When his interest was acquired, he took it subject to the mortgage, with the knowledge that the debt could be revived by a new promise, and the mortgage lien would stand as long as the debt existed." ⁶⁷⁸ The case leaves undetermined the rule with the facts in this case, but the

language quoted is significant in giving prominence to the fact that a party taking a second mortgage knows and must consider that an action barred may be revived, and that the revivor may be either before or after the statutory period. In *Hellman v. Kiene*, 73 Iowa, 448, 5 Am. St. Rep. 693, it is held that where an action is barred, and the debtor makes an assignment for the benefit of creditors, the debtor can, after claims are filed with the assignee, revive the cause of action, and the revivor will be binding on the assignee and creditors. It is true that case differs somewhat from this as to facts, but still it is quite in line with the thought of other cases to the effect that rights do not vest merely because of the condition of the record so as to defeat the right of a debtor to revive a barred cause of action. But, on the contrary, it tends to the theory of permitting actions to be revived without prejudice because of the record. The law makes provisions for the satisfaction of record of mortgages when the debts they secure are paid, and the practice is so common that, where one is not canceled, it naturally gives rise to the thought that it is not paid, even though the period of limitation has run. In *Murphy v. Coates*, 33 N. J. Eq. 424, where the period had run so as to raise a presumption of payment, and a second mortgage was given, it was held that the record of the first mortgage, because uncanceled, gave the second mortgagee such notice of the first mortgage as to put him on inquiry; and the first mortgage, because of a promise to pay by the debtor, that rebutted the presumption of payment because of the lapse of time, was given the priority. In view of the statute on the subject, and the authorities cited, we regard it as fairly well settled that in the absence of controlling equities, a second mortgagee, where a prior mortgage is uncanceled, must take notice of the fact whether or not the cause of action thereon has been revived. In this case the equities are not controlling in behalf of appellees. Except a small sum the mortgages were given for pre-existing debts owing before the action was barred on appellees' mortgage. And, further, it does not appear that anything was parted with relying on the condition of the record: See *Murphy v. Coates*, 33 N. J. Eq. 424. A decree should be entered giving to appellant's mortgage priority.

Reversed.

LIMITATION OF ACTIONS—NEW PROMISE.—The general rule is, that an acknowledgment, to take a case out of the statute of limitations, need not refer to the amount of the debt, but there must be no uncertainty as to the debt referred to: *Davis v. Steiner*, 14 Pa. St.

275; 53 Am. Dec. 547, and note. See, also, the notes to *Mumford v. Freeman*, 41 Am. Dec. 532; *Elliott v. Leake*, 32 Am. Dec. 314, and *Lindeman v. Pomeroy*, 24 Am. St. Rep. 496. If the acknowledgment, however, is clear in its reference to a debt, and the uncertainty is as to whether it may have been intended of another claim than that before the court, proof that no other claim was in existence ought to remove the objection of uncertainty, and render the admission operative to revive the only debt to which it could possibly apply: Note to *Conway v. Williams*, 29 Am. Dec. 467.

LIMITATION OF ACTIONS—MORTGAGES—MORTGAGE NOTE AND LIEN.—In equity, a mortgage is treated as completely incidental to the debt which it is intended to secure. So if a debt, barred by limitation, is revived by a new promise, it will operate to revive the mortgage by which such debt is secured, though there be no words to that effect in the new promise: *Perkins v. Sterne*, 23 Tex. 511; 76 Am. Dec. 72, and note. See, also, *Duty v. Graham*, 12 Tex. 427; 62 Am. Dec. 534.

LIMITATION OF ACTIONS—MORTGAGES—REVIVOR.—As to the effects of a revivor of a mortgage, see note to *Lasselle v. Barnett*, 12 Am. Dec. 222.

MENTZER v. WESTERN UNION TELEGRAPH COMPANY.

[93 IOWA, 752.]

TELEGRAPH COMPANIES—NEGLIGENT DELAY—DAMAGES FOR MENTAL SUFFERING.—If a telegraph company, knowing the character and contents of a telegram announcing the death and the time of the funeral of a near relative of the addressee, negligently fails to deliver it, whereby such addressee is prevented from attending the funeral, he may recover for mental suffering caused by such delay, although no physical injury is sustained. The recovery may be either *ex contractu* or *ex delicto*.

EVIDENCE—MENTAL SUFFERING.—In an action to recover damages for mental suffering caused by negligent delay in the delivery of a telegram announcing the death and time of the funeral of a near relative of the addressee, evidence that the latter desired to attend the funeral, felt "hard" over the delay in delivering the message, and upon its delivery, while excited and anxious, telegraphed to ascertain if he could yet be present at the funeral, is sufficient to sustain a finding that he endured mental suffering.

Mills & Keeler, for the appellant.

Heins & Heins, for the appellee.

753 DEEMER, J. There was testimony tending to show, and the jury may well have found that on the eleventh day of April, 1892, one H. Dorn delivered to the defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message:

"Creston, Ohio, 11, 1892.

To J. D. Mentzer, Cedar Rapids, Iowa:

Mother dead. Funeral Wednesday. Answer if coming or not.
H. DORN."

That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employé in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 A. M., April 11, 1892, but through the negligence and carelessness of defendant's employés, was not delivered until 9 P. M., April 13th. The plaintiff inquired at defendant's office at Cedar Rapids at about 7 o'clock in the evening of April 11th, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11, 1892, and was buried on the 13th, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral. There was also testimony tending to show that plaintiff lost some time from his work, in trying to discover whether a message had been sent him or not. The court gave the jury the following instruction with reference to the measure of damages, in the event they found plaintiff entitled to recover: "7. If you find for plaintiff, then you will allow him for the ⁷⁵⁴ amounts he paid for messages sent by him, if any; for loss of time caused by the failure to deliver said message, and rendered useless thereby, if any; and, in addition thereto, such an amount as you may find from the evidence to be just and reasonable to compensate plaintiff for the damages sustained by reason of mental anguish suffered by him by reason of failure to deliver said message, if any. But you should not allow plaintiff anything for loss of time or expense in going to Creston, Ohio, nor should you allow plaintiff for the money paid by Dorn for the message in question."

It is first insisted by appellant's counsel that the plaintiff cannot recover because he made no contract with the defendant, and is not in privity with it; that the action is founded on contract, and therefore he cannot maintain the suit. Such, no doubt, is the rule in England. But the courts of this country almost universally hold to the contrary. In the recent case of *Herron v. Telegraph Co.*, 90 Iowa, 129, we had occasion to consider this question; and the holding there, which is in accord with the current of judicial opinion in this country, was that the person to whom the message was addressed might maintain an action for the damages sustained by him.

2. It is conceded by appellant's counsel that plaintiff suffered damages under the first two heads covered by the instruction, to the amount of one dollar, and no complaint is made of the

charge, so far as it relates to these two items. The objection to the instruction is, that it allows the jury to assess damages for "mental anguish," and it is contended that such damages are not allowable in actions of this kind. Counsel also insists that, if such damages are recoverable in any case, they should not be allowed here, for ⁷⁵⁵ the reason that the testimony negatives any such suffering on the part of plaintiff as would entitle him to recover. Disposing of this last proposition first, we have to say that there is sufficient testimony in the record to justify the conclusion that the plaintiff did suffer as claimed. The evidence discloses such conduct on the part of plaintiff in inquiring for a message at the office of the defendant company, and in the efforts put forth by him to ascertain if a death message had come, as to evince mental anxiety. Plaintiff says he was desirous of attending his mother's funeral, and that he felt "hard" because of the delay in the delivery of the message. He immediately telegraphed to ascertain if he could be present at the funeral, and took up his journey to Ohio, to be in attendance upon the burial. When he called at defendant's office, after the receipt of the message, he was excited and anxious. He complained of the delay, and wanted to know why the message was not delivered at his house. We think these declarations, and this course of conduct, clearly indicate that plaintiff did suffer as charged. We have, then, the question as to whether damages for mental suffering can be recovered in actions of this kind, independent of any physical injury, where the company is advised of the character of the message, and negligently fails to deliver it. This question has been variously decided by the different courts of the country, but, up to this time, is an open one in this state. The following cases answer the proposition in the affirmative: *So Belle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; *Gulf etc. Ry. Co. v. Wilson*, 69 Tex. 739; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920; *Womack v. Western Union Tel. Co.* ⁷⁵⁶ (Tex. Civ. App., May 10, 1893), 22 S. W. Rep. 417; *Western Union Tel. Co. v. Carter* (Tex. Civ. App., March 9, 1893), 21 S. W. Rep. 688; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Northport etc. R. R. Co. v. Griffin*, 92 Tenn. 694; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Western Union Tel. Co. v. Stratemeier*, 6 Ind. App. 125; *Western Union Tel. Co. v. Newhouse*, 6 Ind. App.

422; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; *Young v. Western Union Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; *Western Union Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129; *Logan v. Western Union Tel. Co.*, 84 Ill. 468; and perhaps others. While perhaps equally as large a number answer it in the negative. See the following: *Western Union Tel. Co. v. Wood*, 57 Fed. Rep. 471; *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 30 Am. St. Rep. 183; *Connell v. Western Union Tel. Co.*, 116 Mo. 34; 38 Am. St. Rep. 575; *International etc. Tel. Co. v. Saunders*, 32 Fla. 434; *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1; 41 Am. St. Rep. 17; *Francis v. Western Union Tel. Co.*, 58 Minn. 252; 49 Am. St. Rep. 507. Perhaps other cases announcing the same rule may be found. Of the text-writers, Shearman and Redfield on Negligence, page 692, section 605, Thompson on Electricity, section 379, 3 Sutherland on Damages, sections 975-980, inclusive, 2 Sedgwick on Damages, section 894, and others, hold that such damages may be recovered, while Wood's Mayne on Damages, page 74, Cooley on Torts, 271, and others, seem to deny it. The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages: See *Lynch v. Knight*, ⁷⁵⁷ 2 H. L. Cas. 577; *Hobbs v. London etc. Ry. Co.*, L. R. 10 Q. B. 122. And doubtless this is the rule of law to-day in all ordinary actions, either ex contractu or ex delicto. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. The general rule above referred to was adopted long before the electric current was harnessed and made subservient to the will of man. One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as it was when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into.

Let us look at this query, then, upon principle, and see if such damages are recoverable. And first we must determine the nature, objects, and purposes of telegraph companies; their legal status and duties to the public, and to those with whom they do business, then the nature of the action, and, finally, the elements of damage which may be recovered, either by reason of their breach of contract or because of their failure to perform their duties—and see if there is any reason known to and recognized by the law, why such damage should not be allowed. Far be it from our purpose to make law. We cannot legislate, but will discover, if we can, whether there are any precedents for recovery lying in the ashes of the past.

What, then, is the nature, purpose, and object of the telegraph, and what is its legal status? It is a system of appliances conducting the electric current or fluid, used for the purpose of transmitting intelligence, ⁷⁵⁸ thought, or news from one place to another. Somewhat akin is it to a common carrier, in this: that they are both carriers, and must serve all alike; but the carrier transports persons or goods, while the telegraph conveys intelligence. The very object of the invention is to quickly convey information from one to another, upon which that other may act. It is a public use, and for that reason eminent domain may be exercised in its behalf, and is engaged in a business affecting public interests to such an extent that the state may regulate the charges of companies engaged in the business. It is not an insurer of the accuracy or of the delivery of messages intrusted to it, but it is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties. Nor can it provide by contract for exemption from liability from the consequences of its own negligence. Enough has been stated to show that it owes a duty to all whom it attempts to serve, independent of the contractual one entered into when it receives its messages. Telegraph companies are held, then, to the exercise of due care, and for negligence, either in sending or delivering messages, are liable to any person injured thereby for all the damages he may sustain. We have stated these rules in order to show that one who is injured by their neglect of duty may maintain an action, either *ex contractu* or *ex delicto*, for the injuries sustained. The rule, no doubt, is as announced by Judge Cooley in his work on Torts, at page 104 et seq: "In many cases an action, as for tort, or an action for a breach of contract, may be brought by the same party on the same state of facts. This, at first, may seem in contradiction to the defini-

tion of a tort as a wrong unconnected with contract, but the principles which sustain such actions will enable us to solve the seeming difficulty. . . . There are also, in certain relations, duties imposed by ⁷⁵⁹ law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. . . . Thus, for breach of the general duty imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought": See, also, *Rich v. New York etc. R. R. Co.*, 87 N. Y. 382; *Nevin v. Pullman etc. Car Co.*, 106 Ill. 222; 46 Am. Rep. 688; *Baltimore etc. Ry. Co. v. Kemp*, 61 Md. 619; 48 Am. Rep. 134; *Cooley on Torts*, 3. In this state all forms of action are abolished. The pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages, on the facts stated, whatever the law will allow, either for breach of the contract or for the tort pleaded. We desire to make this plain, for if, in the further progress of the opinion, it should appear that damages for mental suffering are allowed in cases of this kind, either for breach of contract or for tort, then plaintiff may recover. With this thought in mind, the reader may also be able to explain and reconcile some of the cases before cited.

Having determined the nature and objects, the status, and relation of the defendant company, we turn to the verdict of the jury in this case, and find that not only did the defendant break its contract, but that it was guilty of negligence as well, and that under all known rules of law, plaintiff is entitled to some damages. Defendant insists they are simply nominal, and plaintiff contends he has suffered acute and actual damages, for which he should be compensated. The general rule of damages for breach of contract comes down to us from the opinion of *Hadley v. Baxendale*, 9 Ex. 341, and is as follows: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such ⁷⁶⁰ breach of contract should be such as may fully and reasonably be considered either as arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In actions for tort the rule is much broader. The universal and cardinal principle in such cases is, that the person injured shall receive compensation commensurate with his loss or injury, and no more. This

includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited or affected, so far as they are compensatory, by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force." Whether the injurious consequences may have been "reasonably expected" to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. As said in *Stevens v. Dudley*, 56 Vt. 158, "it is the unexpected, rather than the expected, that happens in the great majority of cases of negligence." Under all the authorities, it was the duty of the defendant to transmit and deliver messages intrusted to it without unreasonable delay; and, in failing to do so, it becomes liable for all damages resulting therefrom: *Cooley on Torts*, 646, 647; *Gray on Communication by Telegraph*, secs. 81, 82, et seq; *Wharton on Negligence*, sec. 767. That a person is entitled to at least nominal damages for an infraction of the duty imposed upon a telegraph company is conceded. And it must also be conceded ⁷⁶¹ that every person desires to attend upon the obsequies of his near relations. And when, able and anxious to attend, he is, through the negligence of a telegraph company, not notified of their death in time to attend the funeral, he naturally and almost inevitably suffers mental pain and anguish. No man is so depraved but that he yet remembers his mother, and, when able, will pay her the last respect that is her due. In the case at bar, it is established that defendant knew the nature of the intelligence it was to transmit, and also knew that, if it was not delivered within a reasonable time, plaintiff was likely to be greatly pained on account not only of not knowing of the death of his mother until she was placed under the ground, but also because of his inability to attend the funeral on account of the delay. That the defendant should reasonably have contemplated such results, under the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, is clear.

But it is insisted that damages for mental suffering, although contemplated by the parties, cannot be recovered for mere breach of contract. That such is the general rule announced by the courts, and that it is the rule with reference to all ordinary contracts must be conceded. But it must be remembered that this

rule grew up at a time when there was no thought of the transmission of intelligence by electricity. Breaches of contract, such as the one in question, were unknown to the common law. The business of telegraphy has grown up within comparatively recent years. But must we say that the law furnishes no remedy because no case of the kind was known to the common law? If so, such law is no longer applicable to our present conditions. Regard must be had, too, to the subject matter of the contract. The message does not relate to property. In such cases, for breach of contract, the law affords adequate compensation. But it does ⁷⁶² relate to the feelings, the sensibilities, aye, sometimes, even to the life, of the individual. It does not affect his pocketbook seriously, but it does relate to his feelings, his emotions, his sensibilities—those finer qualities which go to make the man. Shall we say that in one case the law affords compensation, and in the other it does not? Instead of goods which are conveyed by the defendant, it is intelligence—thought. If defendant were a common carrier of goods, it would be liable for all damages sustained by reason of its breach of contract to deliver them within a reasonable time. But it is said no damages can be recovered for failure to deliver intelligence, beyond the amount actually paid for the message, or nominal damages, although the addressee may endure the greatest of mental pangs, notwithstanding the fact that such suffering was in the contemplation of the parties at the time the contract was made. Of course, every breach of contract is likely to cause some pain, but most of these contracts relate to property and pecuniary matters, and in such case the law furnishes what has always been held to be an adequate remedy for the pecuniary loss sustained. Mental suffering has never been considered as within the contemplation of the parties at the time the contract is entered into, and recovery cannot be had therefor. But few contracts have direct relation to the feelings and sensibilities of the parties entering into them, and the pain growing out of the ordinary breach of contracts relating to property is entirely different from that suffered from a death message: Sutherland on Damages, sec. 980. We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases, the defendant, in making his contract, is dealing with the feelings and emotions. ⁷⁶³ The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's

feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case: See *Halloway v. Griffith*, 32 Iowa, 409; 7 Am. Rep. 208; *Royal v. Smith*, 40 Iowa, 615. The distinction we have pointed out is well stated in 1 *Sutherland on Damages*, section 92. Other exceptions have sometimes been made, which we need not further refer to. As said in the case of *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864: "These illustrations serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that, therefore, the damages resulting from such breach of contract must be measured by pecuniary standards, and that, where other than the pecuniary benefits are contracted for, other than pecuniary standards should be applied in the ascertainment of damages flowing from the breach." "The case before us, so far as it is an action for breach of contract, is subject to the same general rule; and the defendant is answerable in damages for the breach, according to the nature of the contract, and the character and extent of the injury suffered by reason of its nonperformance. The message was sent for a particular purpose, of which the defendant had knowledge. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything—no proposition or promise with respect to any business transaction. The message was of far greater importance to the receiver than any of these. It was information which defendant undertook to convey for a stipulated sum, and which, if promptly conveyed, would have enabled plaintiff to have been with him at the last moments, and would have saved her the injury of which she complains. . . . The messages were in proper language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such information, properly conveyed, would prevent."

Reverting now to the damages which may be allowed if the action is treated as *ex delicto*, and to the broader rule of damages in cases of tort, we find that, in very many of these actions, damages are recoverable for mental anguish, some of which we will refer to hereafter. It is conceded by appellant's counsel that such damages may in certain cases be recovered, but they

insist that they are never recoverable unless accompanied by some physical injury. It seems to us that, when it is conceded that mental suffering may be compensated for in actions of tort, the right of plaintiff to recover in this case is established. Let us look to some of the cases authorizing recovery in such cases, and see if there are no analogies. Damages for injuries to the feelings are given, though there are no physical injuries, where a person is wrongfully ejected from a train: *Shepard v. Chicago etc. Ry. Co.*, 77 Iowa, 54; in actions for slander and libel: *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420; for malicious prosecution: *Fisher v. Hamilton*, 49 Ind. 341; for false imprisonment: *Stewart v. Maddox*, 63 Ind. 51; for criminal conversation and seduction, and for assault. So damages for injured feelings were allowed where a conductor kissed a female passenger against her will: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504. So, likewise, it has been held that the removal of the body of a child from the lot in which it was rightfully buried to a charter plot gives the parent ⁷⁶⁵ a right to recover for injury to his feelings: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759. And a widow may recover for such suffering and nervous shock, against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damages are alleged or proven: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370. See, also, *Sutherland on Damages*, sec. 979, and authorities cited for kindred cases. The wrongs complained of in these cases all directly affected the feelings, and injury thereto proximately resulted. But not more so than in the case at bar, where the injury to the feelings is apparent, and suffering necessarily followed. This rule of necessity applies where the feelings are directly affected by the nature of the wrong complained of. It has no application to such mental suffering as indirectly results from the commission of every tort.

Let us now look to our own cases for a moment, and see what has been held. In the case of *Stevenson v. Belknap*, 6 Iowa, 103, 71 Am. Dec. 392, which was an action brought by a father for the seduction of his daughter, this court approved an instruction that damage may be given, not only for his loss of service and actual expenses, but also on account of the wounded feelings of the plaintiff, and of his anxiety, as a parent of other children, whose morals may be corrupted by the example. In the case of *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, which was an action for an assault by one of defendant's employes upon the plaintiff, the lower court instructed the jury

that plaintiff might recover, as compensatory damages, not only for bodily pain and suffering, but for the outrage and indignity put upon him. This instruction was approved, and it was held that mental suffering not arising from bodily pain, but from the nature of the assault, might be recovered, the court using this language: "The question is fairly presented whether mental anguish, arising from the nature and character ⁷⁶⁶ of the assault, constitutes an element of compensatory damages. . . . We, on principle, are unable to see why mental pain arising from or caused by the nature of the assault whereby the wound was inflicted . . . should not be an element of such damages." "A careful examination of the authorities will disclose the fact that the weight of adjudicated cases is in favor of the proposition that mental anguish arising from the nature and character of the assault is an element of compensatory damages. . . . The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter." It may also be said in this connection that the court in this case declined to follow the case of *Johnson v. Wells*, 6 Nev. 224, 3 Am. Rep. 245, and kindred cases which are relied upon by appellant's counsel, remarking that "the decided weight of authority is opposed to the view taken in that case, and we are unwilling to follow it, and by so doing ignore the other authorities cited." That the question was well considered and deliberately decided is apparent from the fact that Mr. Justice Day dissented from the conclusion of the majority. In the quite recent case of *Shepard v. Chicago etc. Ry. Co.*, 77 Iowa, 58, we went still farther, and squarely held that damages for mental suffering are recoverable, although there was no physical pain or injury. In that case we said: "If these things [wounded feelings] may be considered in connection with physical suffering, in estimating actual damages, we know no reason which forbids their being considered in the absence of physical suffering. It is said that the 'mental pain' contemplated by the court in the case last cited (*McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 315, 24 Am. Rep. 748) includes something more than mere wounded feelings or wounded pride, and that the latter can be considered only where malice is ⁷⁶⁷ alleged and proven, and where there has been proof of actual bodily injury. We do not think the claim is well founded. Humiliation, wounded pride, and the like may cause very acute mental anguish. The suffering caused would undoubtedly be different in different persons, and no exact rule for measuring it can be given. In ascertaining it, much

must necessarily be left to the discretion of the jury, as enlightened by the charge of the court. The charge given in this case, as a whole, confined the jury to an allowance for compensatory damages." In the case of *Curtis v. Sioux City etc. Ry. Co.*, 87 Iowa, 622, this court squarely held that damages might be recovered for mental pain and suffering, although the damages for physical injury were merely nominal; and further held that such damages were compensatory, and not punitive. In the case of *Parkhurst v. Masteller*, 57 Iowa, 480, which was an action for malicious prosecution, this court followed *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, and held that in such actions actual damages would include compensation for bodily and mental suffering, and clearly held that damages for mental suffering might be recovered in such cases although entirely disconnected from bodily suffering or disability. In a case of assault and battery (*Lucas v. Flinn*, 35 Iowa, 9), this court held that damages for mental anguish might be allowed as compensation. In the case of *Paine v. Chicago etc. R. R. Co.*, 45 Iowa, 569, the rule in *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, was recognized; but it was held there was no right of recovery for injury to feelings, on account of the peculiar facts of that case. And the case of *Fitzgerald v. Chicago etc. Ry. Co.*, 50 Iowa, 79, merely follows *Paine v. Chicago etc. R. R. Co.*, 45 Iowa, 569, and holds that, under the facts, plaintiff was not entitled to recover. The rule of *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, has never, to our knowledge, been doubted by any later decision. In the case of ⁷⁶⁸*Stone v. Chicago etc. R. R. Co.*, 47 Iowa, 88, 29 Am. Rep. 458, it was held that the action in that case, owing to its peculiar facts, was an action for breach of contract; and that damages for mental suffering were not recoverable, and in this case it is said: "Insult and abuse accompanying a breach of contract cannot affect the amount of recovery in such actions. If the action is based upon a wrong, the jury are permitted to consider injury to feelings, and many other matters which have no place in actions to recover damages for breach of contracts": Citing *Walsh v. Chicago etc. Ry. Co.*, 42 Wis. 23; 24 Am. Rep. 376. It is enough to say here that the action at bar is *ex delicto*, or that damages may be recovered as if it were, under our system of code pleading. The only other case having any bearing upon this question is *Hall v. Manson*, 90 Iowa, 585, which was a case wherein plaintiff sought to recover damages for personal injuries sustained by reason of a defective street crossing. The lower

court instructed the jury that plaintiff might recover "for the peril, if any, the jury may find she was subjected to, from the evidence in the case." This court disapproved the instruction, not because damages for mental anguish could be recovered, but because, "in our view of the instruction, its wording would warrant the jury in allowing damages for mental pain and suffering, which would include peril, and also for peril, as a distinct, independent, and additional element of damage, thereby allowing double compensation for the peril plaintiff was in, which would be erroneous."

From these cases it is apparent that in actions of tort this court has frequently announced the rule that damages for mental suffering may be recovered, although there is no physical injury. And, if this be so, why is not this a case where they ought to be allowed? It cannot be possible that here is a legal wrong for which the law affords no remedy. The ⁷⁶⁹ wrong is plain, the injury is apparent, and we think the law affords a remedy, for compensatory damages, under the rules above given. It must not be understood to follow that, in all actions ex delicto, damages for mental suffering may be allowed. There must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish. But, when there this connection is so manifest as in the case at bar, we think such damages ought to be allowed. It is very appropriately said, however, in one of the cases which has been cited, that "great caution should be used in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which recovery may be had; and the attention of juries might well be directed to this fact." It is not necessary for us to determine on which theory damages for mental anguish are recoverable. If we find they are recoverable, either in an action for breach of contract, or by reason of a breach of public duty, then the instruction given by the lower court was correct, and should be sustained. It will be noticed that, in some of the cases holding to a contrary doctrine from that here announced, recovery was denied because of the form of the action; that is to say, it was held that the action in the particular case was for breach of contract, and that damages for mental suffering were not recoverable in such an action. Whether they would be recoverable in actions ex delicto or not was not determined. Let us look for a moment

at some of the objections urged to such a rule as we have announced.

1. It is said that such suffering is speculative and remote. We have, as we think, answered this by ⁷⁷⁰ showing that in actions of this kind it is direct and proximate to the wrong complained of.

2. It is urged that such damages are sentimental, are vague and shadowy, and that there is no standard by which an injury can be justly compensated or approximately measured. This objection is answered if we find any case in which such damages are allowed, for if they may be allowed in one kind of case they may in all, so far as this objection is concerned. We have already seen numbers of cases, both from this and other states, wherein it is held that damages for mental suffering, independent of physical injury, may be recovered. It is conceded by counsel that damages can be recovered for mental suffering when accompanied by physical pain or bodily suffering. If this be true, then let us ask how they can be any more accurately measured when so accompanied than when not. When it is once conceded that mental anguish can be considered, and compensation made therefor, then the objection last urged falls to the ground.

3. It is said there is no principle on which such damages can be recovered. We have endeavored to show, to the best of our ability, that there is abundant authority to justify a recovery in such cases.

4. It is contended that the rule opens up a vast and fruitful field for speculative litigation. We have endeavored to so guard and limit the rule that there may be no mistaking its operation and effect. If recovery is for breach of the contract, then it can only be had because of the subject matter—the fact that it is intelligence that is transmitted, and the feelings only affected. And, if the recovery is had because it is a tort, then a somewhat similar limitation is made, which we have tried to make apparent. If, as thus limited, the rule opens up a vast and fruitful field of ⁷⁷¹ litigation, it is only because telegraph companies fail to do their duty. We cannot think that a rule which will tend to make telegraph companies more careful in the matter of delivering their messages will be fraught with such fearful results as counsel imagine. The single, plain duty of a telegraph company is to make transmission and delivery of messages intrusted to it with promptitude and accuracy. When that is done its responsibility is ended. When it is omitted, through negligence, the company should answer for all injury resulting, whether to the

feelings or the purse, one or both, subject to the proviso that the injury must be the natural and direct consequence of the negligent act. We cannot conceive of any danger in such a rule. It seems to us to be in accord with the enlightened spirit of modern jurisprudence and that in actual practice no evil can result therefrom. Juries may be prone, in cases of this kind, to place their estimates high; but the judge is ever present, with a restraining power, ample to prevent unconscionable and unjust verdicts. Without further extending this opinion, it is sufficient to say that the instruction of the district court was correct, and the judgment is affirmed.

TELEGRAPH COMPANIES—NEGLIGENT DELAY IN TRANSMITTING MESSAGE—DAMAGES FOR MENTAL SUFFERING.—Mere mental pain and anxiety are too vague for legal redress, where no injury is done to person, property, health, or reputation: *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431; 53 Am. St. Rep. 648, and note. A telegraph company is not liable for mental suffering and pain resulting from its neglect to transmit a message promptly, although advised by the contents of the message that such suffering and pain will naturally result from its failure to deliver the message without delay: *Connell v. Western Union Tel. Co.*, 116 Mo. 34; 38 Am. St. Rep. 575, and note; *Francis v. Western Union Tel. Co.*, 58 Minn. 252; 49 Am. St. Rep. 507, and note. These cases are in accord with the weight of authority; opposed to them, and in accord with the principal case, are *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Western Union Tel. Co. v. Nations*, 82 Tex. 539; 27 Am. St. Rep. 914, and note.

TELEGRAPH COMPANIES—DAMAGES FOR MENTAL ANGUISH—ADMISSIBILITY OF EVIDENCE.—In an action for damages against a telegraph company for delay in delivering a dispatch, evidence of mental anguish felt and exhibited by speech or otherwise at the time the dispatch was received, is competent and admissible: *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920, and note.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

LEAVENWORTH v. HATCH.

[57 KANSAS, 57.]

NEGLIGENCE OF DRIVER IS NOT IMPUTABLE TO ONE RIDING BY INVITATION.—If a person, riding in a carriage by invitation of the owner, is injured through the negligence of the driver, the latter's negligence cannot be imputed to the person injured where the driver had sole charge of the vehicle, and of the animal drawing it, and the person so riding had no control over either. Hence, the driver's negligence would not bar a recovery, and it is not erroneous to so instruct the jury.

Action for damages for personal injuries. The plaintiff, Ella B. Hatch, at the invitation of Mr. Vantuyl, whose family she was visiting, in Leavenworth, Kansas, rode out one evening in a carriage to the Soldiers' Home, in company with two other ladies, to attend a concert. The carriage was driven by a man named Schroeder. When they returned, after the concert was over, the night was quite dark, and Schroeder drove upon a pile of broken stone, in the street, which overturned the carriage and threw it down a high embankment below where they were passing. The plaintiff, who was on the back seat of the buggy, had her leg broken by the fall, and this action was brought to recover damages from the city for the injury. A portion of Fourth street, on which the accident happened, was macadamized and was out of repair, and it became necessary for the city to place more broken stone in the places where it had become worn. For this purpose the city had stone hauled along the street and thrown off in different places, where it was broken up and left in piles until it could be measured, and then spread out over the street wherever required. The driver, in returning, drove off

the macadamized part of the road and attempted to pass along on the dirt road where, according to some of the evidence, much of the travel went, and, in doing so, met with the accident as stated. The plaintiff alleged, in her petition, that she had been put to the expense of two hundred and fifty dollars for medical attendance, and two hundred and fifty dollars more for nurses and other assistants by reason of the injury, and had sustained damage because of the injuries received in the sum of four thousand five hundred dollars. Judgment for five thousand dollars was demanded. The jury were instructed that, if they found in favor of the plaintiff, they might render a verdict for any sum within the limit of five thousand dollars. They were further instructed as stated in the opinion. A verdict for three thousand two hundred dollars was returned in favor of the plaintiff, and the city appealed.

C. F. W. Dassler and J. W. Haussermann, city attorney, for the plaintiff in error.

Baker, Hook & Atwood, for the defendant in error.

50 ALLEN, J. It is insisted on behalf of the city that there was not sufficient evidence to support the verdict in this case. The witnesses do not all agree as to the condition in which the street was left on the evening the plaintiff was injured, but there is testimony showing that there were piles of stone extending diagonally across the street, and that most of the travel was off the macadamized part of the street on the dirt. The strongest evidence in favor of the plaintiff is to the effect that it was impracticable to drive on the macadam, and that it was necessary to go to the side. It was clearly shown that the night was dark, and that no lights were placed at this point at the time, nor were there any barriers to warn a person approaching of danger. We think there is evidence tending to show that the work was being carried on 60 in a negligent manner, and that the street was in a dangerous condition. The question of fact, so far as there in dispute in the evidence, has been resolved by the jury in the plaintiff's favor.

The principal question of law presented is, whether the negligence of the driver, if he was negligent, should be imputed to the plaintiff and held to bar her recovery. The court instructed the jury that if the driver had sole charge of the vehicle, and she had no control over him, his negligence could not be imputed to her and would not bar her recovery. Counsel for plaintiff in error cite in support of their position the case of Pri-

deaux v. Mineral Point, 43 Wis. 513; 28 Am. Rep. 558; Slater v. Burlington etc. Ry. Co., 71 Iowa, 209; Morris v. Chicago etc. Ry. Co., 26 Fed. Rep. 22. These cases, it must be conceded, give some countenance to the contention of the plaintiff in error, but, so far as they do, we think they are in conflict with the current of decisions on the question: *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163; *Danville etc. Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Wabash Ry. Co. v. Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; *Transfer Co. v. Kelly*, 36 Ohio St. 86; 38 Am. Rep. 558; *Bennett v. New Jersey R. R. etc. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435; *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178. The foregoing were cases in which the plaintiff was a passenger in a public conveyance, and it was held that the servant in charge of the conveyance in which he was riding was not his servant in such sense that his negligence ought to be imputed to the plaintiff: See, also, *Chicago etc. Ry. Co. v. Groves*, 56 Kan. 601; *Chicago etc. R. R. Co. v. Ransom*, 56 Kan. 559. In the case of *Dyer v. Erie Ry. Co.*, 71 N. Y. 228, it was held: "Where one travels in a vehicle over which he has no control, but at the invitation of the owner and driver, no relationship of principal and agent arises ⁶¹ between them; and, although he so travels voluntarily and gratuitously, he is not responsible for the negligence of the driver where he himself is not chargeable with negligence, and where there is no claim that the driver was not competent to control and manage the team."

In the case of *Little v. Hackett*, 116 U. S. 366, the authorities were very fully reviewed in an opinion by Mr. Justice Field, and it was held: "A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver."

We think the law well settled that where the person injured has no right to control the movements of the driver, and does not, in fact, exercise any control, the negligence of the driver cannot be imputed to him.

Complaint is made of the refusal of the court to give other instructions, but we think so much of those asked as was good and applicable to the case was given in the general charge.

Complaint is also made of the statement to the jury that the plaintiff might recover any amount not exceeding five thousand

dollars, because it is said that only four thousand five hundred dollars was asked in the petition for the injury, and that there was no proof whatever concerning the value of the medical services and expense for nurses. If the verdict and judgment exceeded four thousand five hundred dollars, this might present a question requiring consideration, but as the verdict is for only three thousand two hundred dollars, we fail to see any substance in the complaint, there being no complaint that the court gave any other erroneous charge as to the measure of damages.

The judgment is affirmed.

All the justices concurring.

NEGLIGENCE OF DRIVER IS NOT IMPUTABLE TO ONE RIDING BY INVITATION.—The negligence of the driver of a private vehicle cannot be imputed to one invited to ride with him, where the person so riding had no control of the driver, or of the vehicle, and was free from blame; and the driver's negligence is, therefore, no bar to the other's recovery where the latter is injured: See *Reading Tp. v. Telfer*, 57 Kan. 798; post, p. 355, and note thereto.

GUILD v. ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

[57 KANSAS, 70.]

SPECIFIC PERFORMANCE—CONTRACT FOR PURCHASE AND SALE OF LAND—ENCUMBRANCES AS A BAR.—The existence of mortgages and other encumbrances amounting to much less than the contract price to be paid by a purchaser for land, and which can be completely discharged out of the proceeds of the sale, does not constitute a bar to an action by the vendor to enforce the specific performance of a contract for the sale of the land, especially where such encumbrances were known to the vendee, because the court is able to provide for the conveyance of a clear title to the vendee; and the existence of unpaid taxes, even though unknown to the defendant, furnish no obstacle to the performance of the contract, where the fund is ample for their payment.

DEFINITIONS—THERE IS A DISTINCTION BETWEEN APPRAISERS AND ARBITRATORS.—Persons selected to value property sold are simply appraisers, and not arbitrators, as arbitration is properly the submission of a matter, in controversy or dispute between the parties, to the decision of one or more persons.

ARBITRATION AND AWARD—APPRAISERS—REVOCA-TION OF AUTHORITY.—A mere naked arbitration is generally held revocable at the pleasure of either party at any time before an award is made; but if there is an agreement for a valid consideration for the purchase and sale of lands, or chattels, to be appraised by third parties, and if such appraisement is rather an incident of the contract than a single subject of agreement between the parties, one party cannot retain an advantage gained by the contract and revoke the authority of the appraisers.

VENDOR AND PURCHASER—SETTLEMENT OF PAST DIFFERENCES AS A CONSIDERATION.—The settlement of past differences on the basis of the purchase and sale of land at a value to be fixed by appraisers is a valid consideration for the agreement to purchase and sell, and sufficient to render the contract irrevocable.

ARBITRATION AND AWARD—WHEN AUTHORITY OF APPRAISERS CANNOT BE REVOKED.—After a contract for the purchase and sale of lands, at a price to be fixed by appraisers, to be selected by the parties, has been executed upon the consideration of a settlement of past differences, and where such appraisers are afterward named in accordance with the provisions of the contract, and a majority of them make a valuation of the property, the authority of the appraisers cannot be revoked at the pleasure of one of the parties, for the contract is then complete in all its parts and enforceable specifically. Such persons, appointed to fix a value, are merely appraisers, though they are denominated in the contract as "arbitrators."

ARBITRATION AND AWARD—SETTING ASIDE APPRAISEMENT.—IF FRAUD, MISTAKE, OR MISCONDUCT OF APPRAISERS is relied upon as a ground for setting aside an appraisement of lands made by them, it must be pleaded, where they are selected in accordance with the agreement of the parties.

Action for the specific performance of a contract, instituted by Charles Dunn, as plaintiff, against the Atchison, Topeka & Santa Fe Railroad Company. The plaintiff, Guild, was administrator of the estate of Charles Dunn, deceased. The contract provided for the purchase and sale of certain lands, at a price to be fixed by appraisers, who were to be selected by the parties in accordance with the provisions of the contract. These appraisers were denominated in the contract "arbitrators." The plaintiff alleged the execution of the contract sued upon, the full performance of all its conditions on his part, and asked judgment for the sum found by the "arbitrators" or appraisers to be the value of the land described in the contract. The defendant admitted the execution of the written agreement, but denied generally the other allegations of the petition, and alleged that the premises were encumbered by two mortgages for a large amount, which were past due and unpaid. It also denied that one C. W. Jewell, a third man called in by the two appraisers mentioned below, was ever legally appointed an arbitrator, or that any arbitration was ever had under the contract, and alleged that prior to any action by the arbitrators fixing the amount to be paid for the land, the agreement to arbitrate was revoked by the defendant, and notice thereof served on the plaintiff and arbitrators. By the terms of the contract, each party was to select one "arbitrator," and the two "arbitrators," in case of failure to agree, were to select a third "arbitrator"; and the decision of a majority was to be binding and final. The railroad company designated P. I. Bonebrake, and Dunn chose J. B. Whitaker. They

failed to agree and C. W. Jewell was called in as a third man. Several meetings were afterward held, but the appraisers failed to agree. On January 3, 1891, the railroad company notified the arbitrators that it desired to be heard on the questions to be considered. It was admitted on the trial that the purpose of serving this notice was to keep the arbitrators from making an award until notice of withdrawal of submission to arbitration could be served on them. On January 5, 1891, the company did serve such a notice, and that the agreement to submit to arbitration was revoked, and Bonebrake, deeming his authority at an end, declined to take any further action. On January 6, 1891, Whitaker and Jewell took the appraisers' oath, and made an appraisal in writing, valuing the land at twenty-nine thousand five hundred and eighty-six dollars. The plaintiff and his wife then executed a warranty deed, with covenants against encumbrances, and tendered it to the company. It refused to accept the deed, which was then deposited, by the plaintiff, in the Bank of Topeka, with a written power of attorney authorizing John R. Mulvane, president of the bank, to receive the purchase money, and out of it to pay two certain mortgages, one for six thousand dollars, and the other for four thousand dollars, which were encumbrances on the land. Whitaker, on cross-examination, stated that he considered Bonebrake a representative of the railroad company and himself a representative of the plaintiff, and that he was to get the highest price he could for the land. The case was submitted to the court without a jury. There was a judgment for the defendant, and the plaintiff appealed.

John W. Day and Francis C. Downey, for the plaintiff in error.

A. A. Hurd, O. J. Wood, and W. Littlefield, for the defendant in error.

76 ALLEN, J. The answer of the defendant presented two principal issues: 1. That the land described in the contract was encumbered, and the plaintiff therefore unable to convey a perfect title; 2. That the authority of the arbitrators was revoked before an award was made. The principal question for our consideration is whether or not either of these defenses was good under the facts disclosed.

1. It appears that the land was encumbered by mortgages amounting to ten thousand dollars and some interest. Does the existence of an encumbrance on land contracted to be sold defeat specific performance of the contract, where the amount of

the encumbrance is much less than the amount of the purchase money, so that the encumbrance can be completely discharged from the proceeds of the sale? It is well settled that the purchaser will not be compelled to receive and pay for a defective title: Fry on Specific Performance, sec. 859; Watts v. Waddle, 6 Pet. 391; Jeffries v. Jeffries, 117 Mass. 184; Bowen v. Vickers, 2 N. J. Eq. 520; 35 Am. Dec. 516. Nor can a purchaser be compelled to accept a title subject to encumbrances, for the payment of which out of the purchase money provision cannot be or is not in fact made: Hinckley v. Smith, 51 N. Y. 21; Walsh v. Barton, ⁷⁷ 24 Ohio St. 28; Mayer v. Ahrain, 77 N. C. 83. Nor can the purchaser be compelled to receive a deed conveying an encumbered title, and be forced to rely on the vendor's covenants for his security against existing encumbrances, unless he has expressly agreed to do so. But where an encumbrance can be removed merely by the application of the purchase money, and the court is able to provide for the conveyance of a clear title to the vendee, the mere fact that encumbrances exist which the plaintiff has not removed, or even is unable to remove without the application of the purchase money for that purpose, will not prevent a decree for a specific performance: Guynet v. Mantel, 4 Duer, 86; Halsey v. Grant, 13 Ves. 73; Oakey v. Cook, 41 N. J. Eq. 350; Thompson v. Carpenter, 4 Pa. St. 132; 45 Am. Dec. 681. It appears from the evidence of Dunn that the fact that the property was encumbered by a mortgage was known to Robinson, who said that would make no difference; that it could be arranged out of the proceeds. This evidence is uncontradicted. As the amount of the encumbrances was but little more than one-third the proceeds of the sale, especially in view of the defendant's knowledge and statement with reference thereto, they did not constitute a valid ground for refusing specific performance of the contract. Nor does the fact that one-half the taxes for the year 1890 remained unpaid, even though unknown to the defendant, furnish any obstacle to the performance of the contract. The fund was ample for their payment.

2. The contract executed by the parties provided for the sale of the plaintiff's land to the defendant at a price to be fixed by what are denominated, in the contract, as arbitrators. It is not disputed that Mr. Bonebrake was named as one of the arbitrators by the ⁷⁸ defendant, and that Mr. Whitaker was named as another by the plaintiff, though the appointment of Mr. Jewell, as the third, is questioned. We think the evidence clearly shows his selection by the other two as the third arbitrator, and that

he was recognized as such by both parties. The evidence shows that Bonebrake and Whitaker first attempted to fix a price; that they were unable to agree; that thereupon Jewell was selected, and that the three had two or more consultations, at which they endeavored to agree on a price. Bonebrake's figures were lower than those of the others. The railroad company attempted to revoke the authority of the arbitrators. A question is presented whether they were arbitrators, or merely appraisers selected to value the property, and, if the latter, whether the defendant could still revoke their authority before the appraisement was actually made. An arbitration is properly a submission to the decision of one or more persons of a matter in controversy or dispute between the parties. The only matter these persons were called upon to decide was the value of the land, which, according to the evidence, had not been discussed by the parties. Before the execution of the contract the defendant had taken possession of a portion of this land, and constructed its tracks along the edge of it. The plaintiff was claiming damages for the use and occupation of his property, and insisting on their payment. With reference to this claim there was a controversy, but by the written contract it was agreed that the claim should be waived, and that the land should be sold by the plaintiff to the defendant at a price to be fixed by arbitrators. The arbitrators were not named in the contract, and, of course, there could be no specific performance of it until they were selected. ⁷⁹ They were, however, afterward named. The question is, then, whether or not the defendant, by revoking the appointment, could in effect annul the contract.

It must be borne in mind that the railroad company was still in possession of a part of the property, wholly without right, and was during all of the time liable to the plaintiff for whatever actual damage he had sustained by reason of the defendant's occupation of his property. The contract contemplated, and provided, not merely that the plaintiff should sell and the defendant should buy the whole tract of land, but that such purchase and sale should cancel all demands of the plaintiff for what had already been done. The authorities recognize a distinction between appraisers of value or persons selected to make a measurement or computation under such a contract, and arbitrators properly so called. Conditions are frequently attached to policies of insurance providing that, in case differences arise between the parties touching a loss, the matter shall be submitted to arbitrators. Where these provisions are in such form that

they require the submission of every controversy that may arise under the policy to arbitrators, and thus in terms oust the courts of all jurisdiction in the matter, they are held invalid; but where they merely provide for the submission to arbitrators of the question as to the amount of loss sustained, so that the arbitrators have nothing to do but make an appraisement of the property destroyed, if definite and reasonable in their provisions, they are generally sustained, and held to be, when so expressly stated in the policy, conditions precedent to a recovery: *Scottish Union etc. Ins. Co. v. Clancy*, 71 Tex. 5; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116; *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28; *Wolff v. Liverpool etc. Ins. Co.*, 50 N. J. L. 453; *Chandos v. American etc. Ins. Co.*, 84 Wis. 184. If appraisement may be made a valid condition precedent to the maintenance of an action, of course, when the appraisement is made in accordance with the contract, it is binding on the parties. For other instances in which the distinction between an arbitration, which shall have the effect completely to dispose of a matter in controversy between the parties, and an appraisal of property, or determination of any matter of quantity or the like, see the following authorities: *Russell on Arbitration*, 40; *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; *Atkinson v. Whitney*, 67 Miss. 655; *Collins v. Collins*, 26 Beav. 306; *Garr v. Gomez*, 9 Wend. 649. In *Morse v. Merest*, 6 Madd. 25, it was held that, where a defendant refused to permit appraisers to go upon the land, the court would remove the impediment and direct the defendant to permit valuation to be made. *Smith v. Peters*, L. R. 20 Eq. Cas. 511, is to the same effect. In *Rochester v. Whitehouse*, 15 N. H. 468, it was held that the appointment of appraisers might be revoked the same as that of arbitrators. On the other hand, see *Orne v. Sullivan*, 3 How. (Miss.) 161; 34 Am. Dec. 71. Where the parties to an action have entered into an arbitration and made the same a rule of the court, the submission is not revocable: 1 Am. & Eng. Ency. of Law, 664; *Morse on Arbitration*, 232. But mere naked arbitration is generally held revocable at the pleasure of either party at any time before an award is made: *Boston etc. R. R. Co. v. Nashua etc. R. R. Co.*, 139 Mass. 463; *Morse on Arbitration*, 229; *Russell on Arbitration*, 156.

It would seem to be settled, under the authorities, that where there is an agreement for the purchase and ^{S1} sale of lands or chattels to be appraised by third parties, and such agreement is upon a valid consideration, and where the appraisement is rath-

er an incident of the contract than a single subject of agreement between the parties, one party may not retain an advantage gained by the contract and revoke the authority of the appraisers: *McGheehen v. Duffield*, 5 Pa. St. 497; *Bank of Monroe v. Widner*, 11 Paige, 529; 43 Am. Dec. 768; *Atkinson v. Whitney*, 67 Miss. 655. The English cases go so far as to hold that a court will remove obstacles placed by the vendor in the way of the appraisers in performing their duties, as held in *Morse v. Merest*, 6 Madd. 25, and *Smith v. Peters*, L. R. 20 Eq. Cas. 511.

The plaintiff had agreed that he would sell his land to the defendant at a price to be fixed by the appraisers. He had also agreed that, in consideration that the defendant would purchase on those terms, he would relinquish all claims for damages already due him from the defendant for the use of it. After the appraisers were appointed in accordance with the terms of the contract, he could not have sued the defendant for the occupation of his land without revoking not merely the appointment of the appraisers, but his solemn written agreement. This he had no right to do. Nor had the defendant any better right to retreat from and annul its solemn agreement than had the plaintiff. The settlement of past differences on the basis of the purchase and sale of the land at a value to be fixed by the appraisers was a valid consideration for the agreement, and sufficient to render the contract irrevocable. An appraisal having been made by a majority of the appraisers, the contract became complete in all its parts and enforceable specifically, unless other equitable considerations are found constituting a valid defense.

⁸² 3. On cross-examination, the appraiser Whitaker made statements indicating partiality. If the appraisal had been challenged by the answer for fraud, mistake, or misconduct of the appraisers, we might hesitate about holding the appraisal binding. But there was no such claim put forth in the answer, and it is clearly necessary that misconduct should be pleaded if relied upon. It seems to us evident that the trial court decided either that the encumbrances constituted a bar to the plaintiff's action, or that the defendant could lawfully, and did in fact, revoke the authority of the arbitrators, and that the case was decided on the issue presented by the pleadings under an erroneous conception of the law.

The judgment is therefore reversed and a new trial awarded.

Martin, C. J., concurring.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND—ENCUMBRANCES.—A covenant to sell and convey requires the giving of a good title to the covenantee, free from all encumbrances; *Sibley v. Spring*, 12 Me. 460; 28 Am. Dec. 191; and the same is required under a covenant to convey "clear of all incumbrances," notwithstanding the vendee's knowledge of the existence of an encumbrance: *Gans v. Renshaw*, 2 Pa. St. 34; 44 Am. Dec. 152; but equity will compel a vendee to take a good title subject to pecuniary charge, where adequate security is given, although it will not compel him to take a defective title: *Thompson v. Carpenter*, 4 Pa. St. 132; 45 Am. Dec. 681, and note.

CONTRACTS—SPECIFIC PERFORMANCE.—THE CONSIDERATION of a contract necessary to support a suit for its specific performance may consist either of some profit inuring to the promisor or some detriment sustained by the promisee: *Rector v. Wood*, 24 Or. 396; 41 Am. St. Rep. 860.

ARBITRATION AND AWARD—REVOCATION OF SUBMISSION—SETTING ASIDE AWARD.—Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice: *In re Curtis*, 64 Conn. 501; 42 Am. St. Rep. 200. Submissions to arbitration are revocable in their nature: *People v. Nash*, 111 N. Y. 310; 7 Am. St. Rep. 747. A stipulation for arbitration, which does not provide for submitting the matters in dispute to a particular person, or to a particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party: *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138; 53 Am. St. Rep. 521, note; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562. The rule, however, that a party may revoke a submission to arbitration at any time before an award is made, is held to apply only to cases of bare submission, and there is a line of cases holding that, where a submission is part of an agreement containing other terms to be performed by the parties, and especially if those terms have been executed in whole or in part, the submission is not revocable: *McKenna v. Lyle*, 155 Pa. St. 599; 35 Am. St. Rep. 910. The applicability of the principle that, where the agreement does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either, is not disturbed by a provision in the original contract that no action should be brought until after the award is filed, nor by the fact that arbitrators were chosen who failed to agree; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562. Awards will be set aside in equity for fraud, mistake, or misconduct of the arbitrators: *Notes to In re Curtis*, 42 Am. St. Rep. 208; *Jackson v. Roane*, 35 Am. St. Rep. 242; but there are cases holding that if they are not alleged and shown to be unjust, equity will not interpose to prevent their enforcement: *Note to El-mendorf v. Harris*, 35 Am. Dec. 594.

ÆTNA INSURANCE COMPANY v. McLEAD.

[57 KANSAS, 93.]

INSURANCE—PLEADING CONCURRENT INSURANCE—MATTER OF DEFENSE.—Although a policy of insurance contains conditions respecting the liability of the insurer, in case of loss, where there is concurrent insurance, the plaintiff, in an action on his policy, need not mention, in his complaint, a concurrent policy of insurance, though it exists, as anything therein exempting the defendant from liability is matter of defense to be set up by answer.

INSURANCE—WHAT CONDITION AS TO ARBITRATION IS NOT A CONDITION PRECEDENT TO SUIT ON POLICY.—A condition, in a policy of insurance, providing, in case of any difference of opinion between the insurer and the insured, that damage shall be appraised by disinterested appraisers, and the amount of any loss submitted to arbitration, and further providing that no action against the company shall be sustained, unless an award shall first have been returned, does not make arbitration a condition precedent to commencing suit on the policy, and is inoperative where no arbitrators have been agreed upon. The number of arbitrators not being specified, nor the mode of selecting them, the condition is too indefinite to be valid and enforceable.

INSURANCE—WHAT IS NOT PART OF PROOFS OF LOSS—ACTION NOT PREMATURE, WHEN.—Under a policy of insurance making a loss payable in sixty days after proofs of loss are furnished, and fully specifying what such proofs shall be, but requiring the insured to furnish duplicate bills of goods purchased in case the company shall require them, such duplicate bills are not a part of the proofs of loss. The loss is payable in sixty days after the regular proofs are received by the company, and an action therefor is not prematurely brought though the duplicate bills are not furnished sixty days before the commencement of the action.

H. M. Jackson, for the plaintiff in error.

King & Kelley, for the defendants in error.

⁹⁶ ALLEN, J. The defendants in error brought suit against the plaintiff in error to recover two thousand eight hundred dollars claimed under a policy of insurance—two thousand dollars on a general stock of merchandise, and eight hundred dollars on furniture and fixtures, alleged to have been destroyed by fire on the twenty-fifth day of May, 1891. A copy of the policy was attached to the petition, and its execution was admitted by the defendant. The petition alleges that due notice of the fire was given in accordance with the terms of the policy; that proofs of loss were made as required; that the plaintiff had performed all the conditions of the policy on his part; and that the defendant, through its agents, had examined the plaintiffs under oath as to the amount and cause of the loss, and refused to pay the same, and thereby waived all proofs ⁹⁷ of loss. The answer admits that the property was destroyed by fire, as alleged, except about two hundred and fifty dollars worth, and alleges fraud

and false swearing in the proofs of loss furnished by the plaintiffs, and the existence of concurrent insurance on the property to the amount of seventeen hundred dollars, and that the defendant was entitled to have the loss prorated between the two companies in case it should be held liable. There was a general denial of the allegations of the petition not expressly admitted. The reply admitted that the plaintiffs held another policy of insurance for seventeen hundred dollars, concurrent with that of the defendant, but alleged that the total value of the property destroyed was six thousand dollars. The case was tried with a jury, and a general verdict rendered in favor of the plaintiffs for the amount of the policy. 1. The answer alleged, and the reply admitted, that the plaintiffs held concurrent insurance. There were conditions on the back of the policy issued by the defendant with reference to the liability of the defendant in such a case. It is urged by counsel here that the petition fails to state a cause of action because of the failure of the plaintiffs to set up in their petition the other policy, which was issued by the Denver Insurance Company, and to show what its terms and conditions were affecting the defendant's rights. The only attempt to raise any question on the sufficiency of the pleadings was by objection to the introduction of evidence. We find nothing substantial in the contention. The petition was sufficient. If there was anything in the policy of insurance issued by the Denver company exempting the defendant from any part of its liability, it was a matter of defense of which the defendant could take advantage by answer. The plaintiffs' rights were not based on the concurrent policy of insurance, and it ^{was} unnecessary to make any reference to it in the petition. The authorities cited do not apply to the case under consideration.

2. One of the principal questions presented is, whether the submission of the amount of loss to appraisement by arbitrators was a condition precedent to the plaintiffs' right of recovery. The provisions of the policy affecting this question are as follows: "In case of failure to agree, the said damage shall be appraised on each article by disinterested appraisers mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the claimant; one-half of the appraisers' fees to be paid by the insurers. . . . Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and in case differences shall arise touching the amount of any loss or damage, it shall be submitted to the judgment of arbitrators mutually chosen, whose award in

writing shall be binding on the parties. . . . It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim for loss, by virtue of this policy, shall be sustainable in any court of law or chancery, unless an award of damages by arbitrators as herein provided for shall first have been returned."

There is no claim on the part of the plaintiffs below that any award was ever made, or that any request was made by either party that appraisers or arbitrators should be chosen. It was claimed, however, by them that the adjusters who came to Marion, where the plaintiffs live, and where the property destroyed was situated, and examined into the circumstances of the loss, had denied all liability under the policy, and that they thereby waived the conditions of the policy with reference to arbitration and proofs of loss. The ⁹⁹ insurance company claimed that it had never denied liability prior to filing its answer in the case, and that it had never waived any of the conditions of the policy. We shall consider the case as though the defendant's contention in this respect were sound, and shall assume that there never was a denial of liability, though the jury, in answer to a special question, found that there was such a denial.

There certainly was a disagreement between the parties as to the amount of the plaintiffs' loss, and as to the value of the property destroyed by the fire, so that the provisions of the policy with reference to arbitration clearly apply. Are they valid and enforceable? Is arbitration a condition precedent to the plaintiffs' right of recovery? The learned counsel for the plaintiff in error cites a long list of authorities to sustain his position. We shall notice only so many of them as seem necessary to illustrate the current of decisions on this subject. The case of *Scottish Union etc. Ins. Co. v. Clancy*, 71 Tex. 5, was an action on a policy providing that, unless the amount of damage should be agreed upon, it should be appraised by disinterested and competent persons, one to be selected by the company, one by the assured, and, when either party demanded it, the two so chosen to select an umpire, and the award of any two to be binding. This appraisal was to form a part of the proofs of loss, and to be made before the loss should be payable. It was held a valid provision, and that no action could be maintained if the insured, upon demand made for such appraisalment, refused to comply therewith, and that the appraisalment was a condition precedent to the plaintiff's right of recovery. The case of *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28, is to

the same effect. In the case of *Chippewa Lumber Co. v. 100 Phenix Ins. Co.*, 80 Mich. 118, the provisions of the policy were substantially the same as in the other cases. There was no express demand of arbitration, but the insurance company insisted "on estimating the loss under the contract," and it was held that the provision of the policy was valid, and a condition precedent to the plaintiff's recovery. In the case of *Chandos v. American etc. Ins. Co.*, 84 Wis. 184, it was held that "the decision of arbitrators or appraisers, chosen pursuant to an insurance policy, to determine the amount of a loss as to what particular articles or items of property are embraced within the general description of the property insured, is final and conclusive," and that a mortgagee to whom the insurance was payable was bound by the award though not a party to it. In *Wolff v. Liverpool etc. Ins. Co.*, 50 N. J. L. 453, it was held on demurrer that a provision similar to the one in the Texas case, above cited, "making an appraisal of the amount of the loss or damage a prerequisite to a suit on the instrument, is legal." In *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720, it was held that the provision of the policy then under consideration did not make arbitration a condition precedent to recovery, and that a refusal on the part of the insurance company to arbitrate was a waiver of the provision. In *Capitol Ins. Co. v. Wallace*, 48 Kan. 400, it was held that where a stipulation is contained in the policy that "in case differences shall arise as to the amount of any loss or damage . . . the matter shall, at the written request of either party, be submitted to two impartial appraisers," and where it did not appear that differences arose as to the amount of loss or damage, and neither party asked that appraisers be appointed, arbitration was not a condition precedent to recovery.

101 In all the cases we have examined in which arbitration has been held a condition precedent to recovery, the policy under consideration pointed out a definite and practicable method of selecting arbitrators to determine the question. In the policy now under consideration, the number of arbitrators is not fixed, and the method of appointment is by mutual agreement, rendering it necessary, if arbitration should be had, that the parties should both agree: 1. As to the number of arbitrators to be chosen; and 2. On each person who should act as such. In the case of *Case v. Manufacturer's etc. Ins. Co.*, 82 Cal. 263, it was held that a clause in the policy that "in case of differences touching any loss or damage after proof thereof has been received in

due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties," and not providing for the number of appraisers or the mode of their selection, is too vague to give defendant a right to demand arbitration, and plaintiff's refusal of such demand does not deprive him of the right to sue on the policy, or to prove the full amount of his loss, even though it is more than stated by him in the proofs. The case of *Mark v. National Fire Ins. Co.*, 24 Hun, 565, was an action on a policy of insurance containing the following provision: "In case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy."

It then provided that no action should be maintained until after an award. It was held that an award was not a condition precedent to a recovery, ¹⁰² but that the clause in the policy would be treated as an independent covenant, collateral to the agreement to pay. In that case, an attempt was made to name arbitrators, but the parties failed to agree on the persons who should act as such. This decision was affirmed by the court of appeals: *Mark v. National etc. Ins. Co.*, 91 N. Y. 663.

No attempt was made to arbitrate in this case, and we think the provisions of the policy are without any binding force, for two reasons: 1. They are vague and indefinite; and 2. They place it within the power of either party effectually to defeat any submission to arbitration merely by refusing to consent to the number of arbitrators named by the other party, or to agree to the persons suggested. Neither party should be charged with unfairness because of a refusal to accept as arbitrators persons suggested by the other. No means are provided for bringing the parties to terms and securing arbitrators should they attempt to do so. It is like requiring two persons to enter into a new contract, the terms of which either one is at full liberty to accept or reject.

3. Formal proofs of loss were made out by the plaintiffs and forwarded to the home office of the defendant company, where they were received on the twelfth day of June. The company forwarded them to its general agent at Omaha, and the plaintiffs heard nothing from them until July 12th, when their attorneys received a letter from their agent at Omaha, dated July

10th, calling for duplicate bills of the entire stock of goods purchased since the plaintiffs commenced business. There were other criticisms of the proofs contained in the letter, but there was an explicit demand for the duplicate bills. The original bills having been destroyed by fire, the plaintiffs obtained a large number of duplicate ¹⁰³ bills from wholesale houses, which, with an explanatory affidavit of one of the plaintiffs, were forwarded to the defendant August 1st. No response was received until the eighth day of September, when the company objected to the bills as not being certified under the conditions of the policy. This action was commenced on the 5th of September, and it is insisted that it was prematurely brought; that the loss was not payable until sixty days after proofs of loss were furnished; that duplicate bills constituted a part of the proofs required by the policy, and that those sent were insufficient and not received sixty days before the commencement of the suit. It is conceded that the duplicate bills were not furnished sixty days before the commencement of this action. In the face of the policy, it is provided that the loss is "to be paid within sixty days after notice and proof thereof made by the assured in conformity to the conditions printed on the back of this policy." On the back of the policy, No. 14 provides what the proofs of loss shall contain, and then continues: "And also, if required, shall produce their books of account and other proper vouchers, and furnish certified copies of all bills and invoices," and then further provides that the insured shall, if required, submit to an examination. The policy does not treat the certified bills as a part of the proofs of loss. They are mentioned after a full statement of what the proofs of loss shall contain, and are only to be furnished in case the company shall require them. We think the loss became payable sixty days after the original proofs were received by the defendant, and that the suit was not prematurely brought.

4. The defendant asked the court to require the jury to answer ninety-four special questions. Of these the ¹⁰⁴ court required answers to thirty-nine only, and complaint is made of the refusal to require answers to all the questions. We think the court ruled correctly in the matter. The questions it declined to submit to the jury were as to minute and unimportant matters, and answers to them would not have thrown any light on the question of the defendant's liability, or the amount thereof. Numerous other complaints of the action of the court in admitting and excluding evidence, in giving and refusing instructions,

in allowing an amendment to the petition and in overruling the motion for a new trial are made, but we find nothing substantial in any of them. The construction we have given to the provisions of the policy renders the question of waiver, which was considerably mooted at the trial, unimportant, as the conditions relied upon do not avail the defendant. Several pages of the brief are devoted to figures by which it is attempted to show that the plaintiffs' loss was less than they claim. The total amount of insurance under the policies issued by both companies was four thousand five hundred dollars. Several competent witnesses testified that the property destroyed was worth five thousand dollars. Two hundred dollars worth in all was saved. The verdict of the jury settled the question as to the amount of the loss, and, being based on competent evidence, leaves nothing to review here.

We find no substantial error in the record, and affirm the judgment.

All the justices concurred.

CUMULATIVE INSURANCE.—The violation of a condition against cumulative insurance does not render a policy absolutely void, but simply voidable, at the exclusive option of the insurer: *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7; 4 Am. St. Rep. 120.

INSURANCE—ARBITRATION—CONDITION PRECEDENT.—A provision in a policy of fire insurance that no action against the company shall be sustained until after an award shall have been obtained by arbitration fixing the amount due after a loss, is void: *Home Fire Ins. Co. v. Bean*, 42 Neb. 537; 47 Am. St. Rep. 711. A condition that any difference of opinion between the insurer and the insured as to the amount of loss may be submitted to arbitration is not a condition precedent to commencing suit on the policy, but leaves arbitration optional with the parties, and either may decline to arbitrate: *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 23 Am. St. Rep. 720; notes to *Moyer v. Sun Ins. Office*, 53 Am. St. Rep. 693; *Reilly v. Franklin Ins. Co.*, 28 Am. Rep. 557. A condition providing for arbitration does not make such arbitration a condition precedent to the bringing of an action upon the policy, unless clearly made so by the terms of the policy: Note to *Continental Ins. Co. v. Wilson*, 23 Am. St. Rep. 723. A condition that if any difference or dispute shall arise touching the loss it shall be referred to arbitration, is simply collateral to the main agreement to pay, and does not prevent an action on the policy before the reference: Note to *Home Fire Ins. Co. v. Bean*, 47 Am. St. Rep. 717. A condition as to arbitrating the question of loss, but which provides no certain and fixed mode of securing arbitration is void: Note to *Campbell v. American Popular Life Ins. Co.*, 29 Am. Rep. 604.

INSURANCE—WHEN ACTION IS PREMATURE, AND WHEN NOT.—An action upon a policy of insurance is premature when instituted prior to the expiration of the time allowed the company within which to make payment: Note to *Matt v. Iowa Mut. Aid Assn.*, 25 Am. St. Rep. 485; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562; *Camberling v. McCall*, 2

Yeates, 281; 2 Dall. 280; 1 Am. Dec. 341; but, if brought after that time, the action is not premature. Thus, if the company is liable to pay at the end of sixty days from the time that proofs are furnished, and more than sixty days have elapsed after proofs are furnished and before suit is brought, the action is not prematurely brought: Insurance Co. v. McDowell, 50 Ill. 120; 99 Am. Dec. 497.

MASON v. McLEOD.

[57 KANSAS, 105.]

PATENT RIGHTS—POWERS OF STATE—POLICE REGULATIONS.—Patent laws do not prevent a state from enacting police regulations for the protection and security of its citizens. Hence, statutory regulations concerning the transfer of patent rights, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights, or to own patent rights to sell, should be upheld.

PATENT RIGHTS—VALIDITY OF STATE STATUTE—POLICE REGULATIONS.—A state statute requiring the vendor of patent rights to file copies of the letters patent with a clerk of court, and to make and file an affidavit that the letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell, and providing further that any person who takes a written obligation in consideration of a patent right shall insert in the body of it, in writing or print, the words, "Given for a patent right," is a reasonable police regulation, designed to protect people against imposition and fraud, and is valid, because it does not usurp any of the powers of the government, or infringe upon the exclusive rights of the patentee.

PATENT RIGHTS—CONTRACT AS TO, WHEN VOID UNDER STATE LAW.—A contract made by a vendor of patent rights in violation of a state statute regulating the transfer of patent rights, and which declares a noncompliance with its provisions to be a misdemeanor, punishable by fine or imprisonment, is void as between the parties, for the penalty implies a prohibition, and the purpose of the statute is to prevent and punish fraud.

PATENT RIGHTS—CONTRACT—RELIEF FOR PARTY NOT IN PARI DELICTO.—The general rule that courts will not enforce contracts prohibited by statute or allow the recovery of money or property paid or delivered in pursuance of them does not apply to the vendee of a patent right, for he has committed no wrong, and is not precluded from asking and obtaining relief.

Action to annul a contract. On December 19, 1891, Mason sold to McLeod the right to manufacture, sell, and use a patent for an improvement in pruning-hooks, in the undivided half of the state of Texas. The consideration paid was a tract of land in Kansas, money and personal property of the value of eight hundred dollars, and McLeod's promissory note for five hundred dollars. On March 3, 1892, the parties made a new agreement, whereby McLeod was to surrender his patent to the Texas territory, and give a note for two hundred and thirty-five dollars, and Mason was to sell to McLeod a right to the territory of

Utah and state of South Carolina, together with certain counties in western Kansas, and, at the same time, surrender to McLeod the five hundred dollar note. The patent deed for the Texas territory was surrendered by McLeod and delivered to be canceled, and Mason conveyed a right to the other territory above named, but the five hundred dollar note was held by the State Bank of Le Roy, Kansas, as collateral security; so it was agreed that, upon Mason's obtaining the note from the bank, McLeod should execute his note for the two hundred and thirty-five dollars and receive in exchange the five hundred dollar note. Mason never procured the note held by the bank, and McLeod did not execute his note for two hundred and thirty-five dollars. Mason agreed with his wife, Laura A. Mason, that she should have the proceeds of the sales of the patent for the state of Kansas, and, in compliance with such agreement, the McLeod real estate was conveyed to her, and the personal property was delivered to her. At the time of these transactions, Mason had made no attempt to comply with the statutory requirements concerning the transfer of patent rights, the nature of which appears in the opinion. On March 17, 1892, McLeod brought an action against Mason and his wife to annul the contract made between McLeod and Mason, to set aside the deed to the Kansas land which McLeod had conveyed for the patent right, to cancel the five hundred dollar note, of which Mason still had possession, and to recover the value of the personalty which had been transferred as a part of the consideration for the patent right. The court held that the attempted conveyance of the patent right was illegal, that the patent deeds were void, and that the plaintiff was entitled to a judgment for the reconveyance of the real estate previously transferred, for the surrender of the five hundred dollar note, and for the sum of eight hundred and fifteen dollars, the value of the personalty delivered and the money paid for the illegal patent right. The defendants appealed.

R. P. Kelley and W. S. Marlin, for the plaintiffs in error.

Stephenson & Hogueland, G. H. Lamb, and G. E. Manchester, for the defendant in error.

107 JOHNSTON, J. No attempt was made by Mason to comply with the statutory requirements concerning the transfer of patent rights, and for this reason the trial court held the contract to be invalid, and adjudged a rescission. The principal question discussed ¹⁰⁸ by counsel relates to the validity of the statute in violation of which the contract was made. Among other things, it provides that it is unlawful for any person to

sell a patent right in any county of the state without filing with the clerk of the district court copies of the letters patent, and with them an affidavit that the letters patent are genuine, have not been revoked or annulled, and that he has full authority to sell. It is required that the affidavit shall give the name, age, occupation, and residence of the party proposing to sell, and he is required to exhibit a copy of the affidavit to any person on demand. There is a further provision that any person who takes a written obligation in consideration of a patent right shall insert in the body of it in writing or print the words, "Given for a patent right." A failure to comply with these provisions is declared to be a misdemeanor, and the penalty is a fine not exceeding one thousand dollars or imprisonment in the county jail not exceeding six months: Laws 1889, c. 182; Gen. Stats. 1889, pars. 4005-4007.

In our opinion, these provisions do not trench upon the federal power, nor interfere with the right secured to a patentee by the federal law. It is true that no state can interfere with the right of the patentee to sell and assign his patent, or take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations, designed for the protection of the people against imposition and fraud. There is great opportunity for imposition and fraud in the transfer of intangible property such as exists in a patent right, and many states have prescribed regulations for the transfer of such property differing essentially from those which control the ¹⁰⁹ transfer of other property. There were some early decisions holding that such regulations trenched upon the federal power and the rights of the patentee, but recent authorities hold that reasonable police regulations may be enacted by the state without usurping any of the powers of the federal government or infringing upon the exclusive rights of the patentee: *Brechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695; *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40; *Pape v. Wright*, 116 Ind. 502; *Sandage v. Studebaker Brothers Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165; *Tod v. Wick*, 36 Ohio St. 370; *Herdic v. Roessler*, 109 N. Y. 127; *Haskell v. Jones*, 86 Pa. St. 173; *Patterson v. Kentucky*, 97 U. S. 501; *Webber v. Virginia*, 103 U. S. 344. The doctrine of these cases is, that the patent laws do not prevent the state from enacting police regulations for the protection and security of its citizens, and that regulations like ours, which are mainly designed to protect the people from imposition by those who have actually no authority to

sell patent rights or own patent rights to sell, should be upheld. We think the statute is valid.

The purpose of the statute, as we have seen, was to prevent and punish fraud, and noncompliance with its provisions is declared to be a misdemeanor, punishable by fine or imprisonment. The penalty implies a prohibition, and contracts made by a vendor of patent rights in violation of the act are void as between the parties. The transfer of Mason, being illegal, did not constitute a valid consideration for the money or property obtained from McLeod: *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40; *Sandage v. Studebaker Brothers Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165.

It is contended by plaintiffs in error that if the statute is bad all of the parties are in *pari delicto*, and all should be left without remedy. It appears that the ¹¹⁰ contract finally made was not in fact closed up and completed. The five hundred dollar note previously delivered to Mason for the Texas territory was never delivered to McLeod. He had deposited the note as collateral in a bank at Le Roy, and it was not then under the control of himself or his wife. The return of this note and its exchange for the two hundred and thirty-five dollar note was a part of the consideration of the contract, and until these things were done it was not in fact executed. More than that, the general rule that courts will not enforce contracts prohibited by statute or allow the recovery of money or property paid or delivered in pursuance of them does not apply to McLeod. He cannot be held to be in *pari delicto*. The duties prescribed by the statute are imposed upon the vendor of patent rights, and are provided for the protection of purchasers. The law was not violated by McLeod. It placed no burdens upon him, and, having committed no wrong, he is not precluded from asking and obtaining relief.

We think the pleadings are sufficient to warrant the findings that were made, and that the judgment should be affirmed.

All the justices concurring.

PATENT RIGHTS—STATE LAWS RESPECTING THE SALE OF.—A state statute requiring the owner of letters patent to file copies thereof in the circuit court of the county in which he makes any sale thereof, and to insert in the obligation, given for the purchase price, that it is given for a patent right, and subjecting him to a penalty for violating the statute, is not in conflict with the constitution or laws of the United States, and, therefore, is not void: *Sandage v. Studebaker etc. Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165. So, a state statute requiring vendors of patent rights to file with the county clerk an authenticated copy of the letters, with an

affidavit that they are genuine and have not been revoked or annulled, and that the vendors have authority to sell, is valid: *Brechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695; *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40. On the other hand, however, a state statute providing that any person taking a written obligation, the consideration whereof is a patent right, shall, before such obligation is signed by the maker, insert in the body thereof "given for a patent right," has been held unconstitutional, as interfering with the exclusive power of Congress to regulate patents: *Helm v. First Nat. Bank*, 43 Ind. 167; 13 Am. Rep. 395; *Hollida v. Hunt*, 70 Ill. 109; 22 Am. Rep. 63, and extended note thereto; *Crittenden v. White*, 23 Minn. 24; 23 Am. Rep. 676; *Cranson v. Smith*, 87 Mich. 809; 26 Am. Rep. 514, and extended note thereto. In *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, it was held that a promissory note taken by the vendor of a patent right who had not complied with the statute, and which did not contain the words above quoted, was inoperative as between the parties, and as to a purchaser with notice, unless he showed that his indorser was a purchaser in good faith.

WINTER v. RITCHIE.

[57 KANSAS, 212.]

HOMESTEAD—EXCHANGE OF, FOR OTHER LAND IS NOT A FRAUD ON JUDGMENT CREDITORS.—A debtor cannot commit a fraud upon his creditor by disposing of his homestead, and one homestead may be exchanged for another free from any claim of creditors upon either. Hence, if a judgment debtor, desiring to change his place of residence, exchanges his homestead for other land subject to an encumbrance, not with the intention of occupying the land traded for, but for the purpose of executing a mortgage on it to pay off the encumbrance, and to obtain enough money, together with what he may realize from the sale of the equity of redemption, to buy another home, at another place, and is advised, upon applying for a loan to one fully informed of the facts, that if he will take a deed of the land in the name of his son, so that the judgments will not appear to be liens upon the property, a loan will be made, and this is done, the son executing to the lender a first mortgage on the land, and the lender discharging the encumbrance, and paying the balance of the money over to the father, the transaction, though the son afterward conveys the equity of redemption, is not a fraud upon the father's judgment creditors, and, in an action against him to subject the land traded for to the payment of the judgments against him, such creditors have no right to complain as against the lender and his assignees.

R. P. Kelley and W. S. Marlin, for the plaintiffs in error.

G. E. Manchester, for the defendants in error.

212 MARTIN, C. J. The plaintiffs in error, holding judgments against J. C. Gillham for three thousand and ninety-seven dollars and eighty-four cents and costs, commenced their action for the purpose of subjecting three hundred and twenty acres of land in Greenwood county to the payment hereof, and they prosecute this proceeding in error to obtain the relief which the district court denied.

The essential facts are these: J. C. Gillham, being the head of a family, owned a house and lot in Eureka, ²¹³ which he occupied as a homestead, and these judgments and others would have been a lien upon the property except for its homestead character. He was insolvent. On January 5, 1887, he traded the homestead for said land, which was encumbered to the amount of two thousand dollars. The exchange was made, not with the intention of occupying the land, but for the purpose of executing a mortgage on it to pay off the encumbrance, and to obtain enough money, together with what he might realize from the sale of the equity of redemption, to buy another home, either in Fort Scott or Wichita. He made application to the Farmers' Loan & Trust Company at Anthony for a loan upon the land. Its officers were fully acquainted with the circumstances, and they advised him to have the deed for the land made to William E. Gillham, his son, who was twenty-one years of age, so that the judgments might not appear to be liens upon it. Accordingly, the deed for the land was made to William E. Gillham, who made application for the loan (that of J. C. Gillham being withdrawn), and the company made a loan of three thousand dollars. The encumbrance was discharged, and the balance of the money was paid to J. C. Gillham. William E. Gillham executed to the company his note for the amount of the loan, and secured the same by a first mortgage on the land; and he executed four other notes for one hundred and fifty dollars each to T. H. Stevens, who was connected with the company, the same being given as commissions for obtaining the loan, and he secured these notes by a second mortgage upon the land. Stevens transferred these commission notes to the company, and they, together with the second mortgage, came into the hands of Whitney R. Tucker; but the three thousand dollar note was assigned to the Citizens' Savings Bank & Trust Company, of St. Johnsbury, Vermont, ²¹⁴ defendant in error; John T. Ritchie, the other defendant in error, being the treasurer and general manager of said bank, who transacted the business. The transfers of all the notes were by assignment, and not by commercial indorsement. After the execution of the mortgages, William E. Gillham conveyed the land, and, by mesne conveyances, the title became vested in Charles W. Spaulding, subject to the encumbrances. Tucker foreclosed upon three of the commission notes making William E. Gillham and Charles W. Spaulding parties defendant. He obtained judgment for five hundred and sixty-one dollars and fifteen cents, and an order of sale of the prop-

erty subject to the first mortgage of three thousand dollars and interest. The land was sold at sheriff's sale, and said John T. Ritchie becoming the purchaser at the sum of twenty-two dollars, subject to said first mortgage, the sale was confirmed, and on June 6, 1891, the sheriff executed a deed to said John T. Ritchie for said land, subject to said first mortgage.

The plaintiffs contend that, when the legal title was placed in the name of the son, the equitable title vested in the father, and their judgment liens attached to it; but no liens attached to the homestead which was traded for the land, and the exchange and the loan were all parts of a transaction designed to transfer the home from Eureka to Fort Scott or Wichita, and the balance of the loan, over and above the encumbrance, and the equity of redemption together represented the value of the Eureka homestead: *Monroe v. May*, 9 Kan. 466, 475; *Harrison v. Andrews*, 18 Kan. 535, 541. The same principle was applied for another purpose in *Nichols v. Overacker*, 16 Kan. 54, 58. It is well settled that one homestead may be exchanged for another free from any claim of creditors upon either. A ²¹⁵ debtor cannot commit a fraud upon his creditor by disposing of his homestead: *Hixon v. George*, 18 Kan. 254, 260. It may be that if J. C. Gillham had taken the title to the land in his own name, the judgment liens might have attached. Certainly, they would do so if not merely a step in the transaction of exchanging homesteads, but the loan was made at the time of vesting title in William E. Gillham. The sum of two thousand dollars was used to discharge the prior encumbrance, and it would be inequitable to subject the interest in the land which represented the exempt fund to the payment of judgments which never became a lien upon it, to the prejudice of the loan company or its assignees.

The plaintiffs have no just cause of complaint, and the judgment will be affirmed.

All the justices concurring.

HOMESTEAD—SALE OF, AND INVESTMENT OF PROCEEDS IN ANOTHER, IS NO FRAUD UPON CREDITORS.—A debtor's conveyance of his homestead exempt by law is not considered fraudulent as to creditors: *Note to Edwards v. Reid*, 42 Am. St. Rep. 613; *McDannell v. Ragsdale*, 71 Tex. 28; 10 Am. St. Rep. 729; *note to Pike v. Miles*, 99 Am. Dec. 152; *Fellows v. Lewis*, 65 Ala. 343; 89 Am. Rep. 1. A judgment debtor may sell his homestead and invest the proceeds in another, and carry the exemption of the first homestead into the one subsequently acquired, even as against debts created before the acquisition of the latter: *Macke v. Byrd*, 131 Mo. 682; 52 Am. St. Rep. 649. "A man may sell his homestead and give good title, no matter how

many judgments may be standing against him. The proceeds of that sale he may reinvest in a homestead, and though he do not actually occupy it until after he has completed his purchase and secured his title, still, if he purchase it for a homestead, and enter into occupation within a reasonable time thereafter, no lien of existing judgments will attach": See monographic note to Vanstory v. Thornton, 34 Am. St. Rep. 503, on judgment liens on homesteads. Compare monographic note to Morgan v. Rountree, 45 Am. St. Rep. 238, on the exemption of the proceeds and produce of a homestead, to the same effect.

ROHRBAUGH v. HAMBLIN.

[57 KANSAS, 393.]

COVENANT OF ANCESTOR—LIABILITY OF HEIRS—COMMON LAW.—To hold heirs liable, at common law, upon a covenant of their ancestor, it is necessary to show that they are named therein and have assets by descent sufficient to meet the demand.

HEIRS—LIABILITY OF, UPON OBLIGATION OF ANCESTOR.—In the state of Kansas, if the obligation of an ancestor matures after all the assets have been converted into money and distributed to the heirs, they may be compelled to refund to a claimant so much of what they have received as shall be sufficient to satisfy the obligation.

COVENANT OF WARRANTY BY ANCESTOR—LIABILITY OF HEIRS—JURISDICTION OF COURTS.—If an ancestor binds himself by a covenant of warranty in a deed for certain real estate, and dies testate, leaving all his property to the defendants as his legatees, but there is a breach of the covenant by eviction of the plaintiff six years after the final settlement, and distribution of the estate, and discharge of the personal representative by the probate court, the district court has jurisdiction of a suit in equity brought directly by the plaintiff against the defendants, and may compel them to refund that which, in good conscience, they ought not to retain.

Action to recover damages for a breach of the covenant of warranty contained in a deed of real estate, executed by George W. Hamblin and wife, in December, 1879, and originally commenced in the district court of Franklin county by Rohrbaugh. The covenant of warranty was as follows: "And the said George W. Hamblin does hereby covenant and agree that he will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever, against all persons lawfully claiming the same." Hamblin died testate in September, 1882, leaving all his property to the defendants, Amelia L. Hamblin and others, as his legatees. His estate of twenty-two thousand four hundred and sixty-nine dollars and ten cents was fully settled by a court of competent jurisdiction in January, 1884, and distributed in accordance with the will. While Hamblin was in possession of the real estate mentioned, and delivered it to his grantee, yet he had no title thereto, and the plaintiff was evicted therefrom, in 1890, at the suit

of the city of Ottawa: See *Ottawa v. Rohrbaugh*, 42 Kan. 253. It was agreed that, if the plaintiff was entitled to recover, the amount of the judgment should be two hundred and fifty dollars with interest, which, at the time of the decision amounted to twenty-five dollars. There was a judgment in favor of the plaintiff for two hundred and seventy-five dollars, and costs, which was reversed by the court of appeals, and the case was taken to the supreme court on discretionary certification.

C. A. Smart, for the plaintiff in error.

F. A. Waddle, for the defendants in error.

²⁹⁵ MARTIN, C. J. 1. The court of appeals in effect held that the remedy provided by sections 171 and 172 of the executors and administrators act (Gen. Stats. 1889, pars. 2957, 2958), relating to the refunding of legacies and distributions, is exclusive, and that no action having this purpose in view can be maintained in the district court. Referring to those sections as affording a remedy, the court says: "We apprehend that if a proper showing had been made in this case it would have been the duty of the court to appoint an executor or administrator de bonis non, and he, under the direction of the court, would have proceeded after the allowance of the claim to procure assets sufficient to pay said claim."

We do not think the plaintiff was required to pursue this circuitous remedy, if, indeed, an administrator de bonis non can be legally appointed after all the property has been distributed and the personal representative discharged. Final settlement had been made six years before there was a breach of the covenant of warranty; and, under such circumstances, we hold that relief may be afforded in equity directly against the beneficiaries of the estate to compel them to refund that which in good conscience they ought not to retain. It is true that, while an estate remains unsettled and the probate court is still exercising jurisdiction over it, the district court should not, except in special cases, entertain an action for relief properly grantable by the probate court; but we think it follows ²⁹⁶ from a long line of decisions of this court that the district court may properly entertain jurisdiction in a case of this character. The following are some of the authorities, and they refer to most of the others: *Shoemaker v. Brown*, 10 Kan. 383; *Klemp v. Winter*, 23 Kan. 699, 705; *Stratton v. McCandless*, 27 Kan. 296, 306; *Kothman v. Markson*, 34 Kan. 542, 550; *Gafford v. Dickinson*, 37 Kan. 287, 291; *McLean v. Webster*, 45 Kan. 644, 648; *In re Hyde, Petitioner*, 47 Kan.

277, 281. The court of appeals relied on *Fox v. Van Norman*, 11 Kan. 214, but we think that case is distinguishable from this as from *McLean v. Webster*, 45 Kan. 644, as stated by Chief Justice Horton in said case.

2. The defendants claim that, in any event, the judgment of reversal was proper on other grounds, one of which only we think it necessary to discuss. The covenant of warranty does not assume to bind the heirs of George W. Hamblin, and it is well settled in England that in such case they would not be liable. In order to hold them liable on such a covenant, it was necessary to show that they were named therein and that they should have assets by descent sufficient to meet the demand: 2 Blackstone's Commentaries, 304; Rawle on Covenants for Title, secs. 309, 310. The latter author says:

"The liability (whether immediate or ultimate) of the heir by reason of his ancestor's covenants for title depends in this country, to a great extent, upon the statutory provisions adopted in the different states for making the real estate of a decedent liable for the payment of his debts. . . . In the United States, it may be said that, as a general rule, lands are liable for the debts of a decedent, whether due by matter of record, by specialty, or by simple contract. In the last two cases, the existence of the debt, unless it be reduced to judgment, creates no lien during the debtor's life. By his death, however, its quality is ³⁰⁷ changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee subject to the payment of the debt of the ancestor, according to the laws of the state in which it lies, and the rights of the creditor can, in most of the states, be enforced against the lands in the hands of a bona fide purchaser, within certain statutory limitations as to time."

In this state, realty does not become liable to the payment of the debts of the estate until the personalty has been exhausted, in which case it may be applied to the fullest extent unless exempt; and, by analogy, when all the assets have been converted into money and distribution has been made to the heirs, devisees, or legatees, and an obligation of the ancestor or testator then matures, such beneficiaries of the estate ought to be compelled to refund to the claimant so much of what they have received as shall be sufficient to satisfy it. Strictly speaking, the beneficiaries are not liable in an action at law, even when named in the covenant, for they can only be held to the extent of the assets received from the estate. Such action should be equitable in form, to subject the assets received by the beneficiaries to the

payment of the debt. But, in this case, no point was made in the district court as to the form of the action, nor as to the character and amount of the judgment, provided the plaintiff should be entitled to recover; and, the amount received by each of the defendants being greater than the plaintiff's claim, there was no substantial error in rendering judgment in its present form, the defendants being liable to contribution as between each other.

The judgment of the court of appeals must be reversed, ⁸⁹⁸ and the judgment of the district court will be affirmed.

All the justices concurring.

HEIRS ARE LIABLE FOR THE DEBTS OF THEIR ANCESTOR, to the extent of the assets received, and a creditor of the intestate may maintain an equitable action against them to recover his claim, even before administration of the estate: *Shannon v. Dillon*, 8 B. Mon. 389; 48 Am. Dec. 394, and monographic note thereto on the liability of heirs for the debts of their ancestor.

A COVENANT MAY BE ENFORCED IN EQUITY, whether it runs with the land or not, where it appears that it was the intention of the parties that it should bind their successors in interest, as well as themselves: *Bald Eagle etc. R. R. Co. v. Nittany etc. R. R. Co.*, 171 Pa. St. 284; 50 Am. St. Rep. 807.

STATE v. HATCH.

[57 KANSAS, 420.]

HOMICIDE — INSTRUCTIONS — INVOKING PROCESS OF LAW IS NOT AN ELEMENT OF SELF-DEFENSE.—It is error, on a prosecution for murder, where self-defense is relied on, to instruct the jury to the effect that the right of self-defense does not arise where there is opportunity to restrain the assailant by process of law, and that if the defendant had ample opportunity to have the deceased bound over, by a magistrate, to keep the peace, but did not do so, then he is not entitled to the plea of self-defense.

CRIMINAL LAW—SELF-DEFENSE—"RETREAT TO THE WALL."—The doctrine that a person unlawfully attacked must "retreat to the wall" before he can be justified in taking the life of his assailant in self-defense is not the law of Kansas; but if the defendant is in the wrong and commences the affray, even with no intent to kill or inflict great bodily harm, and the other party, being thus provoked, makes a deadly assault, then it is the duty of the defendant to retreat as far as the fierceness of the assault will permit him to do, without danger of great personal injury to himself, before slaying his antagonist.

Prosecution on a charge of murder in the first degree. The defendant, Hatch, was charged with having shot and killed Thomas Mullen, on December 5, 1895. He was convicted of murder in the second degree, and was sentenced to imprisonment in the penitentiary for twenty years, whereupon he ap-

pealed. It was not denied that Hatch shot and killed Mullen, and the defendant pleaded self-defense. Hatch and Mullen first had difficulty at a billiard hall, where Mullen, after some words had passed, threatened to strike Hatch with the butt end of a billiard cue. A man named Freeman interfered, and Hatch went outside, Mullen following him, and there they had hot words, and Mullen threatened to kill Hatch. Soon afterward, Mullen procured a shotgun and carried it about the street, threatening to kill Hatch, as well as Freeman, at whom he had taken offense. Hatch and Freeman were advised of such threats and requested the chief of police and a constable to disarm Mullen. Hatch then endeavored to procure a pistol and made some threats against Mullen. Friends of Mullen, after a time, induced him to give up his gun. Hatch, being a hotel porter, and it being a part of his business to go to the depots, on the arrival of passenger trains, to solicit people to go to the hotel employing him, borrowed a pistol, about 6 o'clock in the evening, from his employer, on the statement that he needed it for defense against Mullen, who had threatened his life, and that it was necessary for him to go to meet an incoming train. He went to meet the train, and at the corner of Second and Main streets he called "Hello, Tom!" meaning, as he said, Tom Fife, not seeing Mullen, but this was a fact in dispute. Mullen came toward Hatch, and there were some words of attempted explanation, when Mullen ordered Hatch to take his hands out of his overcoat pockets, as if in fear that Hatch was armed. Hatch did so, but Mullen approached nearer, and, the talk continuing between them, Hatch drew a pistol and, firing four or five shots at Mullen, killed him. Mullen was not armed at the time, but Hatch testified that, before he shot, Mullen was approaching toward, and threatening to kill, him, and that he made a motion as if reaching for a pistol. During the afternoon, Mullen had been under the influence of intoxicating liquors. The defendant complained particularly of the following instructions given: "24. The right of self-defense does not arise where there is opportunity to restrain the assailant by process of law; and if the jury, in this case, believe from the evidence, beyond a reasonable doubt, that the defendant had an opportunity to invoke the interposition of the law against any threatened assault by the deceased, and failed to invoke the authority of the law, he is not entitled to the plea of self-defense; and it would not be enough for the defendant to call upon the police officers and constables for protection, unless the deceased was present at the time, attempting then and there to assault him. But if he had

ample opportunity to do so, the law devolved upon him the duty of going before some magistrate and have the deceased bound over to keep the peace, or committed to jail in default of bail; and if, having such opportunity, he failed to do so, and deliberately and premeditatedly armed himself with a deadly weapon and went forth to meet the deceased in a conflict which he expected, or provoked a conflict by inviting the deceased into a dispute or altercation with him, he is not entitled to the plea of self-defense. 25. I instruct you further, in the same connection, that in order to establish justifiable homicide in self-defense, it must appear that the party killing had retreated as far as the fierceness of the assault would permit him to do without great personal injury to himself; and if, in this case, the defendant expected an attack to be made by the deceased, and if you believe from the evidence, beyond a reasonable doubt, that the defendant had practicable opportunity to retreat and thus avoid killing the assailant, before he was in imminent danger of great personal injury, he is not entitled to the plea of self-defense."

McKinstry & Fairchild, for the appellant.

F. B. Dawes, attorney general, and Lucius M. Fall, county attorney, for the state.

⁴²³ MARTIN, C. J. 1. The homicide being admitted, and the only defense thereto being that it was justifiable, instruction 24 was of paramount importance. There was no evidence that the defendant went before any magistrate with a view of having Mullen bound over to keep the peace, although he probably had abundant opportunity of doing so during the course of the afternoon and after the difficulty at the billiard hall. He did apply to a constable and a police officer for protection, but this was insufficient according to this instruction. We have been unable to find any authority introducing this element into the law of self-defense. Counsel for the state cite several cases in support of the instruction, and we have examined them all but find in them no justification of the state's contention. Section 9 of the crimes act (Gen. Stats. 1889, par. 2130) is itself a definition of justifiable homicide in this state, and it contains no such element as that required by instruction 24. Instruction 29 further impressed upon the jury the duty of the defendant to go before a justice of the peace ⁴²⁴ for protection as a prerequisite to the plea of self-defense, thus repeating the error in giving instruction 24.

2. Instruction 25 was also erroneous and material. The doc-

trine that a party unlawfully attacked must "retreat to the wall" before he can be justified in taking the life of his assailant in self-defense does not obtain in this state: *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322. Where the defendant is in the wrong and commences the affray, even with no intent to kill or inflict great bodily harm, and the other party being thus provoked makes a deadly assault, then it is the duty of the defendant to retreat as far as the fierceness of the assault will permit him to do without danger of great personal injury to himself before slaying his antagonist: *State v. Rogers*, 18 Kan. 78; 26 Am. Rep. 754. In the present case, it was for the jury to determine from the evidence whether Hatch or Mullen was in the wrong in commencing the affray at Second and Main streets, which resulted in the death of Mullen. The court should not assume that one party or the other was first or chiefly in fault when that fact is in issue, but should instruct the jury on the theory of the defendant as well as that of the state, provided each theory finds some support in the evidence as in this case.

Instruction 15 defining murder at the common law is subject to the criticism that it omits the word "unlawfully"; but, in connection with other instructions, we think it could not have been prejudicial to the defendant, although it should be corrected on a retrial. Evidence touching the declarations of Mullen during the afternoon while armed with the shotgun should not have been admitted; but they were scarcely prejudicial to the defendant, and the judgment would not be reversed on these grounds alone.

⁴²⁵ For the error of the court, however, in giving instructions 24, 25, and 29 the judgment will be reversed and the case remanded for a new trial.

All the justices concurring.

CRIMINAL LAW—SELF-DEFENSE.—"RETREAT TO THE WALL."—A homicide cannot be justified on the ground of self-defense in a combat provoked by the survivor: *State v. Rogers*, 18 Kan. 78; 26 Am. Rep. 754; note to *Gibson v. State*, 18 Am. St. Rep. 102; *State v. Trammell*, 40 S. C. 331; 42 Am. St. Rep. 874; but, where the one who provokes a conflict afterward withdraws from it, and expresses a desire for peace, his right of self-defense is revived: *Stoffer v. State*, 15 Ohio St. 47; 86 Am. Dec. 470; *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 417; notes to *Gibson v. State*, 18 Am. St. Rep. 102; *Carter v. State*, 28 Am. St. Rep. 952. A party who is unlawfully attacked by another may stand his ground, and use such force as reasonably appears necessary to repel the attack and protect himself: *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322.

STATE v. McCORMICK.

[57 KANSAS, 440.]

FALSE PRETENSES—ESSENTIAL ELEMENTS OF OFFENSE.—An essential element of the offense of obtaining property by false pretenses is, that the person who parts with it is, in fact, defrauded to his injury. In addition to the false pretenses, there must be an intent to defraud. The pretenses must be used for the purpose of perpetrating the fraud, and a fraud must be actually accomplished by means of the false pretenses.

FALSE PRETENSES—GIVING OF WORTHLESS CHECK—IMMATERIALITY OF DEFENDANT'S INSOLVENCY.—It is not essential to a conviction for obtaining property by fraud and false pretenses, where the defendant is charged with having obtained a horse by stating that he had money in a certain bank and that a check thereon which he gave was good and would be paid on presentation, when he did not, in fact, have any money in the bank, or any account with it, to allege or prove that the defendant was insolvent, especially where the check was taken as the equivalent of money, without any intention of extending credit to the defendant. The seller was defrauded to his injury regardless of how solvent the defendant may have been.

CHECKS—EVIDENCE OF DISHONOR.—A CERTIFICATE OF THE PROTEST of a check is competent evidence of due presentment, demand, and refusal to pay.

CHECKS—COMPETENT EVIDENCE THAT CHECK IS BAD.—The cashier of a bank, who is its manager, and who has supervision of the books kept, is competent to testify that a certain person has no account with it, or money there subject to his check, although he gets his information, principally, from the books of the bank; and a book purporting to contain a list of the depositors, and which is identified by the cashier, is admissible for the same purpose, although no other evidence is offered of its being correct.

FALSE PRETENSES—RELIANCE UPON FALSE REPRESENTATIONS.—If the defendant upon a charge of obtaining property by fraud and false pretenses, is assisted by another in fraudulently obtaining the property, and such other person makes false representations to the owner in the presence and hearing of the defendant, without objection, or explanation, by him, and which are, in effect, an affirmation of the representations made by the defendant, the false representations made by such other person, with the approbation and concurrence of the defendant, will, if relied upon by the owner, bind the defendant to the same extent as if he himself had made them.

NEW TRIAL—MISCONDUCT OF JURORS—PREJUDICIAL STATEMENTS OF JURORS.—In a prosecution for obtaining property by fraud and false pretenses, it is material error for the court, upon the hearing of a motion for a new trial, based upon the misconduct of the jury, to exclude evidence showing that, after the jury had retired and were deliberating upon their verdict, one of the jurors stated that the defendant had been convicted upon a former trial, and that another juror stated, as a fact, that the defendant had defrauded a witness, who had testified in behalf of the state, out of some cattle while in the state of Colorado. These statements, if made, were of an important and prejudicial character, and might have improperly influenced the verdict.

EVIDENCE—BURDEN IN CRIMINAL CASES—PREJUDICE—IMPROPER INFLUENCES.—Unless the record, in a criminal case,

shows that improper influences did not prejudice the rights of the defendant, the burden of proving that the defendant did not suffer prejudice by reason thereof rests upon the prosecution.

NEW TRIAL—OATH TO BAILIFF.—The fact that the bailiff, who took charge of the jury when the cause was finally submitted, was not sworn as the statute requires is ground for a new trial. Such oath is important in its nature, and, being specifically required, it cannot be omitted.

Stebbins & Evans and Hayden & Hayden, for the appellant.

F. B. Dawes, attorney general, and A. E. Crane, county attorney, for the state.

441 JOHNSTON, J. The defendant was prosecuted upon a charge of obtaining from James Fritz, a bay gelding by fraud and false pretenses. On March 9, 1895, two men appeared at the home of Fritz and entered into negotiations with him for the purchase of a gelding. One of the men was J. C. Goggerty, a liveryman, who had resided a short distance away from Fritz for some time and with whom Fritz had been acquainted. The other man represented himself to be I. T. Jones, of Kansas City, and to be engaged in the business of buying horses. He was a stranger to Fritz, and had never been seen in that community before. After some preliminary negotiations, Jones purchased the gelding at the price of fifty dollars. Jones then wrote out a check on the Interstate National Bank of Kansas City and offered it to Fritz in payment for the gelding. Fritz made some objection to the taking of the check, when Jones remarked that the check was good, and Goggerty, with whom Fritz was acquainted **442** and in whom he had confidence, also stated that the check was good, and that he had also sold a horse to Jones and taken a check in payment therefor. Relying upon these representations, Fritz accepted the check and delivered the horse, which was taken away by Jones. On November 17, 1895, Oliver McCormick was arrested as the person who represented himself to be I. T. Jones in the purchase of the gelding, and charged with the crime of obtaining it by false pretenses. At a trial had at the March term, 1896, the defendant was convicted, and the penalty adjudged was imprisonment at hard labor for a term of four years. He appeals, and contends that the giving of the check, and the representation that he had money on deposit in the bank, if false and fraudulent, is not an offense within the meaning of section 94 (Gen. Stats. 1889, par. 2228) of the crimes act. It is argued in his behalf that the drawee could in no event maintain an action on the check, but is presumed to have taken it on the responsibility of the drawer, and therefore the fact that the check

was without value did not affect the legal rights of Fritz; and, further, that if Fritz has a good cause of action against a solvent party, he has not been defrauded. The information charges that Goggerty combined and conspired with the defendant in making false representations and in perpetrating the fraud, but it was not alleged or shown that either of them was insolvent or unable to respond in a civil action for damages resulting from their fraudulent action. An essential element of the offense is, that the person who parts with his property is in fact defrauded to his injury. In addition to the false pretenses, there must be an intent to defraud. The pretenses must be used for the purpose of perpetrating ⁴⁴³ the fraud, and a fraud must be actually accomplished by means of the false pretenses. The false representation that the defendant had money in the bank with which to pay the check operated as an injury and a fraud upon Fritz. It was in the nature of a cash transaction, and the check was taken as the equivalent of money. It therefore necessarily resulted in an injury to Fritz, regardless of how solvent defendant or Goggerty may have been. Fritz did not sell his gelding upon a promise to pay, nor was it his purpose to extend a credit to the defendant. The check was not taken as a promissory note or as a security for future payment. The defendant pretended to set apart fifty dollars as money out of a special fund; and, upon the faith that the money was there as represented, Fritz accepted the check and parted with his property. It was not done upon the faith that the parties dealing with him were solvent, and might be compelled by civil action to pay the amount of money named in the check. In this respect it is substantially similar to the case of *State v. Decker*, 36 Kan. 717. There it was an attempt to obtain property by means of a false and fraudulent draft that was indorsed by one Brady, and there was no evidence tending to show that Brady was insolvent. It was claimed that if Brady was solvent the parties could not have been defrauded. It was held that the claim, although plausible, was not sound; that the draft was not what it was represented to be, was not drawn upon an actual bank nor for money belonging to the drawer or subject to the payment of his draft; and that it was a fraud upon the owners to attempt to procure their property without delivering to them just such a draft as it was represented to be; that they wanted a draft which was the equivalent of ⁴⁴⁴ money, and were not seeking to purchase a lawsuit against Brady, however good he may have been financially. It was decided that it was a fraud upon the parties to give them

something different from what it appeared to be, different from what it was represented to be, and not as valuable as it was represented to be. So here, Fritz was not trading his horse for a mere chose in action, nor for the right to bring a lawsuit against defendant or Goggerty; but rather was selling it for money supposed to be set apart by and subject to the check. It is clear that he was defrauded to his injury. If he had sold the gelding upon credit, and taken notes or other collateral to secure the payment of the debt, a different question would arise. If some of them were bad, or not as good as represented, the question would still remain whether the good were not sufficient to secure the payment of the debt; in other words, whether he had suffered any injury by reason of the false pretenses. Unless the person parting with the property is defrauded, or unless it has been obtained to the injury of some one, it does not amount to a crime. This was the view taken in *State v. Clark*, 46 Kan. 65, and *State v. Palmer*, 50 Kan. 318, cases that are greatly relied upon by the defendant. In this case, however, no credit was extended. A fraud and an injury were suffered by Fritz, and, as to these features of this prosecution, the cases last cited do not apply.

The contention that there was no competent evidence to show that the check was bad cannot be sustained. A certificate of protest was introduced which was evidence of due presentment, demand, and refusal to pay: Gen. Stats. 1889, par. 494. In addition to that, it was shown by the state that the check ⁴⁴⁵ had never been paid; and, further, there was testimony given by the cashier of the bank that Jones had no money there subject to his check, and in fact had no account with the bank. This information was based principally upon the examination which he made of the books. Being the manager of the bank, and the books being kept under his supervision, he was competent to state the facts to which he testified. A book purporting to be a list of the depositors of the bank was introduced in evidence, and neither the name of Jones nor McCormick appeared in the list. There was an objection to the admission of the book upon the ground that it had not been proved to be correct. It was identified by the cashier under whose supervision it was kept, and we think it was admissible for the purpose of showing that Jones was not upon the list of depositors.

It is next contended that the false representations alleged to have been made by the defendant were not relied upon by Fritz, and that he did not part with his gelding on the strength of them. In his testimony, Fritz stated that he relied on the state-

ments made by the defendant and Goggerty, but principally on those made by Goggerty; and, upon further interrogation, he stated that he relied principally, if not altogether, upon the statements of Goggerty. Goggerty was present, assisting the defendant in purchasing the gelding, and the representations made by Goggerty in the presence and hearing of the defendant, which were, in effect, an affirmation of the representations made by the defendant, without objection or explanation on the part of the defendant, bind him to the same extent as if he had himself made them. According to ⁴⁴⁶ the testimony, Goggerty was in effect the mouthpiece of the defendant; and the representations made by him with the approbation and concurrence of the defendant under the circumstances stated, if relied upon by Fritz, make the defendant responsible the same as if the representations had been made by the defendant.

Several of the instructions are criticised, and complaint is made of the refusal of some that were requested. We think the charge of the court fairly presented the case to the jury, and that none of the objections made to the rulings of the court in charging the jury warrant a reversal.

A motion for a new trial was made, and one of the grounds was misconduct of the jury. On the hearing of the motion, the defendant offered to show that, after the jury had retired and were deliberating upon their verdict, one of the jurors stated that the defendant had been convicted upon a former trial; and also that during their deliberations a juror stated, as a fact, that the defendant had defrauded one Keifer, who had testified in behalf of the state, out of some cattle while in the state of Colorado. We think the court below erred in excluding this evidence. While the testimony of jurors cannot be received to show matters which essentially inhere in their verdict, they may testify to facts which transpired within their own personal observation, and which transpired in such a manner that others as well as themselves would be cognizant of them and could testify to them: *Gottlieb v. Jasper*, 27 Kan. 770; *Atchison etc. R. R. Co. v. Bayes*, 42 Kan. 609. The testimony offered was of an important and prejudicial character, and may have improperly influenced the verdict. There is nothing ⁴⁴⁷ in the record to show that the statements, if made, did not prejudice the rights of the defendant; and, in such cases, the burden of proving that the defendant did not suffer prejudice by such improper influence rests upon the prosecution: *State v. Lantz*, 23 Kan. 728; 33 Am. Rep. 215; *State v. Woods*, 49 Kan. 237.

The bailiff who took charge of the jury when the cause was finally submitted was not sworn as the statute requires, and this is urged as a ground for a new trial. It appears that when the bailiff was originally appointed by the sheriff the ordinary oath of office was administered to him, and also before the commencement of the trial he was sworn as follows: "You do solemnly swear that you will support the constitution of the United States and the constitution of the state of Kansas and faithfully discharge the duties of bailiff of this court, and not let the jury in this case depart or separate without the order of the court; so help you God."

No oath was administered to the bailiff after the cause was submitted and before the jury retired for deliberation. The oath that was administered fails to meet the requirements of the statute: Gen. Stats. 1889, par. 5305. The oath taken before the trial omitted the requirement to keep the jury together in a private and convenient place, without food, except such as the court should order, and also that he should not permit any person to speak or communicate with them, nor do so himself. These provisions were made to protect the jury from improper influences, and were deemed so necessary to the proper administration of the law that they were incorporated into the statute. The oath is important in its nature, ⁴⁴⁸ and, being specifically required, cannot be disregarded.

For the reasons mentioned, the judgment will be reversed, and the cause remanded for a new trial.

All the justices concurred.

FALSE PRETENSES—WORTHLESS CHECK.—To constitute the crime of obtaining property by false pretenses there must be an intent to defraud, the use of false pretenses to perpetrate fraud, and the actual perpetration of fraud accomplished by means of the false pretenses: See monographic note to *Barton v. People*, 25 Am. St. Rep. 378, on the crime of obtaining goods or money by false pretenses. If a person draws a bank check in favor of another in payment for property obtained, knowing at the time that he has no funds to meet it, nor credit at the bank upon which it is drawn, and that it will not be paid upon presentation, it is an obtaining of property by false pretenses: Note to *Barton v. People*, 25 Am. St. Rep. 380. The false pretenses and representations must have been relied upon as true: Note to *Barton v. People*, 25 Am. St. Rep. 385.

NEW TRIAL—MISCONDUCT OF JURORS.—Where a juror stated to his fellow jurors that the defendant was a bad man, and had beaten a man nearly to death, and then narrated the beating, it was held sufficient to warrant a new trial: See monographic note to *Hilton v. Southwick*, 35 Am. Dec. 257, on misconduct of jurors as ground for a new trial.

**BOARD OF COUNTY COMMISSIONERS OF KINGMAN
COUNTY v. LEONARD.**

[57 KANSAS, 531.]

TAXATION OF JUDGMENTS IN FAVOR OF NONRESIDENTS.—Judgments rendered by the courts of Kansas in favor of nonresidents are not taxable in that state, as they have not been given a situs, by statute, for the purpose of taxation.

John T. Little, attorney general, and C. W. Fairchild, county attorney, for the plaintiff in error.

M. D. Libby and P. B. Gillett, for the defendant in error.

532 ALLEN, J. This action was brought by the defendant in error, as plaintiff below, to enjoin the collection of taxes on the unpaid balance of a judgment in his favor rendered by the district court of Kingman county. The judgment was rendered in an action to recover the amount of a promissory note, and to foreclose a mortgage given to secure it. The mortgaged property was sold, and, after the application of the proceeds of the sale to the payment of the judgment, there remained a balance; and the balance remaining unpaid was assessed in the city of Kingman—the county seat of Kingman county—for taxation. The plaintiff is a resident of Missouri.

The question presented for our consideration is whether judgments rendered by the courts in this state in favor of nonresident parties are taxable while they remain unsatisfied. There is no claim in this case that the party against whom the judgment was rendered is insolvent or that the valuation placed on the judgment is excessive.

Has the legislature assumed the power to tax such judgments and provided for their taxation?

Section 1, chapter 107, paragraph 6846, of the General Statutes of 1889 reads: "All property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act." In section 2, the term "personal property" is defined as follows: "The term 'personal property' shall include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also, all tax-sale certificates, judgments, notes, bonds, and mortgages, and all evidences of debt secured by lien on real estate; also, the capital stock, undivided profits, and all other assets of every company, incorporated **533** or unincorporated, and every share or interest in such stock, profit, or assets, by whatever name the same

may be designated; provided, the same is not included in other personal property, subject to taxation, or listed as the property of individuals; and also every share or interest in any vessel or boat used in navigating any of the waters within or bordering on this state, whether such vessel or boat shall be within the jurisdiction of the state or elsewhere; and also all 'property' owned, leased, used, occupied, or employed by any railway or telegraph company, or corporation within this state, situate on the right of way of any railway."

Section 7 of the same chapter provides where property shall be listed for taxation, and the part of the section material to this inquiry reads as follows: "Every person required to list property in behalf of others shall list such property in the same township, school district, or city in which said property is located; but he shall list such property separate and apart from his own, specifying the name of the person, estate, company, or corporation to which the same may belong. All toll bridges shall be listed in the township or ward where the same are located; and, if located in two wards or townships, then one-half in each of such wards or townships. And all personal property shall be listed and taxed each year in the township, school district, or city in which the property was located on the first day of March, but all moneys and credits not pertaining to a business located shall be listed in the township or city in which the owner resided on the first day of March."

It will be observed that the provisions with reference to what property shall be subject to taxation are very sweeping; and that judgments, as well as other forms of intangible property, are not only included within the general terms used, but are specifically mentioned as included in the term "personal property." Sections 9 and 10 of the act require the owners ⁵³⁴ of property subject to taxation to make lists thereof; and section 10a provides that the statement shall set forth the number of the school district, or districts, in which such property was situated on the first day of March. It is ably and earnestly argued that the common-law rule embodied in the maxim, *Mobilia personam sequuntur*, applies with full force in this case, and that the situs of the intangible property evidenced by the judgment is at the domicile of the owner, and subject to taxation there only. This rule of law is subject to so many exceptions and limitations that it is quite as liable to mislead as to furnish a correct guide when considered alone. In the distribution of the estates of deceased persons, it is generally, if not universally, given full force and effect

both as to tangible and intangible property; and, from comity, nations foreign to each other generally recognize the law of the place of the owner's domicile as controlling in the distribution of the personal estate of the deceased owner. To questions of taxation the maxim has very little application. Every sovereignty asserts the right to levy taxes on persons and property within its protection; and the ground on which all taxation is justified is, that it is a burden necessarily imposed by the sovereignty in order to enable it to perform its duty in protecting persons and property: 1 *Desty on Taxation*, 59; *Cooley on Taxation*, 19 et seq; *Story on Conflict of Laws*, 543, note a, and cases cited.

We think it now quite well settled that choses in action belonging to a nonresident, in the hands of a managing agent within the state, are taxable: *New Albany v. Meekin*, 56 Am. Dec. 522, note 530, and cases therein cited: 1 *Desty on Taxation*, 64; *Finch v. York County*, 19 Neb. 50; 56 Am. Rep. 741.

The power to tax residents of the state on credits ⁵³⁵ due from citizens of other states is often upheld: *Kirtland v. Hotchkiss*, 42 Conn. 426; 19 Am. Rep. 546. And this even where it results in duplicate taxation: *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460; note to *People v. Worthington*, 74 Am. Dec. 95, and cases cited. The cases upholding the power to tax promissory notes and other written securities held within the state, though owned by a nonresident, sometimes lay stress on the fact that the securities are in a certain sense property, and are subject to seizure for debt, and that a title may be made to the intangible debt by delivery of the written evidence of it.

We perceive no valid objection to the power of the legislature to tax all judgments by domestic courts and remaining unsatisfied, whether owned by citizens of this state, or other states, or foreign countries, provided the rate of taxation be the same as that imposed on other forms of property belonging to citizens of this state. The question here, however, is whether the legislature has expressed a purpose to tax judgments in favor of a citizen of another state, rather than as to the power to do so. Judgments are included by the express provision of section 2, in the term "personal property." Does this mean judgments owned by citizens of this state, or those rendered by courts within the state without reference to ownership? In answering this question, some weight at least should be given to the rule that credits are generally regarded as residing with the creditor. The case of *Fisher v. Commissioners*, 19 Kan. 414, is an extreme one, and

has been criticised. A resident of this state may undoubtedly be taxed on moneys due him from citizens of other states, and this would be equally true after the claim is reduced to judgment in a foreign jurisdiction. Under the provisions of ⁵³⁶ section 7, where the owner of a domestic judgment resides in this state, it seems clear that it must be taxed at the place of his residence, provided it does not pertain to a business located at some other place. Where the owner is a nonresident, if taxed at all, it must be taxed in the township, school district, or city in which it is located; and, to be taxable, it must be held to have a situs of its own. The authorities with reference to the situs of a judgment are not numerous, and no case is called to our attention where the precise point now under consideration has been decided in an action where the owner of the judgment resided out of the state. But, in cases where the owner resided in the state, it has been held that the situs of the judgment for purposes of taxation is at the residence of the judgment creditor: *Meyer v. Sheriff etc.*, 41 La. Ann. 645; *People v. Eastman*, 25 Cal. 601.

When this case was first considered, the writer was strongly inclined to the opinion that a judgment should be held to have a situs of its own at the place where the record of the court rendering it is kept; but it seems quite clear that, if the owner be a resident of this state, its situs is with him at his place of residence, and there is no purpose expressed by the legislature to give judgments in favor of nonresidents a situs for the purpose of taxation. If the legislature wishes to change the rule, and establish a situs for taxation for all judgments rendered by the courts of this state, it ought to employ language expressive of its purpose to do so. The natural implication from the language in fact employed would seem to be that, as to the situs of credits for taxation, the rules generally recognized were intended to be followed.

The judgment is affirmed.

All the justices concurring.

TAXATION OF DEBTS DUE FOREIGN CREDITORS—SITUS—POWER OF LEGISLATURE.—Intangible property has no actual situs: 1 *Desty on Taxation*, 326; but the legislature has the power to fix the situs of property for the purposes of taxation: *Dubuque v. Chicago etc. R. R. Co.*, 47 Iowa, 196. Debts due to foreign creditors are not the subject of taxation, as they have no situs within the state: *Cooley on Taxation*, 22; 1 *Desty on Taxation*, 66. A chose in action follows the person of him having the right, and, if he is a nonresident, the state has no jurisdiction over the person or over the thing, and can tax neither: *State v. Earl*, 1 Nev. 896.

BERRY v. BERRY.

[57 KANSAS, 691.]

HOMESTEAD—DURESS OF WIFE.—If a wife is compelled, by her husband, through force and fear, to sign a mortgage upon the homestead, such mortgage is a nullity, although it accompanies, and is given to secure the payment of, a negotiable promissory note, which with the mortgage, is transferred to an innocent holder before maturity; and, in an action to foreclose the mortgage, the defense of duress is available to her.

S. K. Woodworth, for the plaintiff in error.

Wells & Wells and F. E. Lane, for the defendants in error.

691 JOHNSTON, J. On December 2, 1889, Joseph and Rebecca Berry, husband and wife, united in giving to the Guaranty Investment Company a promissory note for eighteen hundred dollars, payable five years after date, and a mortgage securing the payment of the note was signed by them. The mortgage was upon a quarter section of land occupied by them as a homestead, and it was subject and subordinate to another mortgage previously given by them to the Mutual Benefit Life Insurance Company to secure an indebtedness of twelve hundred dollars. On February 2, 1890, and before the maturity of the note, the Guaranty Investment Company indorsed and transferred the same to the executors of the estate of Charlemagne Tower, deceased, and the mortgage was assigned and delivered with the note. Default was made in the interest payments, and, afterward, the insurance company began a foreclosure 692 proceeding in which the executors of the Tower estate were made parties defendant, who, on July 16, 1892, filed an answer and cross-petition setting up their note and mortgage and asking for judgment against the Berrys, and, also, that it be declared a lien on the mortgaged premises, subject only to the lien of the insurance company.

Joseph Berry did not appear or defend, but Rebecca Berry contested the validity of the mortgage given to the Guaranty Investment Company, alleging that it was signed under duress. She averred that her husband, who was a strong, powerful man, of violent temper, threatened to abandon her to her own resources, and, also, to kill her; and, believing that he was a dangerous man, who would carry out his threats, she was induced to sign the mortgage. She alleged that the land on which the mortgage was given was purchased by her husband as a homestead, and that it was occupied as a homestead before the execution of the mortgage, and had been continuously ever since that

time. She did not question her liability upon the note, nor deny that the note and mortgage were assigned as alleged; neither did she make any defense other than that of duress in the execution of the mortgage. On the latter ground she asked that the mortgage be canceled and held for naught.

A demurrer to her answer was sustained; and, she electing to stand on her answer, judgment was rendered against her for two thousand six hundred and twenty-five dollars, and for foreclosure of the mortgage, and declaring the judgment a lien on the homestead premises.

Was the mortgage valid and enforceable? If the averments as to duress are true, there was no free will or consent by Rebecca Berry in the execution of the mortgage. As the case stands, we must accept ⁶⁹³ these averments as facts, and, if so regarded, it would seem that Mrs. Berry was induced to sign the mortgage by threats of bodily harm such as might overcome the will of a person of ordinary firmness and courage. In addition to the threats of personal violence, there were threats of separation and abandonment. The property described in the mortgage was a homestead, and could only be alienated by the joint consent of husband and wife. If Mrs. Berry was compelled by force and fear to sign the mortgage, if there was actual duress, she gave no consent, and the mortgage is a nullity: *Anderson v. Anderson*, 9 Kan. 112; *Helm v. Helm*, 11 Kan. 19; *Howell v. McCrie*, 36 Kan. 636; 59 Am. Rep. 584; *Jenkins v. Simmons*, 37 Kan. 496; *Gabbey v. Forgeus*, 38 Kan. 62; *Warden v. Reser*, 38 Kan. 87. This position would be conceded by the defendant in error if the mortgage stood alone, but, as it accompanied, and was security for, a negotiable promissory note which was transferred to a bona fide indorsee before maturity, it is contended that the defense of duress is not available. An assignee who obtains a promissory note before maturity, for value and without notice, takes it free from equities. A mortgage executed concurrently with a note to secure its payment is generally held to be an incident of the note, and to partake of its negotiable character. It appears to be well settled by the courts that a bona fide indorsee before maturity of a note secured by a mortgage upon property other than a homestead, and without notice of infirmities, takes the mortgage, as he takes the note, unaffected by any equities arising between the mortgagor and mortgagee: *Burhans v. Hutcheson*, 25 Kan. 625; 37 Am. Rep. 274; *Lewis v. Kirk*, 28 Kan. 497; 42 Am. Rep. 173; *Carpenter v. Longan*, 16 Wall. 271; *Jones on Mortgages*, sec. 834, and cases cited; 15 Am. & Eng. Ency. ⁶⁹⁴ of Law, 855, and

cases cited. This rule is not prescribed by any statute, but is based upon the equitable principle that the debt, being the main thing, imparts its character to the mortgage, and that when the note is assigned the security follows it and takes the same character. It is conceded that this rule is controlling where the property mortgaged is not a homestead; but it is contended that it can never apply where the mortgage is upon a homestead and where the wife or husband has not joined in, or consented to, its execution. The rule goes upon the theory that a mortgage has actually been executed and is in existence; but, in this state, if the wife or husband does not give consent, or join in the execution, the instrument does not rise to the rank of a mortgage. It is absolutely void, and not even binding upon the one who does consent. Would it be contended that a mortgage to which the wife's signature was forged, or which had never been signed by her, would follow the note and be enforceable as a security? It is unlike a case where joint consent was actually given though obtained by fraud. As the consent of the wife is lacking, there is no mortgage. It would be carrying the doctrine of negotiability beyond reason to make a mortgage which is against the statute and prohibited by the constitution binding and enforceable, merely because it accompanied and purported to secure a negotiable promissory note. It is not negotiable in form, and of itself has no negotiable qualities; but a rule has been established by the courts that because of its relation to negotiable paper it is invested with a negotiable character. A rule so made, applying to mortgages, the principles which pertain to negotiable paper, cannot prevail over the specific provisions of the constitution and statute. The constitution provides ⁶⁰⁵ that a homestead "shall not be alienated without the joint consent of husband and wife, when that relation exists": Const., art. 15, sec. 9. The same prohibition is repeated by the legislature in one of the statutes: Gen. Stats., 1889, par. 2996. These positive and solemn declarations cannot be overcome by a mere rule of commercial law or by any judicial dogma. In *Anderson v. Anderson*, 9 Kan. 112, where a conveyance of a homestead was obtained by duress of the wife, it was urged that a purchaser in good faith and for a valuable consideration without notice of the duress should be protected. In deciding the case, however, it was held that "if a wife sign the deed of the homestead under duress, she does not give that consent to the alienation which the statute requires; and in such case the 'good faith' of the purchaser cannot

be considered in determining the validity of the deed." Much reliance is placed on *Beals v. Neddo*, 2 Fed. Rep. 41, which is contrary to the ruling in *Anderson v. Anderson*, 9 Kan. 112, but it appears to be wholly founded upon cases in which the homestead question was not involved or considered. The court, in its opinion, recognized that, under the constitution, duress is available as a defense within the decisions of the supreme court of this state, but did not incline to follow them. The supreme court of Iowa, in a case where a note and mortgage were obtained by duress and the mortgage was upon a homestead, held that the innocent holder of the note and mortgage might recover upon the note, but was not entitled to a foreclosure of the mortgage. The doctrine is there recognized that, in an ordinary case, a mortgage given to secure a negotiable note partakes of the negotiable character; but, in that state, there is a statute which requires a concurrence ⁶⁹⁶ of both husband and wife to a conveyance or the encumbrance of the homestead. In the case mentioned the signature of the wife was secured by duress, and it was held that she did not legally concur in the conveyance. The court added: "Mortgages are not intended to circulate as commercial paper, and we do not think that the interests of commerce require that the principles applicable to negotiable paper shall be extended to a mortgage executed under such circumstances as the mortgage in question": *First Nat. Bank v. Bryan*, 62 Iowa, 42. We think the answer alleged a defense, and the demurrer thereto should have been overruled.

As the case is presented, the question of estoppel is not before us for consideration. While considerable time elapsed between the execution of the mortgage and the setting up of the defense, there is nothing to show knowledge on her part of the transfer of the note and the subsequent ownership of the same, nor are there any averments showing her acts or declarations in respect to the note and mortgage.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the justices concurring.

DURESS WILL AVOID A CONTRACT, at law or in equity: *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597. A deed of a married woman is voidable for duress, when executed under threats, by the husband, of abandonment or separation, or abusive treatment, if the execution of the deed was induced by a reasonable apprehension that the threats would be carried into execution: *Tapley v. Tapley*, 10 Minn. 448; 88 Am. Dec. 76; *Kocourek v. Marak*, 54 Tex.

201; 38 Am. Rep. 623. A married woman may avoid, on the ground of duress, a mortgage obtained from her by the husband, to secure his debt to the mortgagee: *Central Bank v. Copeland*, 18 Md. 805; 81 Am. Dec. 597.

READING TOWNSHIP v. TELFER.

[57 KANSAS, 798.]

NEGLIGENCE OF HUSBAND NOT IMPUTABLE TO WIFE—DRIVING ON DEFECTIVE HIGHWAY.—A husband's negligence, while driving in a vehicle, over a defective highway, with his wife is not imputable to her in bar of an action for damages brought by her against the township permitting such defects, although the journey was taken at her solicitation, if it is not shown that he was under her direction and control at the time.

NEGLIGENCE NOT IMPUTABLE TO ONE RIDING BY INVITATION.—One who merely accepts the favor of transportation in a private vehicle does not assume all risk of the driver's negligence en route. Especially is this true of a journey undertaken by a husband and wife, where he assumes to drive, and is allowed the responsible management of the journey, in accordance with the almost universal custom of mankind.

STATUTES ALLOWING ACTION FOR INJURIES ON DEFECTIVE HIGHWAYS—CONSTRUCTION.—A statute giving a right of action against counties and townships in favor of a person who, "without contributing negligence on his part," sustains damages by reason of defective bridges or highways, does not declare a rule either of pleading or of evidence, but simply a rule of right. It does not change the rule of pleading, or shift the burden of proof as to cases falling within its terms, but simply brings a class of cases within the operation of the common law of negligence which hitherto had been without it. Hence, a plaintiff suing for damages for injuries caused by such defects need not allege or prove that he was not negligent, and the defendant, if he relies upon contributory negligence, must allege and prove it.

HIGHWAYS—DEFINITIONS—PUBLIC HIGHWAY—DEFECTIVE HIGHWAY.—A laid out and opened road is a public highway, although it has not been put in condition for travel, and a defect in it makes it a "defective highway," within the meaning of a statute giving a right of action for injuries sustained on a "defective highway." To constitute such a road a "defective highway," it is not necessary that it should first have been improved and then allowed to become defective through lack of repair.

NEW TRIAL—DAMAGES FOR PERSONAL INJURIES—WHAT IS NOT EXCESSIVE.—A verdict for five thousand one hundred and sixty-five dollars damages, for personal injuries to a woman, caused by her being thrown from a vehicle on a defective highway, is not excessive, where such injuries were of a peculiar nature, followed by much pain and prolonged confinement to the sick room, and where they, being permanent in some respects, entail consequences of a character which money can hardly compensate.

Charles B. Graves, H. D. Dickson, and I. E. Lambert, for the plaintiff in error.

E. W. Cunningham and W. T. McCarty, for the defendant in error.

⁷⁹⁸ DOSTER, C. J. Mrs. Elizabeth A. Telfer and her husband lived in Reading township, Lyon county. July 19, 1892, they started in a spring wagon to visit ⁷⁹⁹ Mrs. Telfer's mother, some miles distant. Mr. Telfer acted as driver. The highway at a certain point crossed a ravine with steep and rocky banks, which rendered it a difficult and dangerous place. In endeavoring to cross, the wagon was "tipped over," on account of the roughness and difficulty of the descent of one of the banks, and Mrs. Telfer was severely injured thereby. The defect in the highway which caused the accident was known throughout the neighborhood, and, being on an open prairie, most of the travel had avoided it by going around some distance on either side; but, a few weeks previous to the accident, the owners of the adjacent lands had fenced them up, compelling travelers to pursue the line of the highway, and thus cross the place in question; and, a short time before the accident, the husband and wife had crossed the place where it occurred. The township trustee had actual knowledge of the defect in the highway at that point, and contemplated putting it presently in better condition.

The plaintiff, Mrs. Telfer, brought suit against the township in which the accident occurred to recover for her injuries, under the statute, section 1, chapter 237, of the Session Laws of 1887 (Gen. Stats. 1889, par. 7134), which reads as follows: "Any person who shall, without contributing negligence on his part, sustain damage by reason of any defective bridge, culvert, or highway, may recover such damage from the county or township wherein such defective bridge, culvert, or highway is located, as hereinafter provided; that is to say, such recovery may be from the county when such damage was caused by a defective bridge constructed wholly or partially by such county, and when the chairman of the board of county commissioners of such county shall have had notice of such defects for at least five ⁸⁰⁰ days prior to the time when such damage was sustained; and, in other cases, such recovery may be from the township, where the trustee of such township shall have had like notice of such defect."

A verdict was returned and judgment rendered in her favor, from which the township prosecutes this proceeding in error. It was contended in the court below that the evidence showed the husband to have been guilty of contributory negligence in driving over a highway known by him to be defective and dangerous, and that such negligence was imputable to the wife, and, being so, barred a recovery by her; and a request for instructions to the jury predicated upon this view of the law was preferred, and

refused by the court. The first claim of error arises upon this refusal. This claim is rested upon an assumed or implied agency of the husband, in driving the vehicle under the direction and command of the wife, or as a participant with her in a joint venture or enterprise. Before proceeding to the consideration of this claim of error, it may be well to state that no charge of actual negligence is made against the wife herself, either in the briefs or oral argument of counsel. The question of her personal negligence in contributing to the injury was submitted to the jury, under instructions of which no complaint is made, and was found in her favor.

It is claimed that the visit to the mother was undertaken by the husband at the solicitation of his wife; that it was her visit, and not his; and that, if such does not appear as a fact from the evidence, the least that can be said is that it was a joint venture by both husband and wife. From each of these alternative propositions of fact a deduction of agency in the husband for the wife is drawn, and from thence the legal ⁸⁰¹ imputation of negligence is derived. The question is, therefore, squarely presented whether the contributory negligence of the husband, in driving his wife over a defective highway, can be imputed to her in bar of an action against the person principally or primarily responsible for the injury. Our judgment is, that it cannot; but the authorities, it may as well be admitted, are conflicting—irreconcilably so—and are numerous in support of each side of the contention. That the principal cannot recover for injuries to which the negligence of his agent and a third person has contributed is settled beyond dispute, both upon reason and authority. The difficult question is: Under what circumstances can an agency be implied or be said to exist? The plaintiff in error in this case would imply it, as some of the courts have done, from the relation of husband and wife: *Yahn v. Ottumwa*, 60 Iowa, 429; *Carlisle v. Sheldon*, 38 Vt. 440; *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558. The defendant in error contends that this cannot be done: *Hoag v. New York etc. R. R.*, 111 N. Y. 199; *Louisville etc. Ry. Co. v. Creek*, 130 Ind. 139; *Chicago etc. R. R. Co. v. Spilker*, 134 Ind. 380; *Lake Shore etc. Ry. Co. v. McIntosh*, 140 Ind. 261; *Flori v. St. Louis*, 3 Mo. App. 231.

The fact, if it be such, that the journey was undertaken at the solicitation of the wife, possesses no weight. It cannot be that one who merely secures from another the favor of transportation in a private vehicle takes upon herself or himself all risk of

the driver's negligence en route. To so hold would minimize the problem for consideration into a mere question of fact as to which of the travelers solicited the other; the one the favor of a journey, or the other the ⁸⁰² pleasure of company. If the one who asks to be carried hence is the master, so on the other hand the one who invites to a ride is also the master. If the maiden who begs of her escort a carriage drive is the mistress throughout the journey, so the gallant who invites his lady would likewise be the master until her safe return. It may be conceded that persons of mutual purpose and equal privileges of direction and control, who travel in the same vehicle in pursuit of a common object, are the agents of each other in such a sense that the negligent act of one in furtherance of the common scheme is imputable to all; but such mutuality or equality of direction and control does not exist in the case of a journey taken by husband and wife.

Say what we may in advocacy of the civil and political equality of the sexes, there are conditions of inequality between them, in other respects, which the law recognizes, and out of which grow differing rights and liabilities. One of these is instanced in the case of a journey by husband and wife, such as was undertaken by the parties in question. By the universal sense of mankind, a privilege of management, a superiority of control, a right of mastery on such occasions is accorded to the husband, which forbids the idea of a co-ordinate authority, much less a supremacy of command, in the wife. His physical strength and dexterity are greater; his knowledge, judgment, and discretion assumed to be greater; all sentiments and instincts of manhood and chivalry impose upon him the obligation to care for and protect his weaker and confiding companion; and all these justify the assumption by him of the labors and responsibilities of the journey, with their accompanying rights of direction and control. The special facts of cases may ⁸⁰³ show the wife to be the controlling spirit, the active and responsible party, and the husband an agent, or even a mere passenger; but, in cases where such facts are not shown, the court must presume, in accordance with the ordinary, almost universal, experience of mankind, that the husband assumed and was allowed the responsible management of the journey. A review of the opposing decisions upon this question, for the purpose of exhibiting their reasoning and approving that of some and combating that of others, would be profitless, and hence is not undertaken. It may be remarked, however,

that the doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law which finds small favor with the courts, and has been very infrequently applied in our own.

Complaint is made that the court erred in instructing the jury that the burden of proof was upon defendant to establish contributory negligence upon the part of the plaintiff. The rule in ordinary cases is, that contributory negligence is a defense to be alleged and proved; but it is claimed that the statute above quoted changes the rule of pleading and shifts the burden of proof, as to cases falling within its terms. We do not assent to this view. While the statute gives a right of action to "persons who shall, without contributing negligence on their part, sustain damage," etc., yet its object was, not to declare a rule either of pleading or of evidence, but to declare a rule of right. The common law is, that persons who, without contributing negligence on their part, sustain damages by reason of the negligence of others, are entitled to redress for their injuries; but because of the nature of quasi corporations, such as counties and townships, whose ⁸⁰⁴ functions and purposes are entirely public, they have been held to be without the rule of compulsion to respond for the negligent acts of their officers: *Commissioners v. Riggs*, 24 Kan. 255; *Eikenberry v. Bazaar Tp.*, 22 Kan. 556; 31 Am. Rep. 198. This defect in the common law was remedied by the enactment of the statute in question; and the only effect of such statute was to bring a class of cases within the operation of the common law of negligence which hitherto had been without. This statute simply declared as to counties and townships what has always been the law with respect to cities, private corporations, and individuals. A contrary view has been held in *Walker v. Chester Co.*, 40 S. C. 342, but it does not meet our approval.

It is also claimed that the defect in the highway where the plaintiff received her injuries was not a "defective highway," within the meaning of the statute; that to constitute it such the road should first have been improved at the point in question, and then allowed to become defective through lack of repair. It is thought that the statute, section 5, chapter 168, of the Laws of 1885 (Gen. Stats. 1889, par. 7133), re-enforces this view, because it requires township officers "to keep roads in repair, and improve them as far as practicable," and because "permanent roads" need only be constructed "whenever the available means will permit." We cannot assent to this view. A laid-out and opened road is none the less a public highway, because not yet

put in condition for travel. The statute which gives the right of action contains no exceptions to its terms, and it and the one which provides for the improvement and repair of public roads relate to such widely differing subjects that they cannot be construed in *pari materia*. Besides, ⁸⁰⁵ the statute which gives the right of action in question is a remedial one, and should therefore be liberally, rather than restrictively, construed.

Finally, it is urged that the amount of recovery (five thousand one hundred and sixty-five dollars) is excessive. We do not think so. The injuries were of a peculiar nature, followed by much pain and prolonged confinement to the sickroom. According to the testimony of physicians, they are permanent in some respects, and entail consequences of a character which money can hardly compensate.

The judgment of the court below is affirmed.

All the justices concurred.

NEGLIGENCE OF DRIVER, WHEN NOT IMPUTABLE TO ONE RIDING.—The negligence of an able and competent driver of a private carriage, drawn by a quiet horse, and at whose invitation one is taking a gratuitous ride, is not imputable to the person so riding where the latter was injured while so riding, and had no control of the driver or of the horse and carriage: *Baltimore etc. R. R. Co. v. State*, 79 Md. 835; 47 Am. St. Rep. 415; *Miller v. Louisville etc. Ry. Co.*, 128 Ind. 97; 25 Am. St. Rep. 416; *Leavenworth v. Hatch*, 57 Kan. 57; ante, p. 310; *Brannen v. Kokomo etc. Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411; *Robinson v. New York etc. R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1, and extended note thereto; *New York etc. R. R. Co. v. Steinbrenner*, 47 N. J. L. 161; 54 Am. Rep. 126, and extended note thereto; *Carlisle v. Brisbane*, 118 Pa. St. 544; 57 Am. Rep. 483, and extended note thereto; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733. The negligence of the driver of a private vehicle cannot be imputed to one riding with him, when the latter is himself free from blame: Note to *Miller v. Louisville etc. Ry. Co.*, 25 Am. St. Rep. 420. If one rides upon the public highway in the vehicle of another, merely on invitation of the latter, and does not exercise or assume any control over the movements of the team, the driver of the vehicle does not become his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect or obstruction in the highway, will be imputed to him, so as to defeat his recovery in an action against the town or city whose neglect of duty in obstructing the street or highway has resulted in his injury: *Nesbit v. Garner*, 75 Iowa. 314; 9 Am. St. Rep. 486, and note; *Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827; especially where the party invited to ride has no reason to suspect the driver's prudence or competency to drive in a careful and skillful manner: *Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827. The law does not impute to one man the negligence of another, unless the relation of master and servant exists between them: *Palmer v. St. Albans*, 60 Vt. 427; 6 Am. St. Rep. 125. The doctrine of imputed negligence does not prevail in Ohio. Hence, the contributory negligence of a husband in the purchase of a drug for his wife's use is not imputable to her in an action by her or her administrator against the druggist for injury or death resulting from the use of

such drug, unless she clearly constituted him her agent in the transaction: *Davis v. Guarneri*, 45 Ohio St. 470; 4 Am. St. Rep. 548. Negligence will not be imputed to one who takes all the care which prudent circumspection would suggest to avoid an injury: *Sullivan v. Vicksburg etc. R. R. Co.*, 39 La. Ann. 800; 4 Am. St. Rep. 239. But in cases of injuries to persons riding by invitation, it must appear that the passenger is free from blame or personal negligence, as he is liable for his own negligence: *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733; *Noyes v. Boscawen*, 64 N. H. 361; 10 Am. St. Rep. 410; and it has been held that he cannot recover unless it affirmatively appears that his own negligence did not proximately contribute to his injury: *Miller v. Louisville etc. Ry. Co.*, 128 Ind. 97; 25 Am. St. Rep. 416. The negligence of a driver is imputable to one riding by invitation, if the latter was without care or negligent: *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733; or to one who voluntarily takes passage in a vehicle, and is injured through the negligence of the driver: *Whittaker v. Helena*, 14 Mont. 124; 43 Am. St. Rep. 621. Thus, the negligence of the driver of a private conveyance in driving over an obstruction in the street is imputable to a person of the age of discretion who voluntarily rides with him and prevents his recovery for the injuries received: *Mullen v. Owosso*, 100 Mich. 108; 43 Am. St. Rep. 436.

NEGLECT—PLEADING.—A complaint in an action for negligence need not aver that the party injured was at the time of the injury in the exercise of due care or without fault. It is for the party who relies upon negligence either as a cause of action or defense to allege and prove it: *O'Connor v. Missouri Pac. Ry. Co.*, 94 Mo. 150; 4 Am. St. Rep. 364.

NEW TRIAL—PERSONAL INJURIES—EXCESSIVE VERDICT. Damages for personal injury consist of the expenses to which the injured person is subjected by reason of the injury complained of, the inconvenience and suffering naturally resulting from it, and the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury: *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1; 55 Am. St. Rep. 705, and note. In an action to recover for personal injuries suffered by the plaintiff, a verdict in his favor will not be set aside as excessive, unless the sum awarded is so great as to furnish ground for the belief that the jury were actuated by partiality or prejudice: *Richmond etc. Electric Co. v. Garthright*, 92 Va. 627; 53 Am. St. Rep. 839. A verdict of five thousand five hundred and fifty dollars for personal injuries is not excessive, where the evidence shows the injuries to be serious and permanent: *Hannen v. Pence*, 40 Minn. 127; 12 Am. St. Rep. 717. Compare *Henry v. Sioux City etc. Ry. Co.*, 75 Iowa, 84; 9 Am. St. Rep. 457.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

COLUMBIAN IRON WORKS AND DRY DOCK COMPANY
v. DOUGLAS.

[84 MARYLAND, 44.]

SALES—SUBSTITUTION—BREACH OF CONTRACT.—If a specific, designated thing is bought and sold, the substitution and delivery of something else, by the seller, is a clear breach of the contract, and no question of warranty is involved.

SALES—SUBSTITUTION—INSISTING ON TERMS OF CONTRACT.—If a person buys a particular thing, he cannot be compelled to take some other thing, even if like the thing he bought. He has a right to insist on the terms of his contract.

SALES—SUBSTITUTION—REMEDY OF BUYER.—If a buyer has unwittingly received that which he has not bought, he has the right to return it; or, keeping it, to recoup, when sued for the stipulated price, the damages which a failure to comply with the contract has caused him; or, if he has paid the purchase price, he has the legal right to sue for and to recover back the difference in value between the price which he paid for an article he did not get, and the market price of the substituted article delivered to and retained by him.

SALES—SUBSTITUTION—BUYER NEED NOT ACCEPT THAT NOT BOUGHT.—Before a defendant can be compelled to take anything in fulfillment of a contract of sale, it must be shown not merely that it is equally as good as the article that was sold, but that it is the same article he has bargained for, and none other.

SALES BY DESCRIPTION—TENDER—CONDITION PRECEDENT—REMEDY OF BUYER.—If a sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and, if this condition is not performed, the purchaser is entitled to reject the article; or, if he has paid the purchase price, he is entitled to recover back the price as money had and received for his use.

SALES—WARRANTY, WHAT IS NOT—BREACH OF CONTRACT.—If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas. The contract is

to sell peas, and if he sells him anything else in their stead, it is simply a nonperformance of it. If the buyer has purchased a cargo of peas, he cannot be required to take a cargo of beans.

SALES BY DESCRIPTION—WHAT DOES NOT JUSTIFY BREACH OF CONTRACT.—It can make no possible difference whether the failure of a buyer to receive what he contracted to get grew out of the fraud of the seller or out of an accident unmixed with bad faith.

SALES BY DESCRIPTION—WARRANTY—RECOVERY.—Conceding that a contract of sale is wholly in writing, the question of warranty is not involved, where the sale of the goods is by description, and, if the thing described is not delivered, it would be palpable error to deny the buyer a recovery upon the ground that there was no warranty.

SALES BY DESCRIPTION—SUBORDINATING DELIVERY TO INSPECTION.—If a sale of goods by description is made subject to the buyer's inspection, the description is not subordinated to the inspection, unless the parties both agree to substitute an inspection by the buyer for the description furnished by the seller.

SALES BY DESCRIPTION—WHEN QUESTION AS TO CONTRACT IS FOR JURY.—If a contract of sale was partly in writing and partly by parol, it is for the jury to determine what the contract was, and whether it was orally agreed that inspection by the buyer should take the place of description, where the written part of the contract was for the sale of goods by description.

SALES BY DESCRIPTION—BREACH OF CONTRACT—DAMAGES RECOVERABLE.—If a buyer contracts to purchase a certain quantity of steel scrap, consisting only of clippings, etc., from the steel plates of cruisers built by the seller for the United States navy, and it is found, after the scrap is delivered and paid for, that a very large part of it is not cruiser steel, and which part the buyer is obliged to sell for much less than what he gave for it, he is entitled to recover of the seller the difference between the price paid and the value of the article delivered.

Action for damages. The plaintiff offered the following prayer, which was granted and conceded to be correct as to the measure of damages: "If the jury find for the plaintiff, the measure of damages in this case is the difference between what three hundred and fifty-seven thousand seven hundred pounds of steel scrap from the government cruisers would have been worth at Latrobe, Pennsylvania, free from impurities, and what they may find the material mentioned in the evidence as having been actually shipped from Baltimore was worth in Latrobe, Pennsylvania, in the condition in which it actually was on its arrival at Latrobe." Defendant's first prayer was as follows: "That there is no evidence legally sufficient to establish a warranty of the goods sold, and that their verdict must be for the defendant. This was rejected. There were prayers for other instructions, which assumed that the contract was wholly in writing. These, too, were rejected, and the court instructed the jury as follows: "The jury are instructed that the defendant did not warrant that

the steel scrap sold to the plaintiff would analyze not more than six hundredths of one per cent of phosphorus, and four hundredths of one per cent of sulphur; and if the jury find that the steel scrap in the pile which had been seen by the plaintiffs' agent, Douglas, on the occasion of his first visit, and referred to in the letter of August 6th, was punchings, clippings, or shearings from plates, angles, beams, etc., from the cruisers built by the defendant for the United States government, and that the said pile, when seen by the said agent, contained visible impurities of the character of those to which he now objects, and if the jury further find from all the evidence in the case, that the plaintiff purchased the steel scrap in question, with the understanding that the defendant would deliver the same upon its wharf, and that the plaintiff would send a person familiar with such material to pass upon it, and the defendant would accept no abatement of the price, or recognize any claim for such abatement by reason of light weight, dirt, or the quality of said scrap, after the said scrap had left the yard of the defendant, and the jury further find that the plaintiff assented to this, and sent some one to inspect the steel scrap and superintend the loading of the same on the cars, and that the said steel scrap was loaded upon a lighter alongside of the wharf of the defendant by the agents of the plaintiff, and was accepted and paid for without protest or complaint, then, in that event, the verdict must be for the defendant." There was a verdict for the plaintiff for four hundred and thirty dollars and forty-eight cents.

William H. Buckler and Steele, Semmes & Carey, for the appellant.

Frederick W. Brune and George Stewart Brown, for the appellee.

⁵⁶ McSHERRY, C. J. This suit was brought to recover damages for an alleged breach of contract. The declaration contains two counts; one upon the contract and one for money received by the defendant for the use of the plaintiff. The first count alleges, in substance, that the plaintiff purchased from the defendant "all the steel scrap in the shipyard of the defendant, . . . consisting of clippings and punchings from the steel plates and angles and beams used in the construction of the United States cruisers built by said defendant"; and that the defendant ⁵⁷ was to load the said scrap at the plaintiff's expense upon railroad cars on scows at its works. That the defendant agreed to furnish clean steel scrap, consisting only of clippings and

punchings from the steel plates, angles, and beams of the United States cruisers built by it, but that, though warned by the plaintiff not to deliver or to mix with said steel any iron, copper, or other scrap, yet the defendant, without the plaintiff's knowledge, in violation of its agreement, did deliver such iron, copper, and scrap mixed with the steel scrap, whereby the steel scrap was rendered unmerchantable. That, relying on the contract and on the good faith of the defendant to deliver the material purchased, the plaintiff, upon presentation of an invoice from the defendant for three hundred and fifty-seven thousand and seven hundred pounds of steel scrap, paid the defendant the sum of two thousand six hundred and seventy-four dollars and seventy-five cents; and that the plaintiff, immediately upon discovering, after the delivery of the material, that the defendant had wrongfully mixed iron, copper, and other scrap with the cruiser steel scrap purchased, demanded a return of the money paid, and asked that directions be given with reference to the disposition to be made of the scrap, but that the defendant refused to return the money or to assume any responsibility as to the goods, whereby the plaintiff sustained great loss. The defendant pleaded the general issue. The verdict and judgment were for the plaintiff, and the defendant has appealed. There is but one exception in the record, and that brings up for review the rulings of the court of common pleas upon the prayers for instructions to the jury.

The contract sued on is, according to the contention of the appellant, wholly in writing, whilst, according to the contention of the appellee, it is partly in writing and partly in parol. Whether it be the one or the other is of practically little consequence. If wholly in writing, it is evidenced by numerous letters and telegrams; and, if partly in writing and partly in parol, it is evidenced by the same letters and telegrams, and by interviews between the agent of the plaintiff ⁵⁸ and some of the officers and employes of the defendant. The negotiations opened July 19, 1892, with a written inquiry from the plaintiff to the defendant, as to whether the latter had on hand and for sale any steel scrap, angle, or plate croppings or punchings. To this the defendant, which is a shipbuilding company, replied the following day that it had a large quantity of steel scrap left from the government cruisers that it had constructed, and that this scrap was first-class material. Considerable correspondence then followed until August 3d. This correspondence related to the price, quality, and quantity of the

material, and included an offer at a named sum, which was rejected; but subsequently a price was agreed on. Throughout the correspondence and the interviews the material negotiated for was described and understood by both parties to be scrap from cruiser steel. Two of the United States cruisers, the Detroit and the Montgomery, had been built for the federal government by the defendant at its yard in Baltimore. The steel of which the hulls of these vessels were made was required to be of a high grade and quality. The shearings, clippings, and punchings from the plates, beams, and angles used in the construction of the cruisers were the steel scrap which the plaintiff agreed to purchase and the defendant agreed to sell. Not only was no other material contemplated, but all other and different material was, in express terms, excluded. On August 2d the plaintiff wrote as follows:

"I now confirm having made the purchase from you of from one hundred and twenty-five to one hundred and seventy-five tons steel scrap, consisting of clippings and punchings from the steel plates and angles used in the construction of the United States cruisers built by you, at sixteen dollars and fifty cents per gross ton f. o. b. cars your works, and will wait your confirmation of the sale. Terms of payment as usual in such cases, net cash, thirty days. We will send you instructions in regard to shipment within a few days, and would be glad to know when it will suit your convenience to load up the scrap."

59 And the next day the defendant replied:

"Yours of 2d to hand, and contents noted. In reply, we respectfully call your attention to ours of 2d, wherein we say the price of the material for which you are in negotiation with us is sixteen dollars and fifty cents per ton net. Of course this does not mean that we shall load it on the cars, which we do not propose to do, neither will we accept other than prompt cash payments, as the cars leave here loaded, or short time paper, with interest added at the rate of six per cent per annum, indorsed to our satisfaction. These are the terms. We thought you understood this portion of the inquiries, as they have always been named. These two points accepted by you, and the material is yours."

Upon the receipt of this letter, instead of replying in writing, the plaintiff, who is an iron merchant, doing business in New York, sent his brother, John B. B. Douglas, to Baltimore, to settle the matter and to conclude the negotiations. When Mr. Douglas reached Baltimore he called on Mr. Malster, the president of the

defendant company, and they discussed the proposed terms of purchase and the cost of moving the material from the company's yard to the wharf for loading. Mr. Malster had described the steel scrap as "a nice, clean lot." Upon examining the pile, Mr. Douglas noticed that there was a considerable amount of iron pipe and galvanized iron and pieces of wrought iron lying on the pile, and to this he took exception. Mr. Malster's office assistant stated in reply that there was but a small quantity of this iron in the pile, and that it was so entirely different in appearance from the steel, that it could easily be kept out when loading. Upon the return of Mr. John Douglas to New York, the plaintiff, on August 6th, wrote in part as follows: "Confirming conversation with your Mr. Malster yesterday, relative to your favor of 3d instant, I will take the lot of punchings and clippings from plates and angles of cruiser steel, at sixteen dollars and fifty cents per gross ton where they lie, terms cash on presentation of bill with railroad shipping receipt attached. We will pay you fifteen cents per ton for loading ⁶⁰ on cars, and if we ship by lighter or railroad float will pay ten cents per ton more (twenty-five cents per ton in all), to cover cost of cartage in your yard, and loading on lighter or in cars on float. . . . In loading the scrap, please keep out all the light scrap, such as sheet or galvanized iron, and steel or pipe, and the other materials, such as turnings and borings. I wish the stock loaded free from all such materials and dirt and earth, as my customer is particular in regard to this." To this letter the defendant, on August 8th, replied as follows: "In reply to yours of 6th instant, referring to purchase of material, will say: We accept your proposition to sell to you what punchings, clippings, or shearings from plates, angles, beams, etc., we have from cruisers, for sixteen dollars and fifty cents per gross ton, as they now lie in our yard, and you to pay fifteen cents per ton additional to the above-mentioned figure, for loading cars in our yard, when they are loaded upon our track. Thus far your proposal is accepted." Then followed some observations as to the cost of loading, and the letter concluded in these words: "Furthermore, we desire you to send some one familiar with the quality of such material, as referred to in our several letters, so as to pass upon it as to quality, for we wish you to take notice, and be guided accordingly, that there shall not be any rebate on the said material, on account of light weight, dirt, or quality of material, or for any other cause after having left our yard." On the 9th Douglas replied. Part of his letter reads as follows:

"Regarding my sending some one to inspect the loading of the scrap, it is not very convenient for me to do so at present, and I do not think it is necessary, unless you choose to take up so arbitrary a position as to compel me to do so. I would be satisfied to accept the material as represented by you, that it is the 'punchings, clippings, and shearings from plates, angles, beams, etc., from cruisers,' with your assurance that you would exercise every care that no other material is shipped. Light sheet iron, borings, turnings, etc., do not come under your description, nor ⁶¹ would such real estate as might be shoveled into the cars with the steel. We are paying you a high enough price to warrant your taking some little extra care in this respect, and will be satisfied with your assurance in regard to it. It would be impossible for anyone to accept a lot of scrap as being of the quality represented. We know what the requirements of cruiser steel are, and presume what has been delivered to you has passed the government inspection. The only point we could decide would be whether what you loaded on the car was covered by the terms 'punchings, clippings, and shearings from plates, angles, beams, etc.,' and, in my opinion, it should be unnecessary for us to send anyone to decide such a matter."

Getting no reply, he again wrote on the sixteenth, and, amongst other things, stated:

"In regard to sending some one to inspect the loading of the scrap, as already explained, it is hardly convenient to do so, and I would prefer to leave it to yourselves to load only a nice lot, which would come entirely within the description, and so be a means of leading to further business. However, if you could arrange a day for loading, say Tuesday or Wednesday of next week, when we could have a float in, I would try to have some one on hand to inspect the scrap. If these, or any other day would suit you, please advise and I will endeavor to arrange it."

Again, on August 17th, Mr. Douglas wrote as follows:

"Confirming my respects of yesterday, we can arrange to take delivery of the scrap alongside lighter your wharf, and will pay you ten cents per gross ton for trucking, in addition to fifteen cents for loading, making price in all twenty-five cents per ton for delivering scrap from where it lies to alongside float or lighter. If this is satisfactory to you, on receipt of your confirmation I will order float to be sent in on any day suitable for you, say Monday, Tuesday, or Wednesday of next week, and will have some one on hand to inspect loading, so as to start first thing in the morning, and have it go right along without further delay."

And on the following day the defendant replied to the letter of the sixteenth:

"In reply to yours of August 16th to hand, wherein you state, if we will load the material (steel scrap) and cart it to the side of a lighter, which you will have placed at our wharf, you will pay to us twenty-five cents per gross ton for so doing; as we understand it, we have nothing whatever to do with loading the scow or flat. We load the carts with the scrap and haul it to the scow or flat, where we unload it alongside, or as near as we can get to the flat. For this you will pay us twenty-five cents per gross ton. This we accept, although at a loss to us beyond what we previously agreed to. But it must be understood that the above figure does not include the loading the flat, or doing anything other than above stated, and the flat to be placed as we may direct. If the above is your offer, you can commence to move the stock at any time, with the understanding, however, that the part of our letter dated August 8th, referring to payments for the said stock, is in full force, and the acceptance of this part of your proposal shall in nowise vitiate or annul that part of the contract."

On August 23d, John B. B. Douglas arrived at the defendant's shipyard, at about eight A. M. The witness was turned over to Mr. Malster's assistant, and the assistant turned him over to the yard foreman. The work of carting the scrap to the wharf then began. The witness noticed the galvanized iron and other objectionable material on the pile hauled to the wharf, pointed it out, and it was removed and placed in a separate heap. On the following day the hauling to the wharf and the loading aboard the cars on the scow continued, explicit instructions having been given by John Douglas that the objectionable scrap should not be loaded. Being called away, Mr. Douglas notified the yard foreman that he would leave for Philadelphia, and, there being no objection to his going, he went, relying upon the good faith of the defendant not to load the material that had been rejected, and depending on the understanding that only cruiser steel would be put on the cars. The loading from the wharf to the cars was done by the Baltimore Storage and Lighterage Company. The barge with the loaded cars left the defendant's wharf on August 31st. The defendant wrote, inclosing invoice and receipt of the lighterage company for three hundred and fifty seven thousand seven hundred pounds of "steel scrap," and the next day the plaintiff forwarded his check for the amount claimed to be due. On the second of September the defendant returned a receipted bill for the same number of pounds of "steel scrap." The plaintiff sold

the scrap to the Latrobe Steel Works, of Pennsylvania. When it reached Latrobe in the cars loaded at the defendant's yard, it was found that of the total one hundred and fifty-nine tons shipped, eighty-nine tons were cruiser steel and seventy tons were not. By reason of this default the plaintiff was obliged to sell the seventy tons at a much less sum than he had paid for it, in consequence of which he incurred considerable loss. On October 13th the plaintiff communicated this result to the defendant, and the defendant in reply merely referred to the antecedent correspondence. To recover for the loss thus sustained the pending suit was subsequently brought.

Under all these circumstances there ought to be, and we think there is, no serious difficulty as to the law which should govern this case. Without going into a specific criticism of each prayer and each instruction contained in the single exception which the record brings up, a general statement or summary of the law upon the subject involved will be sufficient, we apprehend, to show that there is no error suggested of which the appellant has the slightest reason to complain. It is a mistake to assume that the doctrines applicable to warranties have any reference to or can be invoked in this controversy. The contract, whether treated as evidenced alone by the writings referred to, or as consisting of both the writings and the parol interviews, is obviously not an agreement warranting the steel scrap to be of a designated or prescribed quality; but in whichever ⁶⁴ light the contract may be viewed, it is impossible to escape the conclusion that it was an agreement for the purchase by the appellee and for the sale by the appellant of a specific, designated thing; and that thing was not steel of a described grade, free from a named percentage of sulphur and phosphorus, but steel scrap from the plates, beams, and angles of United States cruisers built by the appellant. This was the named and designated—the specific and identical—thing contracted for; and the substitution of any other or different material, no matter what its quality or chemical test might be, was a clear breach of the undertaking entered into by the parties. When a person buys a particular thing, he cannot be compelled to take some other thing, even if like the thing he bought. He has a right to insist on the terms of his contract. If he has unwittingly received that which he has not bought, he has the right to return it, or, keeping it, to recoup, when sued for the stipulated price, the damages which a failure to comply with the contract has caused him; or, finally, if he has paid the purchase price, he has the legal right to sue for and to recover back the

difference in value between the price which he paid for an article he did not get, and the market price of the substituted article delivered to and retained by him. He cannot, if he has purchased a cargo of peas, be required to take a cargo of beans: Lord Abinger in *Chanter v. Hopkins*, 4 Mees. & W. 399; 2 Benjamin on Sales, 768. Before a defendant can be compelled to take anything in fulfillment of a contract of sale, it must be shown not merely that it is equally as good as the article that was sold, but that it is the same article he has bargained for, and none other: Lord Blackburn, in *Bowes v. Shand*, 2 App. Cas. 455; 2 Benjamin on Sales, 768. In other words, if the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid the purchase price, he is entitled to recover back the price as money had and received for his use: 2 Benjamin on Sales, sec. 918. This doctrine cannot be better stated than it was put by Lord Abinger, in *Chanter v. Hopkins*, 4 Mees. & W. 399: "A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A 'warranty' is an express or an implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a 'warranty,' and the breach of such a contract a 'breach of warranty'; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as if a man offers to buy peas of another and he sends him beans, he does not perform his contract. But that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sell him anything else in their stead, it is a nonperformance of it." Precisely this principle is recognized in *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547. It can make no possible difference whether the failure of the plaintiff to receive what he contracted to get grew out of the fraud of the defendant, or out of an accident unmixed with bad faith.

If the contention of the appellant that the contract was wholly in writing be conceded, then there was obviously a sale of goods by description, and as the question of warranty was not involved at all, it would have been palpable error to have denied the plain-

tiff a recovery on the ground that there was not a warranty, though the condition precedent that the goods sold should be what they were alleged to be was wholly unfulfilled. There can, therefore, be no error predicated of the refusal on the part of the court below to grant the appellant's first prayer.

If the theory of the appellant be accepted, that there was no condition precedent as to the character of the goods involved in their description, and that the sale was made subject ⁶⁶ to inspection, then, assuming the contract to have been evidenced solely by writing, there was no term in it which subordinated the description to the inspection; because it is perfectly apparent the minds of the two contracting parties never concurred in substituting an inspection by the purchaser for the description furnished by the vendor. This is made clear by the correspondence heretofore transcribed. But if, on the other hand, the contract was both in writing and in parol, then the question as to inspection was a question as to the construction of the contract, and was for the jury, and the court, so considering it, left it to them.

These views dispose of the whole case. If the contract be treated as one wholly in writing, the appellant wrongly construes it. If it be considered as partly in writing and partly in parol, the appellant's prayers were wrong in assuming that it was wholly in writing. The instruction given by the lower court cannot be objected to, because it was in fact more favorable to the appellant than the appellant was, in strictness, entitled to receive.

As we find no errors, we shall affirm the judgment.

SALES—SUBSTITUTION.—A vendee is not bound to receive and pay for a thing he has not agreed to purchase: *Reed v. Randall*, 29 N. Y. 358; 88 Am. Dec. 305, and note; *Webster-Gruber Marble Co. v. Dryden*, 90 Iowa, 37; 48 Am. St. Rep. 417. If a chattel is sold as being of a particular description, there is an implied warranty that the article sold is of that description. So where an article is sold as a certain described commodity, and there is no opportunity for the buyer to inspect it, there is an implied warranty that it is of the description named, and salable in the market under that description: Note to *Bragg v. Morrill*, 24 Am. Rep. 112.

VICTOR G. BLOEDE COMPANY v. BLOEDE.

[84 MARYLAND, 129.]

CORPORATIONS—WHAT IS NOT A SALE OF STOCK.—If a large number of shares in a corporation are originally issued, for value, to one who afterward causes some of them to be transferred to other parties, including a certificate for nine shares made out in the name of a particular person, for the purpose of giving him an opportunity to purchase them if he wishes, and such person refuses to accept, or to pay for, the shares made out in his name, but assigns the certificate to the original holder, who demands a transfer of the shares back to himself, which transfer the corporation refuses to make, upon the ground that a by-law of the company regulating transfers of stock has not been complied with, the shares in question continue to be the property of the original holder, and a retransfer of them to him is not a sale within the meaning of such a by-law, even if it were valid; and, if it is invalid, the company could not, of course, interpose it as an obstacle to the transfer of the shares.

CORPORATIONS—BY-LAWS—INVALID RESTRAINT ON ALIENATION OF STOCK.—A by-law of a corporation providing that, if any stockholder desires to dispose of his stock, he shall, before a transfer, notify the president of his intention to sell and of the price he can obtain, which notice shall be communicated to the other stockholders, who shall have the option to purchase the shares at the price named, in pro rata amounts, and that the corporation shall have the right to take any such stock not taken by the shareholders, is an unreasonable and palpable restraint upon the alienation of property and, therefore, invalid.

CORPORATIONS—LIMITATIONS UPON POWER TO REGULATE TRANSFER OF STOCK.—The power to regulate the transfer of stock does not authorize a corporation to control its transferability by prescribing to whom the owner may sell, and to whom not, and upon what terms.

CORPORATIONS—TRANSFER OF STOCK—EQUITABLE TITLE.—If one holding a certificate of stock executes a transfer on the back thereof and delivers the certificate to another, the latter has an equitable title to the stock without a transfer on the books of the company.

Appeal from a decree directing the appellant company to transfer to the appellee, Bloede, nine shares of the capital stock of the appellant, standing upon its books in the name of Louis Yakle.

John E. Semmes and Steele & Carey, for the appellant.

George R. Willis and Robert Biggs, for the appellee.

136 **McSHERRY, C. J.** The bill of complaint which was filed in Circuit Court No. 2, of Baltimore City, by the appellee against the appellant, a body corporate, prayed that a decree might be passed enjoining and requiring the appellant to transfer upon its stockbooks, to the appellee, nine shares of its capital stock that were then, and still are, standing in the name of Louis Yakle, but which are claimed by the appellee to belong to, and to be

owned by, him. It is averred in the bill that upon the formation of the Victor G. Bloede Company of Baltimore, which is the party appellant in this cause, the appellee became entitled to a large part of the company's capital stock, and, believing that Louis Yakle intended to purchase from him nine shares thereof, he instructed the treasurer to make out a certificate in the name of Yakle for that number of shares, which was accordingly done. That the appellee then tendered the certificate to Yakle, who declined to receive or to ¹³⁷ pay for it, because, as he insisted, its issue to him was unauthorized and erroneous, and because he claimed no interest in or title to it. That the certificate remained, and still is, in the possession of the appellee. That the issuing of the certificate to Yakle was a mistake on the part of both the appellant and the appellee, and that the nine shares of stock represented thereby are the property of the appellee. The bill further alleges that the appellee made a demand upon the company for a transfer of these shares to himself, but that the demand was refused, upon the ground that a by-law of the company regulating transfers had not been complied with. The by-law in question reads as follows: "If any stockholder shall desire to dispose of his stock, he shall, at least thirty days before a transfer shall be made, notify the president, in writing, of his intention to sell, and of the price he can obtain, which notice the president shall communicate to the other stockholders, who thereupon shall have the option to purchase the stock at the price named, in amounts pro rata to the stock held by them respectively, and the corporation shall have the option to take any such stock as may not be taken by any stockholder individually."

The answer relies on this by-law, and insists that the stock certificate was regularly issued to Louis Yakle, and that the nine shares were properly placed in his name, and that the certificate cannot be transferred to the appellee except in accordance with the provisions of the by-law just transcribed. The answer further goes into a detailed statement as to the method in and by which the appellant company was formed, sets forth the substance of an agreement alleged to have been entered into between the appellee and the Joseph Bancroft & Son's Company, a Delaware corporation, whereby, as a condition precedent to the latter corporation becoming a large stockholder in the yet unformed appellant company, a list of stockholders, including Yakle, with the number of shares which each was to hold, was arranged, and then insists that the nine shares in controversy were issued to Yakle pursuant to this agreement, and not by error or mistake at all.

¹³⁸ A large mass of testimony was taken, much of which, as is usual in such controversies, is irrelevant. After a hearing, the court below signed a decree granting the relief prayed. From that decree this appeal has been taken.

It appears that the appellee, who is a chemist, has for some years past been conducting a large business in Baltimore City, as a manufacturer of dyes and colors made according to his own secret processes. The Joseph Bancroft & Son's Company of Wilmington, a body corporate, engaged in dyeing cloth, was one of the appellee's largest customers, and dependent, to a considerable extent, upon him for some of the dyes and colors used by it. With a view of more closely identifying the interests of the two industries, it was proposed that the appellee should cause a corporation to be formed to take over his entire business, and that the Joseph Bancroft & Son's Company should be allowed to have a part of the capital stock of the new corporation, in exchange for an equal amount of the stock of the Wilmington company. Thus the appellee would receive in the Bancroft company an interest equal in value to the interest which the latter corporation would obtain in the business of the appellee. It is not material who proposed this scheme, and we need not discuss this controverted question. After several interviews and some negotiations, the scheme was finally consummated. There is wide and abrupt conflict in the evidence as to the results reached in these negotiations; but it would serve no useful purpose to enter into an analysis thereof, or to set forth the reasons or the lines of reasoning which influence and sustain the conclusions to which we have come in respect thereto; and hence we proceed, not to discuss the testimony bearing thereon, but, after weighing it as we have carefully done, to state the deductions of fact, which a due consideration of all its details, in our opinion, warrants and justifies.

When the Victor G. Bloede Company was formed for the purpose of taking over the business of the appellee, the articles of association fixed the capital stock at one hundred ¹³⁹ and fifty thousand dollars, fifty thousand of which was retained in the company's treasury; six shares were issued to six of the incorporators, and nine hundred and ninety-four shares in one certificate to the appellee, in payment for the plant and business turned over to the appellant company. Of the nine hundred and ninety-four shares, the appellee transferred to the Joseph Bancroft & Son's Company, in exchange for an equal amount in value of its stock, four hundred and seventy-four shares; he sold and transfer-

red to John Hutton, an employé of the Bancroft company, twenty shares, and he caused certificates to be made out in the name of Glaeken for ten shares, and in the name of Brown for five shares, under a special agreement with these parties as to the method of payment, and one additional share to Nowlin and nine to Yackle, leaving four hundred and seventy-five in his own name. He thereupon surrendered up and had the original certificate for nine hundred and ninety-four shares canceled. Yackle had not subscribed for these nine shares, nor did he authorize the appellee to have them issued to him. He was, at that time, associated with the appellee in another business enterprise. When the two certificate issued in the name of Yackle—one for one share as an incorporator, and one for the nine shares now in controversy—were sent to Yackle, he declined to accept or to pay for the nine shares, on the ground that he had never subscribed for them, and the certificate for these shares was at once returned to the appellee, who thereafter kept possession of it; and when he and Yackle dissolved their other business connection, Yackle signed upon the certificate a transfer of the nine shares to the appellee. Yackle never claimed to own these nine shares; he never paid for them or had them in his possession. It is these nine shares that the appellant now refuses to transfer on its books to the appellee.

From this statement it is obvious that these nine shares were originally part of the nine hundred and ninety-four shares issued in the first instance to the appellee by the appellant ¹⁴⁰ for value. It is equally obvious that as between Yackle and the appellee there never was a purchase by the one or a sale by the other of these nine shares, or the semblance of a negotiation for the acquisition of them by Yackle in any way. This is one of the undisputed features of the controversy. It is manifest, then, that in so far as Yackle and the appellee are concerned, the latter never parted with his ownership of these shares, and certainly Yackle never supposed or contended that he, Yackle, had purchased them. There was no gift of them to Yackle; there was no sale of them to him; he paid nothing for them, refused to take them when tendered to him, and afterward indorsed the certificate over to the appellee.

There are two conflicting contentions as to how the certificate for nine shares came to be made out in the name of Yackle. The appellee insists that he directed the treasurer of the company to so make it out, not because Yackle had agreed to take the stock, but because the appellee wished to give Yackle an opportunity to acquire it, though he did not then know whether Yackle would

purchase the shares or not; whilst the appellant maintains that the certificate was made out in the name of Yakle pursuant to an agreement between the appellee and the Bancroft company, so that neither the appellee nor the Bancroft company, by having a majority of the stock, could control the corporation, but that the control might be in the hands of a neutral third party. Each denies the contention of the other. Yakle was confessedly no party to the understanding set up by the appellant, and unless it be assumed that the appellee, for the purpose of preserving an equilibrium between himself and the Bancroft company in the management of the Victor G. Bloede Company, deliberately agreed to gratuitously give away nine shares of his own stock for which he had paid value, the theory of the appellant cannot be adopted. The probabilities are all against it, and the flat denials of the appellee and other witnesses are sufficient to justify its rejection.

¹⁴¹ If, then, the stock issued in the name of Yakle was not issued under the agreement which the appellant sets up, these nine shares undoubtedly continued to be the property of the appellee; and if they continued to be his property, a retransfer of them to him was not a sale of them within the meaning of the by-law hereinbefore set forth, even if that by-law be conceded to be valid, and consequently that by-law furnishes no ground for refusing the relief sought by the appellee. The mere statement of this proposition is tantamount to its demonstration. If the shares belong to the appellee, and have always belonged to him, though a certificate was erroneously made out in the name of Yakle, then, if the by-law be valid and controls the transfer, each shareholder would be entitled to a pro rata proportion of these nine shares, even though the appellee did not desire to sell any of them. An attempt to retransfer these shares would result in a forced sale of part of them to the other shareholders, though he wished to sell none of them. The transfer on the back of the certificate and the delivery of the certificate to the appellee completed his equitable title to the stock, without a transfer on the books of the company, even if Yakle had ever had any interest in the nine shares. As between Yakle and the appellee, the equitable title to the shares was complete upon the execution of the transfer; and, all other considerations out of view, the right to the shares then vested in the appellee. The entry of the transfer on the books of the company is required, not for the translation of the title, but for the protection of the parties and others deal-

ing with the company, and to enable the company to know who are its stockholders entitled to vote at meetings and to receive dividends when declared: *Gemmell v. Davis*, 75 Md. 552; 32 Am. St. Rep. 412; *Noble v. Turner*, 69 Md. 519; *Johnston v. Laffin*, 103 U. S. 800.

But the by-law itself can, when invoked by the company, interpose no obstacle to the transfer of these shares, for the reason that it is invalid. It is an unreasonable and a palpable ¹⁴² restraint upon the alienation of property. As a general rule, stockholders indisputably have the right to sell their shares at pleasure: *Trisconi v. Winship*, 43 La. Ann. 45; 26 Am. St. Rep. 175. That the power to regulate transfers of stock does not include authority to control its transferability, by prescribing to whom the owner may sell, and to whom not, or upon what terms, and that the mere power to regulate transfers does not authorize a refusal to allow a transfer of shares to even an insolvent, is decided in *Chouteau Spring Co. v. Harris*, 20 Mo. 383. And so a by-law prohibiting the alienation of shares of stock or imposing any restrictions on its exercise is declared to be in restraint of trade and against public policy, and void, in *Moore v. Bank of Commerce*, 52 Mo. 377; *In re Klaus*, 67 Wis. 401; *Brinkerhoff-Farris etc. Co. v. Home Lumber Co.*, 118 Mo. 447; *Feckheimer v. National Ex. Bank*, 79 Va. 80. And in *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, in considering a similar by-law, it was held, without passing on its validity, that no one but the stockholders could take advantage of the noncompliance with the by-law, and that they had the power to waive it. And in *Ireland v. Globe Milling etc. Co.*, 19 R. I. 100, it was decided that a by-law giving the corporation the first right to purchase stock which is for sale by any of its members, is not valid under a statute specifying several subjects upon which by-laws may be enacted, but making no reference to the question of stock transfers. See, also, *Farmers' etc. Bank v. Wasson*, 48 Iowa, 339; 30 Am. Rep. 398; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306.

The cases of *Hager v. Cleveland*, 36 Md. 491, and *Morrison v. Dcrsey*, 48 Md. 473, and others cited, are distinguishable, for there the invalidity relied on by the stockholders was invoked to defeat the claim of a creditor.

As we shall affirm the decree appealed from, we have not thought it worth while to consider the motion made to dismiss the appeal.

Decree affirmed with costs above and below.

To What Extent Transfers of Stock may be Restricted.*

Right of Alienation and Restraint on Transfer, Generally.—Shares of stock in a corporation are personal property: Thompson on Corporations, sec. 1066; Bank of Utica v. Manufacturers' etc. Bank, 20 N. Y. 501, 505; St. Louis etc. Ins. Co. v. Goodfellow, 9 Mo. 149; Tregear v. Etiwanda Water Co., 76 Cal. 537; 9 Am. St. Rep. 245. The right of alienation is an incident of property, and is, therefore, an incident to shares of stock in a corporation: Chouteau Spring Co. v. Harris, 20 Mo. 382, 387; Moore v. Bank of Commerce, 52 Mo. 377; Bank of Atchison County v. Durfee, 118 Mo. 481; 40 Am. St. Rep. 396. "The jus disponendi is essential to the very notion of property. The general rule, subject to qualifications growing out of the peculiar nature of the property, and others founded in the governing statute or constitution of the company, is, that a shareholder may freely transfer his shares to any other person capable of making or taking a contract, thus introducing the latter as a member of the corporation in his stead": Thompson on Corporations, sec. 3231. A married woman, in some jurisdictions, may be the transferee: Keyser v. Hitz, 133 U. S. 138. One stockholder need not refrain from selling shares in order that another stockholder may make a profit out of negotiations pending, but may sell to whomsoever he sees fit, and at any price he can obtain: Farmers' Loan etc. Co. v. Chicago etc. Ry. Co., 163 U. S. 31, 41, 44. A state may sell and transfer its shares in a corporation like other stockholders: La Grange etc. R. R. Co. v. Rainey, 7 Cold. 420; and a purchaser of shares in a corporation is not bound to examine antecedent transfers at the peril of being affected by "trusts" which may be expressed therein or in any of them: Duggan v. London etc. Co., 18 Ont. App. 305, 334. Stockholders in a corporation, including its directors, who own stock, have the indisputable right to dispose of their stock at their pleasure, and they are under no obligation to inform their costockholders of their intention to exchange their stock for the stock of another corporation, or of their intention to invest therein: Trisconi v. Winship, 43 La. Ann. 43; 26 Am. St. Rep. 175. A director has the same right as any other shareholder to transfer his shares, and his exercise of this right is not affected by his knowledge of the fact that a call upon the shares is imminent, unless there is some equity against him as director, such as having been a party to a postponement of the call, to enable him to get rid of his shares and so evade liability: In re National Provincial etc. Ins. Co., 5 L. R. Ch. 539; In re Cawley, 42 Ch. Div. 209. The quality of transferability given to certificates of shares in a trust imports the right to make it effectual by a transfer on the books of the trust: Rice v. Rockefeller, 134 N. Y. 174; 30 Am. St. Rep. 658. To hold that parties receiving property shall not be at liberty to agree upon what terms they shall hold it or upon what terms they will retransfer it, would be to limit the right of

*** REFERENCE TO MONOGRAPHIC NOTES.**

Limitations on the power of private corporations to enact by-laws: 48 Am. St. Rep. 152-158.

Power of corporation to purchase its own capital stock: 33 Am. St. Rep. 389-347.

What by-laws private corporation aggregate may adopt: 85 Am. Dec. 617-622.

Lien of corporation on stock: 11 Am. Dec. 581-582.

contract with which, in the words of Sir George Jessel, in *Printing etc. Co. v. Sampson*, L. R. 19 Eq. 462, 465, it is the "paramount public policy" not to interfere. As supporting this principle, see *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Bank of Utica v. Manufacturers' etc. Bank*, 20 N. Y. 501.

As the right of alienation is an incident to shares of stock in a corporation, the necessary consequence is that restrictions upon this right must be found in express legislative enactment, the articles of association, charter, or original compact, or authorized by-laws, as the corporation cannot restrain one of its members from transferring his shares, unless the legislature has given it power to do so, or unless the members themselves have clothed it with such power in the by-laws or other governing instrument: *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249. Rules and regulations are, of course, necessary in conducting the business of a corporation, and, while a shareholder's right of alienation is, in general, inviolable, in the absence of any statute, charter, or agreement restricting such right, yet the form, procedure, and methods of transferring shares are a legitimate subject of corporate regulation. The corporation may, as will be shown further on, prescribe certain formalities of transfer, for noncompliance with which it may refuse registration. It may, also, as a means of enforcing its lien on shares, prohibit a transfer of stock by a shareholder indebted to it. The corporation may also limit the right of transfer by denying registry to an applicant who is guilty of laches: *Noble v. Turner*, 69 Md. 519; *Newberry v. Detroit etc. Iron Co.*, 17 Mich. 141; or where the shares have already been transferred to another: *State v. Warren Foundry etc. Co.*, 32 N. J. L. 439; *Chapman v. New Orleans Gas Light etc. Co.*, 4 La. Ann. 153. In the charters of English and Canadian companies, it is frequently provided in express terms that all transfers shall be subject to approval by the directors: *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Ex parte Penney*, L. R. 8 Ch. 446; *Shortridge v. Bosanquet*, 16 Beav. 84; *Shepherd's case*, L. R. 2 Eq. 564; *Robinson v. Chartered Bank*, L. R. 1 Eq. 32; *Payne's case*, L. R. 9 Eq. 223; *Smith v. Canada Car Co.*, 6 U. C. P. 107. Where such is the case, the directors may absolutely refuse transfers, if they do so in good faith and for the benefit of the company: *Shepherd's case*, L. R. 2 Eq. 564; and they are not bound to disclose their reasons for rejecting a transferee, if they fairly consider the question at one of their meetings, and there is no showing of bad faith: *Ex parte Penney*, L. R. 8 Ch. 446. Furthermore, where the directors have permitted a transfer which is afterward shown to be fraudulent, the transaction may, under such provision, be avoided entirely, and the name of the transferrer placed upon the list of contributories, even after the lapse of three years: *Payne's case*, L. R. 9 Eq. 223. The power of approval, however, cannot be insisted on unless it has been expressly conferred: *Weston's case*, L. R. 4 Ch. 20; and, when exercised, it must be done reasonably. The directors are not clothed with arbitrary power to refuse transfers to any one, and the exercise of such power may be controlled by a court of equity: *Robinson v. Chartered Bank*, L. R. 1 Eq. 32; *Smith v. Canada Car Co.*, 6 U. C. P. 107; *Chappell's case*

L. R. 6 Ch. 902. The reasonableness of a refusal in any particular case is a question for the courts of equity: *Taft v. Harrison*, 10 Hare, 474; *Robinson v. Chartered Bank*, L. R. 1 Eq. 82; and objections to the motive or objects of the transferrer do not constitute sufficient grounds for refusal: *Moffatt v. Farquhar*, 7 Ch. Div. 591; *In re Stranton Iron etc. Co.*, L. R. 16 Eq. 559. The principle of all such decisions is that shareholders have a right of property, and that those who have the rights of property are entitled to exercise them: *Pender v. Lushington*, 6 Oh. Div. 70, 75. Ordinarily, the power of a corporation to alienate its property, unless restrained by statute, is unlimited: *Wilson v. Miers*, 10 Com. B., N. S., 348, 364; *Ardesco Oil Co. v. North American etc. Min. Co.*, 66 Pa. St. 375; *Dana v. Bank of United States*, 5 Watts & S. 223.

Statutes — Charters — Articles of Association — Agreements — Usage. — It was held in *Bank of Utica v. Manufacturers' etc. Bank*, 20 N. Y. 501, that the general banking act of the state of New York invested the stockholders of banks formed under it with the unconditional right of transferring their stock, except as they might agree to limit it by their articles of association; but that a delegation by the articles, to the board of directors, of the general powers of the association and the management of its stock, did not authorize a by-law subjecting the stock to a lien in favor of the bank for the indebtedness of the stockholder; and that a stockholder in a bank which had passed such a by-law, having assigned his stock to a purchaser for value, without notice of the by-law, and the bank, having given him credit, before a transfer of the stock on its books, and without notice of its assignment, the purchaser had an equitable title to the stock, free from any lien in favor of the bank.

A state statute prohibiting a corporation from selling or disposing of its capital stock at less than par, except at auction, for nonpayment of assessments, does not apply to the holder of stock which the corporation has pledged or mortgaged: *Peterborough R. R. Co. v. Nashua etc. R. R. Co.*, 59 N. H. 385. Though the charter may prohibit a corporation from selling stock except in a particular manner, it may, nevertheless, compromise in a different manner a dispute concerning stock previously subscribed: *Berks v. Myers*, 6 Serg. & R. 12; 9 Am. Dec. 402. If the charter of a bank authorizes its board of directors to make rules regulating transfers of stock, a by-law adopted by them, forbidding the transfer of stock so long as the owner is indebted to the corporation, is valid, although inconsistent with the general law of the state governing the transfer of property: *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388; and it has been held that shares in a bank, whose charter provides that they shall "be transferable only at its banking-house and on its books," cannot be effectually transferred as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificates, together with an assignment and blank power of attorney from the vendor to the vendee, even where notice of such transfer is given to the bank before the attachment: *Fisher v. President etc. Essex Bank*, 5 Gray, 373. So, if the charter of a bank provides that "no part of the capital stock shall be sold or

transferred, except by execution or distress, or by administrators or executors, until the whole amount thereof shall have been paid in," a contract to transfer shares in the bank, which does not fall within the exception, made and to be executed while but fifty per cent is paid in, is illegal and void: *Merrill v. Call*, 15 Me. 428. The validity of a sale of stock by a corporation, for neglect to pay assessments, depends upon a strict compliance with the laws of the state in which the corporation exists, and the charter and by-laws of the corporation: *Mitchell v. Vermont Copper Min. Co.*, 8 Jones & S. 406.

The directors of a corporation, in the absence of any restrictions in the articles of incorporation, cannot prevent a transfer of shares of stock: *Weston's case*, L. R. 4 Ch. 20; and even a provision in articles of incorporation which is not responsive to any provision of the statute relating to corporations is not a charter provision imposed by statute. Hence, a provision in articles of incorporation that no stockholder shall hold more than one hundred shares does not invalidate a transfer of stock, made in good faith, to one who already holds one hundred shares: *O'Brien v. Cummings*, 18 Mo. App. 197. A charter providing that the capital stock of a corporation shall not be sold or transferred, but shall be held by the original subscriber during one year from the date of the charter, does not invalidate an assignment made within the year. It is good in equity: *Nesmith v. Washington Bank*, 6 Pick. 324. So, a provision in articles of association that fully paid-up shares issued to an officer of the company shall be retained by him, and not dealt with by him for a period of seven years, is a provision for the protection of the company, and does not entitle a shareholder to invalidate a call made at a meeting of directors at which a transferee of such shares was necessarily present to form a quorum, though such transfer is made, by the consent of the company, within the seven years: *London etc. Supply Assn. v. Griffiths*, 1 Cab. & E. 15.

In the absence of any restrictions in the charter, it may be agreed that rights in the joint or capital stock of a corporation which has issued no shares of stock shall pass with a transfer of the corporate property: *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 186. But an agreement to restrain the disposition of shares of stock for a period of six months from the date of the agreement is against public policy, and void, where it is inconsistent with general statutory provisions of the state: *Williams v. Montgomery*, 68 Hun, 416. An agreement, however, in writing, executed by persons interested in property, which is transferred to a corporation recently organized, and providing for an allotment of certain amounts of the corporate stock to the several parties to the agreement, and that the stock certificates to be issued therefor shall be deposited with a certain trust company, "and shall not be withdrawn for the period of six months from this date, without the written consent of each and every party hereto," does not impose any restraint upon the disposition of the stock in question; but will simply prevent, if carried out, the actual handing over of the certificates of stock to the purchasers thereof, and the transfer of the same upon the books of the company: *Williams v. Montgomery*, 68 Hun, 416. An agreement between the sharehold-

ers of an association, in its articles, that shares of stock shall not be transferred until all debts due by the holder thereof to the association are discharged, is valid and effectual, and binds every holder of the corporate stock. It is not prohibited by any statute, nor is it inconsistent with public policy. It is intended exclusively for the benefit and protection of the corporation; and if there is a provision on the face of the certificate of stock that the shares therein referred to are held "subject to the conditions and stipulations contained in the articles of association above mentioned," this is sufficient notice to put a purchaser of the shares represented by such certificate upon inquiry to ascertain what such conditions and stipulations are; and every prospective purchaser of shares in such an association, represented by certificates containing such notice, is bound to examine the articles of association, and cannot plead his ignorance thereof in order to defeat the lien of the association upon such shares or stock: *Gibbs v. Long Island Bank*, 83 Hun, 92. The following agreement is void, because in restraint of trade and against public policy, and especially where there is no adequate and sufficient consideration: "For value received from and paid to each other, we, the undersigned, stockholders of the Genessee Valley Canal Railroad Company, mutually agree with the other, and to all, that we will not sell, assign, set over, pledge, or give power of attorney to vote, or agree to sell, assign, transfer, set over, pledge, or give power of attorney to vote in any way, shape, or manner, the stock which we respectively and individually own, hold, or possess in said company, without the concurrent consent of all signers to this instrument. This agreement is made for mutual protection, and to prevent the sale of the company's franchise by a majority of the members of the present board of directors, who are, and who represent, a minority of the shares of the capital stock of this company": *Fisher v. Bush*, 85 Hun, 641.

In the English practice it is an ordinary provision that shares shall not be transferred without being first offered to the corporation or association, this being secured by the articles of association as part of the organic law of its existence. As said in *New England Trust Co. v. Abbott*, 162 Mass. 148, 152: "In England, it is not unusual to find in the deeds of settlement or articles of association under which corporations or joint stock companies have been organized, and which correspond to the charter and by-laws here, provisions requiring the stockholder, in case he wishes to transfer his stock, to offer it to the directors, or to submit to them the name of the transferee for approval. No objection seems to have been made to these provisions": See *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Ex parte Penney*, L. R. 8 Ch. 446; *Chappell's case*, L. R. 6 Ch. 902; *Moffatt v. Farquhar*, L. R. 7 Ch. 591; *Poole v. Middleton*, 26 Beav. 646. In the case last cited, it was provided, by the deed of settlement of a joint stock company, "that no shareholder should be at liberty to transfer his shares, except in such manner as a board of directors should approve." A shareholder contracted to sell his shares, and it was held that he was bound specifically to perform the contract, by the execution of a transfer, though the directors refused to allow it:

Poole v. Middleton, 26 Beav. 646. In this country, a corporation may agree with a subscriber to have an option to purchase his shares, and such agreement is enforceable: **New England Trust Co. v. Abbott**, 162 Mass. 148. Thus, a corporation has power to contract with a purchaser of shares of its stock that, at his death, the shares shall be appraised by the directors of the corporation, and transferred to it at the appraised value, if the directors so elect, who, "whenever, in their judgment, it can be done with safety and advantage to the corporation," shall "sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability" of the corporation. Such an agreement is not contrary to public policy, and "the restraint upon alienation is no greater than is often agreed to." Furthermore, the fact that such conditions are contained in by-laws, invalid as such, does not render the purchaser's agreement void, if the contract is, in substance, one which the corporation has power to make: **New England Trust Co. v. Abbott**, 162 Mass. 148, 152.

"A distinction has been taken between a restraint imposed upon the alienation of shares by a by-law, and such a restraint imposed by the charter or governing statute of the corporation, with the conclusion that where the restraint is imposed by a by-law merely, this is to be allowed an operation no further than is necessary to protect the rights of the corporation, leaving the transfer good as between the transferrer and the transferee; but that where it is prohibited by the charter or governing statute under conditions named, that prohibition renders the transfer void, even as between the parties to it: **O'Brien v. Cummings**, 13 Mo. App. 197, 198. But whether this distinction is well founded may be doubted, in view of the fact that statutes and charter provisions prohibiting, expressly or impliedly, the transfer of shares, except upon the books of the corporation, are generally construed as enacted to protect the rights of the corporation merely, to prevent such a transfer from being good as against it, while leaving it good as between the parties to it": **Thompson on Corporations**, sec. 3235; and see, *infra*, subhead, "Transfers not Made in Manner Prescribed."

Validity of Restraint upon Alienation Imposed by Means of By-Laws.—A by-law cannot take away or even abridge, the substantial rights of a stockholder of a corporation: **People's Home Sav. Bank v. Superior Court**, 104 Cal. 649; 43 Am. St. Rep. 147. A company may make by-laws regulating the transfer of stock consistent with its charter: **Chandler v. Northern Cross R. R. Co.**, 18 Ill. 190; but the power contained in the charter of an incorporated company "to regulate the transfer" of stock by by-laws does not include the power to restrain transfers, or prescribe to whom they may be made. It merely prescribes the formalities to be observed in making them. Such a power will not prevent a party from selling his stock even to an insolvent person: **Chouteau Spring Co. v. Harris**, 20 Mo. 382. By-laws regulating the transfer of stock are merely intended for the protection of the interests of the corporation, and no effect should be given to them further than to attain that object. Such regulations are not restrictive of the stockholder's right to

transfer his stock at pleasure, subject to the charter rights of the corporation: *Seeligson v. Brown*, 61 Tex. 114; *Planters' etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585. Alienation is an incident to corporation stock, and, in the absence of express statutory authority, a by-law prohibiting this right, or imposing any restrictions on its exercise, is in restraint of trade, against public policy, and void: *Bank of Atchison Co. v. Durfee*, 118 Mo. 431; 40 Am. St. Rep. 396. A corporation may, of course, prescribe the form, procedure, and methods of transferring stock, but a by-law which unreasonably interferes with the free exercise of the right to transfer stock is void, as being in restraint of trade: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398; *Moore v. Bank of Commerce*, 52 Mo. 377; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476. It may, therefore, be said that by-laws of a corporation restraining the transfer of shares are valid only so far as they protect the rights of the corporation in respect to the shares, and are not valid where they merely interfere with the rights of third persons. In other words, while a by-law of a corporation respecting the transfer of stock may sometimes be enforced as a reasonable regulation for the protection of the corporation against worthless stockholders, it cannot, therefore, be made available to defeat the rights of third persons, as where such a by-law provides that transfers of stock shall not be valid unless approved by the board of directors: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. Any by-law of an insurance company limiting the transfer of its shares of capital stock only at the office of the company, personally, or by attorney, with the assent of the president, would be in restraint of trade, and contrary to the general law of the commonwealth: *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306. A by-law requiring the consent of all the stockholders in a corporation to a transfer of the stock of one shareholder is void, as against public policy; and the fact that the stockholders were originally copartners, and that the one attempting to transfer his stock consented to and voted for such by-law, does not constitute an exception in the application of the rule: *In re Klaus*, 67 Wis. 401. If the president of a bank, who is surety upon the note of an insolvent stockholder to a third person, takes an assignment of his stock for indemnity, where such stockholder is also indebted to the bank, the president, in the absence of fraud or concealment, has the right to such security as between himself and the bank, and the bank has no equitable right thereto: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. Directors of a business corporation empowered only to make by-laws directing the manner of taking votes of stockholders on the question of increasing or diminishing the number of directors or trustees, or of changing the corporate name, are not authorized to enact by-laws making it a condition of transferring the corporate stock that the holder shall first have offered it for sale to the directors, and shall have paid all his indebtedness to the corporation: *Brinkerhoff-Farris etc. Co. v. Home Lumber Co.*, 118 Mo. 447.

Prohibiting Transfer by One Indebted to Corporation.—At common law, and independently of positive provisions of the legislature granting or authorizing the exercise of the power, a corporation cannot prohibit the transfer of its shares on account of the indebtedness of the shareholder to the corporation. Where the stock is personal property, restrictions upon its transfer must have their source in legislative action, and the corporation itself cannot create these impediments: *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249, 252. The mere fact that one is indebted to a corporation is no reason why his property cannot be sold by his judgment creditor, especially where the corporation claims no privilege or lien. It cannot ordain a by-law "to remove property from commerce." Such an argument would be "a glaring absurdity": *Byron v. Carter*, 22 La. Ann. 98. And, when no restriction is placed by public law on the transfer of corporate stock, a purchaser is not affected by any contractual restriction of which he had no notice: *Brinkerhoff-Farris etc. Co. v. Home Lumber Co.*, 118 Mo. 447. Hence, if a corporation enacts a by-law making transfers of stock subject to a lien for any indebtedness of the holder to the corporation, and prescribes that such by-law shall be printed on all certificates of stock as a notice to purchasers of the existence of such lien, a failure to print such condition on the stock certificates will be considered a waiver thereof as to subsequent purchasers: *Brinkerhoff-Farris etc. Co. v. Home Lumber Co.*, 118 Mo. 447. So, a clause in the by-laws of a bank, adopted by its board of directors subsequently to the issue of the stock, that "no transfer of stock shall be made when the party is indebted to the bank as principal, indorser, or security on any obligation that is due, as long as it remains unpaid," is not binding on the judgment creditors of the stockholders: *Byron v. Carter*, 22 La. Ann. 98. Even a by-law of a banking corporation providing that no transfer of stock shall be allowed so long as the holder is indebted to the bank, and that the bank shall reserve a lien on all stock for such indebtedness, is void, as against an innocent holder or purchaser for value, unless expressly authorized by statute: *Bank of Atchison Co. v. Durfee*, 118 Mo. 431; 40 Am. St. Rep. 396. In the absence of contract, or provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it to secure such indebtedness: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. A delegation, by the articles, to the board of directors of a banking association of its general powers and management of its stock, does not authorize a by-law subjecting the shares to a lien in favor of the bank for the indebtedness of the shareholder, where the general banking law contemplates an individual ownership of the shares, and their transfer from one person to another: *Bank of Utica v. Manufacturers' etc. Bank*, 20 N. Y. 501, 504.

Every corporation, however, has power, within the limits prescribed by its charter, and by the general law, to make regulations prohibiting the transfer of shares by members who stand indebted to the corporation; and the grant of power to a corporation to "regulate" transfers of its stock has been very generally held sufficient to authorize a by-law prohibiting a transfer of shares by one indebted

to the corporation: *Cunningham v. Alabama Life Ins. etc. Co.*, 4 Ala. 652; *Pendergast v. Bank of Stockton*, 2 Saw. 108; *McCready v. Rumsey*, 6 Duer, 574. Contra: *Bank of Utica v. Manufacturers' etc. Bank*, 20 N. Y. 501. Compare *Nesmith v. Washington Bank*, 6 Pick. 324; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454. In determining whether the corporation has power to enact such a by-law, the particular language of a statute or charter must, of course, govern. Thus, under a charter declaring the stock of the corporation to be personal property, and authorizing the board of directors to make rules and regulations concerning the transfer of the stock, subject to the general law of the state, the board is authorized to adopt a rule prohibiting the transfer of stock until all the debts due by the owner of the stock to the corporation are paid, although such rule is inconsistent with the general policy of the law of the state favoring the free transfer of personal property: *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 518; 100 Am. Dec. 888; *Spurlock v. Pacific R. R. Co.*, 61 Mo. 319, 327; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; as a provision in the charter of a corporation requiring that "all rules and restrictions made by the board of directors, concerning the transfer of stock, shall be subject to the general law of the state," does not require such rules and restrictions to be consistent with, and in conformity to, the general law governing the subject matter to which the rules and restrictions apply, but only means that such rules and restrictions shall not contravene the general law of the state other than that governing such matter as the rules and restrictions are intended to govern, and shall be reasonable: *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149. A by-law providing that if any member becomes indebted to the company his stock shall be "liable for the debt," is valid: *Child v. Hudson's Bay Co.*, 2 P. Wms. 207. A charter provision that certificates of stock shall be assignable on the books of the corporation, under such regulations as the board of trustees shall establish, authorizes a by-law that "no stockholder shall be permitted to transfer his stock of the company while he is in default": *Cunningham v. Alabama Life Ins. etc. Co.*, 4 Ala. 652. Under a somewhat similar charter provision, a by-law prohibiting any transfer of stock in the company by a person indebted to it is valid, where the certificates of stock state that the shares are transferable on the books of the company only in conformity to the charter and by-laws: *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149. Compare *Brent v. Bank of Washington*, 10 Pet. 596, 615. A corporation organized under a statute which authorizes it to make by-laws for "the management of its property, the regulation of its affairs," and "the transfer of its stock," and provides further that the stock of the company "shall be transferable in such manner as shall be prescribed by the by-laws of the company," has power to make a by-law providing that no transfer of stock shall be made upon the books of the corporation until after the payment of all indebtedness to the corporation due from the person in whose name the shares stand on its books: *Pendergast v. Bank of Stockton*, 2 Saw. 108. But even a valid by-law providing that no transfer

of shares shall be made by a shareholder who is indebted to the corporation cannot be made to operate so as to invalidate a transfer made before its passage: *People v. Crockett*, 9 Cal. 112. The word "indebted," when used in a by-law or charter restraining a stockholder from transferring his stock while indebted to the company, applies to debts to become due, as well as to those due, and to those in which the stockholder is a surety, as well as to those in which he is principal: *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *Cunningham v. Alabama Life Ins. etc. Co.*, 4 Ala. 652; *Grant v. Mechanics' Bank*, 15 Serg. & R. 140, 142; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285, 286. If it is the usage of a bank not to permit stock to be transferred while the holder is indebted to the bank, a stockholder who becomes its debtor, knowing such usage, is bound by it, and neither he nor his voluntary assignees can maintain an action for a refusal to permit a transfer of his stock: *Morgan v. Bank of North America*, 8 Serg. & R. 73; 11 Am. Dec. 575; *Vansands v. Middlesex County Bank*, 26 Conn. 144.

Transfers not Made in Manner Prescribed, Validity of.—It is not our purpose here to discuss in detail the form, procedure, and methods of transferring stock, but to show to what extent a noncompliance with prescribed rules and regulations as to such transfers may restrict transfers of stock. Nothing need be said where the subject is dealt with by statute, for the object of such a statute is to set all doubtful questions at rest. A provision, however, that stock shall be transferable only upon the books of the company will be found either in the acts or articles of incorporation, charters, or by-laws of most modern corporations, and the effect of a failure to observe this requirement has been answered by the courts in several ways. It is substantially agreed that a transfer, in other respects regular, but without the required registration or notice, is valid as between the parties, and passes the interest of the transferrer. A failure to make the required registration may raise a question with the corporation, but it is not important as between the transferrer and the transferee of the stock: *Sargent v. Essex Marine Ry. Corp.*, 9 Pick. 201; *Leitch v. Wells*, 48 N. Y. 585, 605; *O'Brien v. Cummings*, 13 Mo. App. 197; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Planters' etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Seellgson v. Brown*, 61 Tex. 114; *American Nat. Bank v. Oriental Mills*, 17 R. I. 551; *Gemmell v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412; note to *Harpold v. Stobart*, 15 Am. St. Rep. 626; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; 8 Am. St. Rep. 643, and note; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *In re Klaus*, 67 Wis. 401, 407; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 284; *Newberry v. Detroit etc. Iron Co.*, 17 Mich. 141; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. 627; *Haegle v. Western Stove Co.*, 29 Mo. App. 486; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341; *Comeau v. Guild Farm Oil Co.*, 3 Daly, 218; *Baldwin v. Canfield*, 26 Minn. 43; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App.

249; *Ross v. Southwestern R. R. Co.*, 53 Ga. 514; *Smith v. Crescent City etc. Co.*, 30 La. Ann. 1378. No record is necessary, of course, to perfect the transfer of stock, unless such record is required by the charter or by-laws of the corporation: *Sayles v. Bates*, 15 R. I. 842; *Haegele v. Western Stove Co.*, 29 Mo. App. 486.

A transfer of stock which has not been entered on the books of the company as provided by the statute is, nevertheless, valid, in California, as against all the world, except a subsequent purchaser in good faith without notice: *Parrott v. Byers*, 40 Cal. 614; *People v. Elmore*, 35 Cal. 653. A transfer of stock, made according to the general law governing the transfer of personal property, is good between the parties, though it may not be good as against the company: *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149. A transfer of shares in a corporation, either by absolute sale or by way of pledge, passes the title thereto to the transferee. A transfer on the books is not necessary to perfect the pledge, notwithstanding the fact that the stock is only transferable on the books of the company: *Blonin v. Liquidators*, 30 La. Ann. 714; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252.

A provision in the by-laws of a corporation, requiring a transfer of stock to be made on the books of the company, is a formality intended for the protection and security of the corporation, and of third persons, who may in good faith acquire stock without notice of prior equitable transfers, and no effect should be given to it further than to attain that object: *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 284; *Leitch v. Wells*, 48 N. Y. 585; *Planters' etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *American Nat. Bank v. Oriental Mills*, 17 R. I. 551; *Seeligson v. Brown*, 61 Tex. 114; and this provision may be waived by the company: *American Nat. Bank v. Oriental Mills*, 17 R. I. 551; *Bank of Commerce v. Bank of Newport*, 63 Fed. Rep. 898; *Upton v. Burnham*, 3 Biss. 431. In speaking of the fact that the charter and by-laws frequently provide that the stock of the company shall be transferable on the books of the company only, or that, to be valid and effectual, the transfer must be registered, by the clerk or treasurer of the corporation, in the company books, it is said in *Angell & Ames on Corporations*, 11th edition, sections 353, 354, and which language is quoted and approved in *Seeligson v. Brown*, 61 Tex. 114, that "It is necessary that an incorporated company should have the means of knowing who are stockholders and members, in order that they may know to whom dividends are to be paid, and who are entitled to vote upon the stock; and where the company has a lien upon the stock for debts due to it from a stockholder, that it should have the means of preventing a transfer in derogation of its own rights. To secure this knowledge, and to enable corporations to avail themselves of their lien upon the stock of the company, without danger to the rights of purchasers, these clauses are usually inserted in their charters, or form a part of their by-laws. Accordingly, where transfers of stock are made without conforming to the requisitions of the charter or by-laws in making them, or having them registered on the books of the company, the better opinion decidedly is, that the transfer passes to the purchaser

all the right that the seller had; that such provisions were not intended to, and do not, incapacitate the owner of the stock from transferring it at his pleasure, by way of equitable assignment of his interest in it, subject to the charter rights of the corporation, which all must notice, or compel him to own it, unless the corporation allow him to sell against his will; and the only effect allowed to them seems to be, that the purchaser cannot claim a certificate of, or a dividend upon, the shares, unless he first applies for a transfer according to the charter and by-laws. Any other proper transfer is equally valid, as between vendor and vendee, and even as against a creditor of the vendor, who attached the shares before he or the corporation, through its officers, had notice of the transfer. In other words, such provisions, whether by charter or by-law, apply solely to the relation between the corporation and its stockholders—to the questions, who shall vote, to whom dividends shall be paid; and enable the corporation to protect any lien it may have upon the stock, or equity it, as between itself and the stockholder transferring it. They constitute a privilege of the corporation which may be waived or asserted at the pleasure of the president and directors."

A bona fide transfer of shares in a corporation, without the registry and notice required, is held, in many cases, to pass the complete legal title of the transferrer: *Leitch v. Wells*, 48 N. Y. 585, 605; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 284; *O'Brien v. Cummings*, 29 Mo. App. 197; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *American Nat. Bank v. Oriental Mills*, 17 R. I. 551; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249. "When shares of stock," says the court in *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 284, "are transferred, there is a complete substitution of one person for another in all the rights and duties attaching to the interest forming the subject of their contract. An entry on the books is not necessary to vest the vendee with all the title which the vendor had. By the sale and assignment, the vendor divests himself of not only the equitable, but the legal, title, and this principle applies, notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration": See, to same effect, *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249.

The legal title to shares of corporate stock, assignable only on the books of the corporation, does not, according to other authorities, pass by an assignment of the shares which is neither made nor recorded on the books of the corporation: *Lippitt v. American Wood Paper Co.*, 15 R. I. 141; 2 Am. St. Rep. 886; *Black v. Zacharie*, 3 How. 483; *Brown v. Adams*, 5 Biss. 181; that one is a stockholder in a corporation only when he holds shares on the books of the company, and not when he merely holds the certificate of such shares: *In re Argus Printing Co.*, 1 N. D. 435; 26 Am. St. Rep. 639; and that an unrecorded transfer of stock in a corporation is not valid for any purpose, except as between the parties: *In re Argus Printing Co.*, 1 N. D. 435; 26 Am. St. Rep. 639; *Stockwell v. St. Louis etc. Co.*, 9 Mo. App. 133. The legal title does not pass until an actual transfer made as required: *Brown v. Adams*, 5 Biss. 181.

Other cases hold that a sale and transfer of shares in a corpora-

tion, made in good faith, but without complying with the requirements as to registry and notice, etc., pass, at least, the equitable title to the shares: *Quiner v. Marblehead etc. Ins. Co.*, 10 Mass. 476; *Planters' etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Bruce v. Smith*, 44 Ind. 1; *Lippitt v. American Wood Paper Co.*, 15 R. I. 141; 2 Am. St. Rep. 886; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; 8 Am. St. Rep. 643; *Jennings v. Bank of California*, 79 Cal. 323; 12 Am. St. Rep. 145; *Black v. Zacharie*, 8 How. 483. As between the seller and purchaser, however, it would seem to be of little moment whether the title be deemed a legal or equitable one: *Johnston v. Laffin*, 103 U. S. 800, 804.

As said in *Planters' etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, while the legal title to shares of stock cannot pass except in the mode prescribed by the corporation, "a complete equitable title may be acquired by a transfer in any form or manner appropriate to pass property of that kind, divesting the stockholder of all right and interest, and entitling the transferee to demand that he be invested with the legal title." An assignee of stock in a bank, the transfer to whom has not been entered upon its books, has a mere equity, which must yield to any superior equity or lien of the bank; and an assignee in a bank who gives no notice of the transfer to him holds the title subordinate to any lien the bank may have for money advanced to his assignor in ignorance of the transfer: *Jennings v. Bank of California*, 79 Cal. 323; 12 Am. St. Rep. 145. An assignment of a certificate of stock is only an equitable transfer: *Bank of Commerce's Appeal*, 73 Pa. St. 59. Equity will protect the claims of the holder of stock irregularly transferred: *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461. As between vendor and vendee or pledgor and pledgee of stock, a transfer on the books of the corporation is not essential to perfect an equitable title in the vendee or pledgee: *Gemmell v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412. Although shares of stock in a banking corporation are, by statute, made transferable only on the books of the bank, yet, as between the immediate parties, an assignment without such transfer is effectual, and will be recognized and enforced, at least in equity, as against all parties not showing a superior right: *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; 8 Am. St. Rep. 643.

A transfer of stock in a dividend-paying corporation, not recorded by the proper officer in the record-book kept for the purpose, has been held ineffectual to pass the property as against attaching creditors, without notice of the assignment and subsequent sale on execution: *Buttrick v. Nashua etc. R. R.*, 62 N. H. 413; 13 Am. St. Rep. 578; *Fisher v. Essex Bank*, 5 Gray, 373; *Blanchard v. Dedham Gas Light Co.*, 12 Gray, 213; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245. Under the statute of Maine, no transfer of the capital stock of a bank will secure it from attachment, until it is entered on the books of the corporation, "showing the names of the parties, the number of shares, and the date of the transfer": *Skowhegan Bank v. Cutler*, 49 Me. 315. Transfers of shares of stock, to be valid, must be made on the stock-book of the corporation, and the creditors of the corporation have the right to rely upon that book as showing who the

stockholders are, and the amount of stock held by each: Harpold v. Stobart, 46 Ohio St. 397; 15 Am. St. Rep. 618, and note. In Tennessee, the title of an assignee to stock in a corporation is not complete, as against creditors of the assignor, until notice to the corporation: State Ins. Co. v. Sax, 2 Tenn. Ch. 507; and under the Alabama statute a transfer of stock not recorded upon the corporation books within fifteen days thereafter is void as to bona fide creditors, or subsequent purchasers without notice: Berney Nat. Bank v. Pinckard, 87 Ala. 577.

If the corporation has notice of the transfer, the transferee may hold the shares against an attachment by the transferrer's creditors: Scripture v. Frankestown Soapstone Co., 50 N. H. 571. So, a transfer, for a valuable consideration, of shares in a manufacturing corporation, though not recorded, as required by statute, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer: Bridgewater Iron Co. v. Lissberger, 116 U. S. 8. An unregistered sale and transfer of corporate stock, which, either by statute or charter, is declared to be transferable only on the books of the corporation, is effectual to pass the title to the property as against subsequent attaching creditors of the vendor, who have notice of the transfer before any sale is made under their writ: Lund v. Wheaton etc. Mill Co., 50 Minn. 36; 36 Am. St. Rep. 623. A by-law of a corporation which prohibits the transfer of the stock of the corporation, except by a formal transfer on its books, does not, in the absence of a constitutional or statutory prohibition, render invalid a transfer of its stock by a transfer of the certificate thereof; and such a transfer is good against an execution creditor of the stockholder who did not have notice of the transfer when the execution was levied, but was notified of it before he purchased the stock, at a sale under the execution: Wilson v. St. Louis etc. Ry. Co., 108 Mo. 588; 32 Am. St. Rep. 624. An attachment of shares of bank stock, after notice of an assignment of the shares, made without a transfer on the books of the bank, is ineffectual to defeat the prior right of the assignee: Nicollet Nat. Bank v. City Bank, 38 Minn. 85; 8 Am. St. Rep. 643. A transfer of stock conveys the interest of the holder, and is valid, whether recorded or not, except as against persons having equities. Hence, a judgment creditor, buying at an execution sale, with notice of the transfer, can get no better title than his creditor had: Newberry v. Detroit etc. Iron Mfg. Co., 17 Mich. 141.

On the contrary, there are authorities showing that it is not necessary to the perfection of a sale of corporate stock, and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer should have been made on its books, though the by-laws required transfers of stock to be registered: Smith v. Crescent City etc. Co., 30 La. Ann. 1378; Cornick v. Richards, 3 Lea, 1; Thurber v. Crump, 86 Ky. 408. An assignment of stock, without any transfer on the books of the corporation, is valid as against an attaching creditor of the vendor who attaches the shares before he or the corporation, through its officers, has notice

of the transfer: *Seeligson v. Brown*, 61 Tex. 114; *Sargent v. Essex etc. Corp.*, 9 Pick. 201; *Thurber v. Crump*, 86 Ky. 408. A provision of a statute or by-law, requiring a transfer of stock to be made upon the books of the company, is not intended to protect creditors of stockholders, but to protect the corporation: *Thurber v. Crump*, 86 Ky. 408; *Seeligson v. Brown*, 61 Tex. 114; *Johnston v. Laffin*, 103 U. S. 800, 804; note to *Wilson v. St. Louis etc. Ry. Co.*, 32 Am. St. Rep. 640. Nor is such a provision intended to protect purchasers: *Clark v. German Security Bank*, 61 Miss. 611. Compare *Thurber v. Crump*, 86 Ky. 408. Hence, a bona fide assignment of certificates of stock entitles the assignee to have the transfer made upon the books of the company to his name; and this right is not affected by an attachment of the stock by creditors of the assignor before the transfer on the books has been made: *Clark v. German Security Bank*, 61 Miss. 611. A sale of stock in a corporation is, of course, valid against a subsequent attaching creditor of the seller, although no transfer of the stock is made on the books of the corporation, where neither the statute nor the charter of the corporation requires such transfer to be made: *Boston Music Hall Assn. v. Cory*, 129 Mass. 435.

A transfer of shares of stock in a corporation by their owner to a purchaser in good faith, for value, vests the title in such purchaser free of equities, between the seller and the corporation, of which the purchaser was ignorant at the time of the transfer, though provided for by a by-law of the corporation. The existence of such a by-law is not enough to charge the purchaser with notice: *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. Compare *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 332, 7 Am. Rep. 341, which clearly shows the danger and effect of omitting to have a transfer registered as required.

After a transfer of shares, the corporation may be compelled, at the instance of either party to the sale, to make the transfer on the books of the company: *Johnston v. Laffin*, 103 U. S. 800, 804; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Cushman v. Thayer Mfg. etc. Co.*, 7 Daly, 330; but it cannot be compelled to transfer shares issued in violation of law: *People v. Sterling etc. Mfg. Co.*, 82 Ill. 457. The refusal, without right, by a corporation, to register a transfer of its stock, may be treated as a conversion, and the corporation be held answerable in damages: *Ralston v. Bank of California*, 112 Cal. 208; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50; *Bond v. Mount Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49; *Iasigi v. Chicago etc. R. R. Co.*, 129 Mass. 46; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75; *McLean v. Charles Wright Med. Co.*, 96 Mich. 479.

Existence of Lien as Restraint upon Alienation.—It is evident that the existence of a lien upon shares of stock in a corporation may constitute an impediment to or operate as a restraint upon, the alienation of the property. This lien is, of course, for a debt due the company, but does not exist unless allowed by statute, charter, by-laws, contract, or usage. In the absence of contract or statute, or pro-

visions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it to secure such indebtedness: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398; *Lankershim etc. Co. v. Herberger*, 82 Cal. 600. At common law, no lien exists in favor of a corporation upon the stock of any shareholder to satisfy or secure a debt due by him to the company; and, unless such lien is created by statute, by charter, or by usage brought to the knowledge of, and acted on by, both parties, it does not exist at all. When the corporation has no such lien, it cannot resist or prevent a transfer of the stock by any shareholder to some one else: *Gemmell v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412; note to *Morgan v. Bank of North America*, 11 Am. Dec. 581, concerning lien of corporation on stock. A statute, however, giving a lien on stock for a debt due the company, is valid, and enforceable against all the world: *Tutwiler v. Tuscaloosa etc. Land Co.*, 89 Ala. 391; *Hammond v. Hastings*, 134 U. S. 401; *Bank of Commerce v. Bank of Newport*, 63 Fed. Rep. 898. So, a charter provision that no transfer shall be made by any stockholder indebted to the company until his debt is paid or secured gives the company a lien on the stock, which is a legal one, and it cannot be defeated by a transfer of the stock except in the manner pointed out in the charter: *Kenton Ins. Co. v. Bowman*, 84 Ky. 430. But the question whether a corporation may, by a by-law, create a lien in its own favor upon the shares of its stockholders for debts due by them to the corporation is not settled. There are cases sustaining the validity of such a by-law: See monographic note to *People's Home Sav. Bank v. Superior Court*, 43 Am. St. Rep. 156, discussing limitations on the power of private corporations to enact by-laws; *M'Dowell v. Bank of Wilmington*, 1 Harr. (Del.) 27; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; 11 Am. Rep. 253; *Farmers' etc. Bank v. Haney*, 87 Iowa, 101; note to *Morgan v. Bank of North America*, 11 Am. Dec. 581. Nevertheless, it seems to be clear that a by-law of the usual purport, forbidding a transfer by a stockholder in debt to the corporation, and making all indebtedness a lien on the debtor's stock until paid, cannot affect subsequent purchasers for value without notice: Note to *People's Home Sav. Bank v. Superior Court*, 43 Am. St. Rep. 156; and this upon the principle that restrictions upon the transfer of stock must have their source in legislative enactment; that the corporation itself cannot create these impediments by mere by-laws; and that the power of corporations to make by-laws for the transfer of their stock does not include the power to create liens thereon affecting purchasers for value without notice: Note to *People's Home Sav. Bank v. Superior Court*, 43 Am. St. Rep. 156; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; note to *Morgan v. Bank of North America*, 11 Am. Dec. 581. If a lien on stock is given by statute for indebtedness to the corporation, owing by a stockholder, a transfer of the stock to a person ignorant of the lien does not discharge it, nor authorize the purchaser to demand and receive a transfer of it so discharged: *Hammond v. Hastings*, 134 U. S. 401.

A by-law of a banking corporation providing that no transfer of stock shall be allowed so long as the holder is indebted to the bank, and that the bank shall reserve a lien on all stock for such indebtedness, is void, as against an innocent holder or purchaser for value, unless expressly authorized by statute. A corporation may make by-laws regulating the transfer of its stock, but it cannot thereby create a secret lien on the stock which would adhere to it in the hands of a bona fide purchaser without notice. But a by-law of a banking corporation providing for a lien in its favor on its stock for an unpaid indebtedness due from the holder, although passed without authority, is binding on him and purchasers from him with notice, when at the time of the adoption of such by-law, and the transfer of the stock, such holder was an officer of the bank and a party to the passage of the by-law: Bank of Atchison Co. v. Durfee, 118 Mo. 431; 40 Am. St. Rep. 396.

If a lien on stock for debts due from a stockholder has been declared by statute, or the charter of the corporation, the courts have refused to confine it to debts due for stock only, but have extended it to debts due generally from the shareholder to the corporation, except where the statute compels a different construction: Mobile Mutual Ins. Co. v. Cullom, 49 Ala. 558; and the statute of Alabama confers the lien to secure debts which were contracted before its enactment, as well as those contracted afterward: Birmingham etc. Sav. Co. v. East Lake Land Co., 101 Ala. 304. That a lien on bank stock for debts due does not attach for paper not due at the time a transfer of the stock is demanded, see Reese v. Bank of Commerce, 14 Md. 271; 74 Am. Dec. 536. The lien given by the Minnesota statute to a corporation upon stock for debts due it from the stockholders, attaches whether the debt accrued before or after the stock was acquired: Schmidt v. Hennepin etc. Co., 35 Minn. 511.

A corporation which issues a certificate of stock, stating on its face that it is transferable, has no lien on such stock as against a purchaser thereof: Fitzhugh v. Bank of Shepherdsville, 3 T. B. Mon. 126; 16 Am. Dec. 90; but a bank has an equitable lien on shares of its stock for all sums of money due from the person in whose name such stock stands, when the certificate for such stock declares, "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank by the person in whose name stock stands on the books of the bank, except by the written assent of the president or cashier"; though there was no by-law of the corporation nor any resolution of its board of directors authorizing the insertion of this condition in this certificate. A stockholder who accepts a certificate with this condition printed on it, and then borrows money of the bank, must be held to have assented to the condition, and to be bound by it. A condition printed in and upon a certificate of stock is sufficient to put a purchaser thereof on inquiry, and make it his duty to ascertain whether the stock is free of such condition: Jennings v. Bank of California, 79 Cal. 323; 12 Am. St. Rep. 145.

A National Bank has no power, either in its articles of association

or in its by-laws, to impose a lien upon the shares of its stockholders to secure an indebtedness to itself: See notes to *People's Home Sav. Bank v. Superior Court*, 43 Am. St. Rep. 156; *Morgan v. Bank of North America*, 11 Am. Dec. 581. Such a by-law is void, where it attempts to secure the bank by a lien upon the shares of one of its stockholders for a loan made to him, as being in contravention of section 5201 of the Revised Statutes of the United States, which prohibits such banks from making loans on the security of shares of their own stock: *Fleckheimer v. National Ex. Bank*, 79 Va. 80. The title to shares of stock in a national bank passes by a delivery of the certificate to the purchaser, with authority to have it transferred on the books of the bank: *Johnston v. Laffin*, 103 U. S. 800; affirming same case, 5 Dill. 65; *Doty v. First Nat. Bank*, 3 N. D. 9; though in *Koons v. First Nat. Bank*, 80 Ind. 178, it is held that the title can only pass by a transfer of the stock on the books of the bank. The effect to be given state statutes, so far as they may interfere with or limit the transferability of national bank stock, is purely a federal question, and should be controlled by the construction given to the statutes of the United States by the federal courts. Under those statutes, the rights of a transferee of national bank stock, under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferor without notice: *Doty v. First Nat. Bank*, 3 N. D. 9. A by-law which prohibits a stockholder, who is indebted to a national bank, from transferring his stock without the consent of the board of directors, is void, though notice thereof is indorsed on the certificate of stock: *Fleckheimer v. National Ex. Bank*, 79 Va. 80.

HANNA v. YOUNG.

[84 MARYLAND, 179.]

ELECTIONS—PROPERTY QUALIFICATION FOR VOTERS IN CITIES, WHEN VALID.—If the constitution authorizes the legislature to create corporations for municipal purposes, leaving the management of their concerns to it, and does not prohibit it from imposing any reasonable restriction upon the right to vote, a law providing that the voters at a certain municipal election shall possess a property qualification is valid.

"ELECTIONS," IN CONSTITUTION, INCLUDES WHAT.—The word "elections," in the suffrage clause of a constitution providing that every male citizen of the United States of the age of twenty-one years and upward who has been a resident of the state for one year, etc., shall be entitled to vote at "all elections," includes only those elections which the constitution itself requires to be held, or those which it has directed the legislature to provide for.

ELECTIONS—PROPERTY QUALIFICATION FOR VOTERS OUTSIDE OF CITY NAMED IN CONSTITUTION—POWER OF LEGISLATURE.—Although a particular city is mentioned in that part of a constitution prescribing the qualifications of voters, the legislature has constitutional power to prescribe a property qualification for voters at municipal elections in the state outside of such

city, where it is clothed with power to create and manage municipal corporations, and is not prohibited by the constitution from imposing any reasonable restriction upon the right to vote.

ELECTIONS—VALID RESTRICTION AS TO PROPERTY QUALIFICATION FOR VOTERS IN CITIES.—A statute providing that only male residents above twenty-one years of age and assessed on the tax-books with one hundred dollars' worth of real or personal property shall be entitled to vote at an election for commissioners of a certain town is a valid restriction upon the right to vote at such election.

STATUTES—DECLARING UNCONSTITUTIONALITY OF.—A law will not be declared unconstitutional unless it is clearly and palpably in violation of the constitution.

MANDAMUS—ELECTIONS—WHEN ISSUANCE OF WRIT IS ERROR.—If a valid election law as to the qualifications of voters is ignored in the election of town commissioners, who proceed as if they had been duly elected, and choose a town treasurer, it is reversible error for the court to issue a writ of mandamus, at the instance of the latter, to compel his predecessor in office to deliver to him books, papers, and other property of the town in his possession.

Appeal from an order directing the issue of a writ of mandamus commanding the appellant, Hanna, to surrender and deliver to the appellee, Young, the funds, books, papers, and corporate seal of the town of Bel-Air.

Thomas H. Robinson, Hugh Judge Jewett, Jr., and Gilbert S. Hawkins, for the appellant.

George L. Van Bibber, for the appellee.

180 ROBERTS, J. The sole object of this appeal is to test the validity of the thirtieth section of the act of the general assembly of Maryland, passed at January session, 1896, chapter 359, entitled, "An act to repeal section 23 of article 13 of the Code of Public Local Laws, entitled 'Hartford County,' subtitle 'Bel-Air,' as repealed and re-enacted by the acts of 1890, chapter 154, and also to repeal section 30 of article 13 of the Code of Public Local Laws, entitled 'Hartford County,' subtitle 'Bel-Air,' and to re-enact the same with amendments."

The facts proper to be stated are that an election for five town commissioners was held in the town of Bel-Air, on the first Monday of May, 1896, and conducted in accordance with the provisions of its charter as amended by the act of 1896, except that of judges of election, as required by section 30 of said act, did not, as a condition precedent, require of each person offering to vote at such election, to show that he was assessed with one hundred dollars' worth of real or personal property on the tax-book of said town before he was entitled to vote. The said judges of election ignored this provision of the act of 1896, and

allowed all male citizens residing within the corporate limits of Bel-Air above the age of twenty-one years to vote, notwithstanding the right of a number of said citizens to vote was challenged, upon the ground that they were not assessed with the requisite amount of property. The election was accordingly conducted as if the act of 1896 had not been passed or was void of legal effect. The result of the election was that the five persons receiving the highest number of votes ¹⁸¹ acted as if they had been duly elected; having qualified and organized, they proceeded to elect James C. Young, the petitioner in this case, treasurer of the town of Bel-Air for the ensuing year. The petitioner and appellee here, having qualified, demanded of the appellant, who had on the first Monday of May, 1895, been elected treasurer of Bel-Air, the possession of the books, papers, and other property of the town then in his possession. This the appellant refused to yield, and the appellee accordingly filed his petition in the court below, for the writ of mandamus to compel the delivery to him of said books, etc. The appellant answered said petition, denying the validity of said election and justifying his refusal to deliver said books, etc., because the judges conducting said election had failed and refused to observe and give effect to the provision of the act of 1896, which prescribed a property qualification for said electors voting at said election. Whereupon issue was joined, and the case was heard by the court below without the aid of a jury. The court directed the writ to issue, and from the order of the court this appeal is taken.

The question lies within very circumscribed limits, but it is nevertheless a question which has not heretofore been passed upon by this tribunal. Whilst it has received consideration in some of the courts of the other states of the Union, it does not, however, appear to have been determined except in a very limited number of cases. The contention here is that the thirtieth section of the act of 1896 is directly in conflict with the provisions of article 1, section 1, of the constitution of the state, which reads as follows: "All elections shall be by ballot; and every male citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the state for one year, and of the legislative district of Baltimore City, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district in which he resides, at all elections hereafter to be held in this state."

¹⁸² It is contended, on the part of the appellant, that this

section of the constitution plainly comprehends and includes within its express terms all elections, whether state or federal, county or municipal. Yet there is but one municipality mentioned in this section of the organic law, and, in fact, Baltimore City is the only municipality mentioned *eo nomine* in any part of the constitution. This court, in *Smith v. Stephan*, 66 Md. 381, Mr. Justice Bryan delivering the opinion of the court, said: "It is sufficient to say that no municipal elections, except those held in the city of Baltimore, are within the terms or meaning of the constitution." Whilst the constitution, article 3, section 48, authorizes and empowers the general assembly to create corporations for municipal purposes, it nowhere prohibits the legislature from imposing upon the qualified voters, residing within the corporate limits of a town, any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise in the selection of its officers. In this respect the power of the legislature is unlimited. The argument advanced at the hearing in this court is to the effect that the act in question is void, because the constitution has conferred the right and prescribed the qualifications of all electors in this state, the legislature is without authority to change or add to them in any manner. If the premises of this contention were correctly stated, the argument and sequence would undoubtedly be correct. But, as already observed, the constitution, article 3, section 48, only in general terms authorizes the creation of corporations for municipal purposes, and leaves to the legislature the enactment of such details as it may deem proper in the management of the concerns of the corporation, or which may be regarded as beneficial in the government of the same. The constitution of this state provides for the creation of certain offices, state and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the state (outside the corporate limits of Baltimore City) ¹⁸³ can be properly termed elections under the constitution, such as state and county elections, or that the framers of the constitution ever contemplated that article 1, section 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment. In the creation of a new municipality, the constitution devolves upon the general assembly the entire duty of giving vitality to and of organizing and fostering the body corporate without any other constitutional regulation than the mandate to provide for the system itself. It is, therefore, the

mere creature of legislative sanction and the subject of statutory regulation. In the case of *State v. Dillon*, 32 Fla. 545, it was held that the suffrage provision in the constitution of that state (which is substantially the same as article 1, section 1, in the constitution of this state), prescribing the qualifications of electors at all elections under it, does not apply to elections for municipal officers, but such elections are subject to statutory regulation, and, further, that it is competent for the legislature to prescribe the qualifications of voters at the same.

It is only at elections which the constitution itself requires to be held, or which the legislature, under the mandate of the constitution, makes provision for, that persons having the qualifications set forth in said section 1, article 1, are by the constitution of the state declared to be qualified electors. Nowhere in the constitution are the governments of municipalities in this state, or their officials, either clothed with power or designated as any part of our state government, but their very creation, together with all the powers and attributes which attach to their management, are lodged by the constitution with the legislative department of our state government, save in some respects the city of Baltimore.

The same question now under consideration here arose in the case of *McMahon v. Mayor etc. of Savannah*, 66 Ga. 217; 42 Am. Rep. 65. The suffrage clause in the constitution of the state¹⁸⁴ of Georgia is almost in totidem verbis the same as that in the constitution of this state. The statute sought to be declared unconstitutional was assailed upon the ground that it imposed upon the electors of the city of Savannah the payment of a poll tax as a condition essential to their qualification as voters at any municipal election. The court held the statute to be a valid exercise of legislative power; and further held that "all legislative acts in violation of the constitution are void, and it is the duty of the judiciary so to declare. But, in considering and passing upon the question of the constitutionality of the law, the rule is too well established and settled to be departed from; that it must be made to appear that the statute, before it is declared inoperative for that cause, must be 'plainly and palpably' in violation of the constitution": *Beall v. Beall*, 8 Ga. 210. The solemn act of the government will not be set aside by the courts in a doubtful case. "The incompatibility or repugnancy between the statute and the constitution must be 'clear and palpable'": *Parham v. Justices*, 9 Ga. 341. We also refer to the cases of *Buckner v. Gordon*, 81 Ky. 666, and *Mayor v. Shattuck*, 19 Colo. 104, 41 Am.

St. Rep. 202, as sustaining the views expressed in this opinion. The last-mentioned case was a special proceeding under a statute of the state of Colorado praying for the dissolution of the town of Valverde, and its annexation to the city of Denver. In such proceeding the county court made an order requiring the mayor and trustees of the town to call an election for the purpose of determining the question of dissolution and annexation; this order required the question to be submitted to a vote of the qualified electors of said town at such election. The mayor and trustees of the town sought to vacate the order on the ground of the unconstitutionality of the statute under which it was obtained. The statute required that the question of dissolution and annexation be submitted "to a vote of such of the qualified electors of such town or city (to be annexed) as have in the year next preceding paid a property tax therein." The suffrage clause, section 1 of article 7 of the constitution ¹⁸⁵ of the state of Colorado, is substantially the same (in so far as it involves the question under consideration in this case), as that of the Maryland constitution. Mr. Justice Elliott, delivering the opinion of the court, observes: "It is manifest that some restriction must be placed upon the phrase 'all elections' as used in section 1 of the constitution, else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with the affairs of others in which he has no interest. In our opinion, the word 'election,' thus used, does not have its general or comprehensive signification, including all acts of voting, choice, or selection, without limitation, but is used in a more restricted political sense, as elections of public officers."

Without extending the discussion of this question, we are clearly of opinion, both upon reason and authority, that the appellee's contention is not sustained. For the reasons stated, the order of the court below directing the writ of mandamus to issue is reversed.

Order reversed with costs.

ELECTIONS—ADDING TO QUALIFICATIONS OF VOTERS—MUNICIPAL ELECTIONS.—The legislature of a state cannot add to the qualifications of an elector as prescribed by the state constitution: *State v. Findlay*, 20 Nev. 198; 19 Am. St. Rep. 346. An act requiring, as one of the qualifications of a voter, that he shall be a "taxable inhabitant," has been held invalid, where the constitution does not require any property qualification; but, in Kentucky, it has been held that the act amendatory of the charter of Winchester, providing that voters at municipal elections shall pay their taxes before they vote, is not in violation of the constitution of that state, as the offices to be filled at such elections are not constitu-

tional offices: See monographic note to *Blair v. Ridgely*, 97 Am. Dec. 263, on the power of the state to impose qualifications for voters and holders of offices. So, a statute requiring the question of annexation to a municipality to be submitted at an election to the determination of the tax-paying electors thereof, is not unconstitutional, as requiring a property qualification. The word "election," as used in the constitution, refers only to elections of public officers: *Mayor v. Shattuck*, 19 Colo. 104; 41 Am. St. Rep. 208.

CONSTITUTIONAL LAW.—COURTS UPHOLD LEGISLATIVE ACTS relating to municipal corporations, unless their unconstitutionality is clearly and palpably apparent: *Mayor v. Shattuck*, 19 Colo. 104; 41 Am. St. Rep. 208.

HARVARD PUBLISHING COMPANY OF NEW YORK v. BENJAMIN.

[84 MARYLAND, 338.]

HUSBAND AND WIFE—SUITS AGAINST WIFE—CONSTRUCTION OF STATUTE.—A statute providing that a married woman may be sued at law jointly with her husband upon any note, contract, or agreement which she may have executed jointly with him includes only contracts or agreements reduced to writing and signed by both husband and wife.

HUSBAND AND WIFE—LIABILITY OF WIFE TO BE SUED.—A wife is liable to be sued at law only upon such contracts or agreements as she is empowered by statute to make. Her common-law disability still continues as to all other undertakings.

HUSBAND AND WIFE—NOTE OF WIFE INDORSED BY HUSBAND AS PAYEE—JOINT LIABILITY.—In an action against a husband and wife, where one count of the declaration sets forth a promissory note made by the wife alone, payable to the husband and by him indorsed in blank, the note sued on is not evidence of a contract executed by the wife jointly with her husband, as the liability of the maker of a promissory note is quite different from the liability of an indorser, who is also named as payee. The two contracts are wholly different, and do not form one joint undertaking.

HUSBAND AND WIFE—WIFE IS NOT LIABLE UNLESS HER CONTRACT IS WHOLLY IN WRITING.—If a married woman is, by statute, not liable upon her contract or agreement, unless it is in writing and is executed by her jointly with her husband, she is not liable where part of the contract or agreement is in writing and part in parol. Hence, in an action against a husband and wife, where one count of the declaration sets forth a promissory note made by the wife alone, payable to the husband, and by him indorsed in blank, evidence is inadmissible to show that a note, which, on its face, is her note alone, was, in reality, the joint note of the two, as this would make her liability depend, in part, upon parol testimony while the statute prescribes a writing.

PROCESS—QUASHING WRIT OF SUMMONS—WHEN REVERSIBLE ERROR.—It is reversible error to quash a writ of summons while there are good counts in the declaration. Hence, where the declaration, in an action against a husband and wife, sets forth, in a special count, a promissory note made by the wife alone, payable to the husband and by him indorsed in blank, and the note is filed with the declaration, which also contains the common counts in assumpsit and another special count setting forth the execution,

by husband and wife, of a joint promissory note, it is error to quash the writ of summons as to the wife, although the note filed with the declaration was not a contract upon which she could be sued at law.

NEGOTIABLE INSTRUMENTS—ACTIONS ON—PARTIES. The maker of a promissory note and the indorser, who is also the payee, cannot be joined in one action on the note, as the contract or undertaking of one is different and distinct from that of the other.

Appeal from a judgment quashing the writ of summons as to Margaret Benjamin, one of the defendants, in a suit on a promissory note.

William Reynolds, for the appellant.

Joseph C. France and Robert E. France, for the appellee.

³³⁷ **McSHERRY, C. J.** Suit was brought in the Baltimore city court by the Harvard Publishing Company of New York against Charles R. Benjamin and Margaret Benjamin, his wife. The declaration contains the money counts, a count on a promissory note executed jointly by the defendants, and a special count wherein it is alleged that Margaret Benjamin, by her promissory note, promised to pay to the order of Charles R. Benjamin two hundred and eighty-eight dollars and eighty-four cents, two months after date, "with the intent and understanding that said note should be indorsed by him to the plaintiff, to be by it received in part payment of certain property agreed to be sold by it to him by a contract dated November 18, 1895, and that said note was so indorsed by him to the plaintiff, and was duly presented for payment and was dishonored, etc." With the declaration there was filed a promissory note drawn by Margaret Benjamin, the wife, and payable to the order of Charles R. Benjamin, the husband, and by him indorsed in blank. By leave of the court, the wife was allowed to make defense separately from her husband, and she accordingly filed a motion to quash the writ of summons against her for the following reasons: 1. Because she did not contract or promise to pay as alleged in the declaration; and 2. Because, being a married woman, she is not subject to suit except as by statute allowed, and the cause of action set forth in the declaration is not a cause of action upon which, by the statutes of the state of Maryland, she may be sued. The motion was sustained, and the writ of summons was quashed as to the wife. From this order the pending appeal was taken.

There are two questions presented by the record. The first is, whether the note described in the special count and ³³⁸ filed with the declaration is a promissory note that is binding on the

wife under the statutes of Maryland; and the second is, whether the other counts of the declaration state a valid cause of action against the husband and wife jointly.

It is enacted in section 2, article 45, of the code, that "any married woman may be sued jointly with her husband in any of the courts of this state on any note, bill of exchange, contract, or agreement which she may have executed jointly with her husband"; and this has been construed to include only contracts or agreements reduced to writing and signed by both husband and wife: *Sturmfelsz v. Frickey*, 43 Md. 569. The wife is liable to be sued at law only upon some contract or agreement that she is empowered by the statute to make; her common-law disability still continuing as to all other undertakings: *Davis v. Carroll*, 71 Md. 571. Inasmuch, then, as to be binding on her under the section of the code quoted above, the contract or agreement sued on must be in writing and must be executed by the wife jointly with her husband; it is quite apparent that the provisions of the statute will not be gratified if but part of the contract be in writing and part in parol; or if the contract, promise, or agreement be not executed by the wife jointly with her husband. If the contract be not wholly in writing, or if it be not executed jointly by husband and wife, and if it be a contract whose validity depends upon a compliance with the above-quoted provision of the code, there can be no liability on the part of the wife, and consequently no suit or action can be maintained at law thereon against her. This is the settled law of Maryland often declared and now merely reiterated.

The averments of the special count of the narratio make it clear that the plaintiff seeks to hold the wife liable upon the note therein described, not because the note upon its face discloses a contract in writing, executed jointly by the husband and wife, but because dehors the note it may be made by parol evidence to appear that the note was executed by the wife, with the intent and understanding that it should be ⁸³⁹ indorsed to the plaintiff, whereby the assent of the husband to the execution of the note by the wife is sufficiently evidenced to convert her note, payable to him, into the joint note of the two by his indorsement. But if it be conceded that such evidence would tend to show that the note, which on its face is her note alone, was in reality the joint note of the two, it would clearly be inadmissible, for it would make her liability depend, not on the evidence which the statute prescribes—a writing—but upon parol. To allow this would broaden the statute by interpretation, and would directly

reverse the ruling in *Sturmfels v. Frickey*, 48 Md. 569. But, besides this, no parol evidence could be received to vary or alter the character affixed by the law to the undertaking of the husband as the payee and indorser of the note. The contract, to be binding on the wife, in cases like this, must be executed by her jointly with her husband. The note described in the special count and filed with the declaration is a promissory note, made by the wife alone, and payable to the husband, and by him indorsed in blank. It is obvious that the liability of the maker of a promissory note is quite different and distinct from the liability of an indorser, who is also named as payee. The liability of the maker is absolute and primary, that of such an indorser is contingent and conditional. The payee of a note incurs no liability on it until he becomes an indorser. Up to the moment that he indorses the note no one is liable on it but the maker; though when the payee does indorse it, he enters into a contract separate and distinct from that of the maker. The two contracts or undertakings are so distinct that both the maker and the indorser, who is also the payee, cannot be joined in one action on the note: *Halley v. Jackson*, 48 Md. 254. Assuming that the note drawn by Mrs. Benjamin was binding on her, her liability was that of a maker. When her husband, who was the payee, indorsed it, he incurred, not a joint liability with her as maker, but a separate contingent liability as indorser. These two contracts, being wholly different, do not form one joint undertaking, and ⁸⁴⁰ consequently the note described in the special count and filed with the narratio, does not evidence a contract executed by the wife jointly with the husband, and therefore cannot be recovered on under the statute. Hence, had there been no other count in the declaration, the order quashing the writ would have been free from error. The case at bar is clearly distinguishable from *Schroeder v. Turner*, 68 Md. 506. In that case the notes were drawn by Herbert & Co., payable to Schroeder, and were indorsed by the wife of Herbert. Under the case of *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411, the wife was held to be a joint maker.

The seventh count states a good cause of action. It contains an averment that the husband and wife, by their promissory note, executed by them jointly, promised to pay to the plaintiffs a designated sum of money at a specified time. Whilst under this count the note filed with the declaration would not be admissible in evidence, for the reasons we have already given, yet any note answering the description in the count could have been offered.

With this count in the declaration it was error to quash the writ of summons. It was equally erroneous to quash the writ when the common counts were in the declaration: *Davis v. Carroll*, 71 Md. 568. In the case last cited, we held that a demurrer to the common counts was bad. The suit there was in assumpsit against the executor of the last will of Ann Chatterton, deceased. The declaration contained the common money counts, and also a special count. A demurrer was filed to each count and was overruled. This ruling was held to be correct as to the common counts, but erroneous as to the special count. In dealing with the special count, we said: "A plaintiff's right to recover must be shown on the face of the declaration; and when, therefore, the suit is one upon a contract of a feme covert, who can only be sued under prescribed conditions, it must appear, by proper averments, that those conditions exist; otherwise, the declaration will be fatally defective on demurrer." There were no averments in that special count which disclosed a ³⁴¹ liability on the part of the feme covert; but the language used in disposing of the question presented by the demurrer to that count cannot be separated from the subject under consideration and applied to a totally different subject. Under the common counts, now before us, a recovery could be had upon any written contract, not under seal, executed by the husband and wife jointly, that was admissible in evidence under the issue joined on the plea thereto. The question intended to be raised by the motion to quash would have arisen on an objection to the admissibility of the proffered evidence, and in that way only.

The first reason assigned for quashing the writ amounts merely to the plea of never promised as alleged, and, even if true in point of fact, furnished a defense to the suit, but not a ground for quashing the writ.

Because of the error in quashing the writ whilst there were good counts in the declaration, the judgment appealed from must be reversed.

Judgment reversed, with costs above and below and new trial awarded.

HUSBAND AND WIFE—CONTRACT IN WRITING—JOINT LIABILITY.—At common law, a wife's contracts are void, and not enforceable against her in a court of law; and exceptions to this rule must be created by statute: *Stevens v. Parish*, 29 Ind. 260; 95 Am. Dec. 636, and note; but she may contract with respect to her property in the mode prescribed by statute: *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 402. In Maryland, no action at law lies against a husband and wife upon a contract, unless it is in writing executed by both; and the plaintiff must prove that the cause of action sued on was executed by the wife jointly with her husband: *Maulsby v. Byers*, 67 Md. 440.

HARPER v. CLAYTON.

[84 MARYLAND, 346.]

DOWER—NATURE OF RIGHT BEFORE ASSIGNMENT.—Previous to the assignment of dower to a widow, her interest is a mere chose in action, nothing but a right by appropriate proceedings to compel the assignment to be made.

EXECUTION—WIDOW'S RIGHT OF DOWER BEFORE ASSIGNMENT.—A widow's right of dower in the lands of her deceased husband cannot be taken in execution by her creditors before the same has been assigned and set off to her.

CREDITOR'S BILL—WIDOW'S UNASSIGNED RIGHT OF DOWER.—Creditors cannot, by means of a creditor's bill, subject a widow's unassigned right of dower in the lands of her deceased husband to the payment of her debts.

EQUITY—CHOSES IN ACTION—PAYMENT OF CREDITORS—JURISDICTION.—Aside from statute, and in the absence of fraud, or some element of trust, it seems that equity has no jurisdiction to subject choses in action to the payment of creditors, merely because the creditors have no remedy at law.

FRAUD—REFUSAL TO HAVE DOWER ASSIGNED.—As a person may stand upon his legal rights without violating any rule of equity, the neglect or refusal to have dower assigned does not amount to fraud.

Creditors' bill, praying for the sale of the unassigned dower interest of Rachel C. Clayton, in the lands of her deceased husband, in order to satisfy judgments obtained by the plaintiffs against her. A demurrer to the bill was sustained. The plaintiffs then asked leave to amend, by charging that writs of execution had been issued and returned nulla bona. They also desired to pray for the appointment of a receiver, but the court refused the leave asked for, and the plaintiffs appealed.

Hope H. Barroll and James P. Gorter, for the appellants.

James A. Pearce and Lewin W. Wickes, for the appellee.

347 FOWLER, J. The plaintiffs below are judgment creditors of the defendant, who is the widow of the late John S. Clayton, and as such widow she is entitled to dower in the real estate of her late husband. But it appears that her dower has never been actually assigned or set off to her, and it would, therefore, follow that she has not, at common law, any interest or estate in the lands of her husband until such assignment has been made. "Previous to the assignment of dower, her interest is a mere chose in action, nothing but a right by appropriate proceedings to compel the assignment to be made": Freeman on Executions, sec. 185. So long, therefore, as the common law prevails, the unassigned dower right cannot be taken in execution at law. It is contended, **348** however, and this contention appears to be the

main ground upon which the plaintiffs ask the aid of a court of equity, that, the law affording them no relief, equity must necessarily do so. And although an interesting question of equity jurisdiction is here presented which has been examined by some of the most learned jurists both of England and this country, it would be impossible in the limits of this opinion to do more than refer to and discuss some of the leading cases.

In the early cases in England, the jurisdiction here contended for, to subject choses in action to the claim of creditors by a creditor's bill, was sustained, but generally upon the ground of fraud, trust, or for some other reason which it was conceded would entitle the creditor to invoke its aid. Thus *Taylor v. Jones*, 2 Atk. 600, lays down the doctrine that where a debtor has in fraud of his creditors assigned to trustees certain choses in action in trust for himself for life, and then over to his wife and children, a court of equity will favorably hear the application of such creditors, and decree such trust estate to be sold for the payment of their debts. And this was held to be so, notwithstanding such choses in action were not subject to levy and sale upon execution at law: *Rex v. Marisal*, 3 Atk. 192; *Edgell v. Haywood*, 3 Atk. 352; *Horn v. Horn*, Amb. 79; *Partridge v. Gopp*, Amb. 578; *Smither v. Lewis*, 1 Vern. 398. But even in cases like that of *Taylor v. Jones*, 2 Atk. 600, and the others just cited, which would perhaps be now generally conceded to be within the limits of equity jurisdiction because of the allegation and proof of fraud, it was subsequently held in England that creditors could get no relief in equity because they had no legal right which equity could enforce: *Dundas v. Dutens*, 1 Ves. Jr. 196; *Grogan v. Grogan*, 2 Ball & B. 210. In the case last cited, Lord Manners quoted Lord Thurlow as having said: "The opinion in *Horn v. Horn*, Amb. 79, is so anomalous and unfounded that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, ³⁴⁹ which if set aside leaves the stock in the name of the person where you could not touch it." And in *Bayard v. Hoffman*, 4 Johns. Ch. 450, Chancellor Kent, after a most careful and elaborate examination of the English authorities, came to the conclusion that while Lord Hardwicke had maintained the jurisdiction of equity thus to proceed against choses in action, it was afterward denied and overthrown by both Lord Thurlow and Lord Eldon, although his own opinion, as expressed in *Bayard v. Hoffman*, 4 Johns. Ch. 450, was that "the better reason is with the earlier authorities." But, notwithstanding this expression of opinion in the case just cited,

the more recent cases upon this point in New York and some other states have vigorously announced and maintained the doctrine that aside from statute, and, in the absence of fraud or some element of trust, chancery has no jurisdiction to subject choses in action to the payment of creditors, because there happens to be no remedy at law, and it would seem that the chancellor himself had adopted this view, as will appear by reference to his commentaries, volume 4, page 61, where he refers to the New York statute as authority for the statement that in that state a chose in action may be reached by process in chancery for the benefit of creditors.

The cases relied upon by the plaintiffs do not, we think, sustain their position. The first of those in point of time is the case of *Hamilton v. Mohun*, 1 P. Wms. 122. But in that case there was no question of jurisdiction as there is here, and it was very properly held on a bill filed for an account by an heir at law against the widow, as guardian, "that a court of equity, in taking the account, should allow to the widow one-third of the profits for her right of dower—and this, too, whether dower had or had not been actually assigned." The question of jurisdiction was not involved in *Hamilton v. Mohun*, 1 P. Wms. 122, and it is therefore not an authority here. The plaintiffs also cited and relied upon three New York cases: *Tompkins v. Fonda*, 4 Paige, 448, *Stewart v. McMartin*, 5 Barb. 438, and *Payne v. Becker*, 850 87 N. Y. 153. But it is sufficient to say in regard to all of those cases that they appear to be based upon the provisions of the New York statute which was in force when they were respectively decided. That statute, in effect and in words, provided that courts of chancery should have power to decree satisfaction of a judgment at law out of "any money, property, or thing in action belonging to the defendant whenever an execution against his property shall have been returned unsatisfied in whole or in part." The same observations may be made in regard to *McMahon v. Gray*, 150 Mass. 289, 15 Am. St. Rep. 202, and *Boltz v. Stolz*, 41 Ohio St. 540. In each of the states just named there were statutes expressly giving chancery courts jurisdiction to decree the sale of choses in action upon the application of judgment creditors.

The case of *Davison v. Whittlesey*, 1 MacAr. 163, was much relied on by the plaintiffs. It was decided on the authority of *Tompkins v. Fonda*, 4 Paige, 448, which, having been based on the New York statute, should have had no weight where, as in the District of Columbia, no such statute was in force. Nor are

we satisfied to adopt the reasoning of the court in *Davison v. Whittlesey*, 1 MacAr. 163. After stating that at law the right to have dower assigned could not be reached, it is said: "But in equity it is otherwise. The widow has no right in conscience to deprive her creditors of the benefit of her right of dower for the satisfaction of their claims by continuing in joint possession with the heirs and neglecting to ask for a formal assignment, which assignment, if made, would enable the creditors to reach her dower by execution." It must be remembered that, in the case at bar, there is not only no fraud alleged by the plaintiff, but they have disclaimed any intention of charging bad faith or collusion between the defendant and the heirs at law who are in possession of the land in which she is entitled to have dower assigned to her. In the position she has assumed in this case, she is only standing upon her legal rights. It is conceded that, at common law, aside from such statutes as ³⁵¹ have been enacted in some of the states, though not in Maryland, the defendant's right of dower is not liable for her debts. And while it may be said, perhaps, in one sense, that "in conscience she ought not to deprive her creditors of the benefit of her right of dower" for the payment of their just claims, yet the same may be said of any one who relies on the statute of limitations or exemption laws to defeat such a claim. If debtors could be required by a court of equity to abandon their legal rights and to subject themselves to the dictates of conscience or to some law regarded as higher than the law of the land, they would doubtless seldom plead the statute of limitations or rely upon the provisions of homestead or exemption laws; but, whenever these statutes are properly and reasonably pleaded, they are as binding in a court of equity, which is sometimes called a court of conscience, as they are in a court of law. And recognizing this right to stand upon one's legal rights, it has been held that the neglect or refusal to have dower assigned does not amount to fraud: *Maxon v. Gray*, 14 R. I. 641; *Buford v. Buford*, 1 Bibb. 305. This is only another application of the well-settled principle of equity that "where a rule, either of statute or common law, is direct and governs the case in all its circumstances or the particular point, a court of equity is as much bound by it as a court of law, and can as little depart from it": 1 Story's Equity Jurisprudence, sec. 64. Applying here, then, the conceded common-law rule that the creditor has no legal right to look to the unassigned dower (it being a chose in action) for the satisfaction of his claims, it follows that equity will not aid him.

Much reliance was also placed upon the language used by Chancellor Bland in the case of *Watkins v. Dorsett*, 1 Bland, 531. To the same general effect also is *Ager v. Murray*, 105 U. S. 126, where it is said that it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debts any property which, by reason of its nature only, and not by reason of any positive rule exempting it from ³⁵² liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation or of choses in action. While the rule thus stated may be, when properly applied, admitted to be correct, we cannot agree with the application of it sought to be justified by *Watkins v. Dorsett*, 1 Bland, 531, nor with the broad application of the rule, as in *Ager v. Murray*, 105 U. S. 126, to all choses in action. In the case first named, Chancellor Bland said that the facts before him exposed one of the then existing deficiencies of our code. And, after stating that both real and personal property of a debtor had been subjected to be taken on execution at law, he says: "There are, however, still several kinds of property which a debtor may hold, lying beyond the reach of his creditors," and he mentions as in this class stock in corporations and things in action. The case from which we have quoted the foregoing language of the chancellor was decided in 1829. But very soon thereafter the act of 1832, chapter 307, now codified, was passed, by which any interest of a debtor in stock of a corporation may be taken and sold under an execution at law. But no such act has ever passed in this state by which the thing in action here attached could be so taken and sold. That there is no such statute is the main foundation of this proceeding in equity, for if there were a remedy at law, the bill in this case was properly dismissed. It was held in *Watkins v. Dorsett*, 1 Bland, 531, that where a party cannot obtain relief at all, either by an ordinary execution or by the extraordinary remedy of outlawry or attachment of the person, by reason of the peculiar situation of the property or the equitable nature of the title, he may obtain relief by bill in equity. But we think it is apparent that this language, even if it was not so intended, should be limited so as to relate to enforcement of some existing legal right, for a court of equity, however broad and far-reaching its powers are, cannot create new rights, not before existing at law, and then take jurisdiction to pass upon and enforce them because the law ³⁵³ affords no remedy. It is, perhaps, but fair to infer that the language of the

chancellor related to property situated like that in *Harris v. Alcock*, 10 Gill. & J. 226, 32 Am. Dec. 158, to which case he refers, where it was held that the equitable interest of the defendant in personal property, which, under the circumstances of that case, could not be taken by execution at law, might be attacked in equity.

Nor do we assent to this view that the mere abolition of the extraordinary remedies of outlawry and attachment of the person would confer jurisdiction on equity. Such a conclusion would be in conflict with reason, as well as with modern authority. It would certainly not seem to follow that if the law had always and consistently refused to give an execution against things in action, and had allowed only the extraordinary remedies just mentioned, that upon the destruction of the latter, the former would not only thereupon spring into existence, but become remedies appropriate for a court of equity. The contrary conclusion would, we think, be more reasonable, namely, that the legislature having abolished execution against the person which was used for the purpose of getting satisfaction out of the debtor's effects which could not be reached by other executions, and having failed to provide any new remedy to take its place, it was not intended there should be any. And so it has been held in *Donovan v. Finn*, 1 Hopk. Ch. 59; 14 Am. Dec. 531; *Buford v. Buford*, 1 Bibb. 305, and *Greene v. Keene*, 14 R. I. 388, 397; 51 Am. Rep. 400. "Equity follows the law," and, as we have seen, a rule either of statute or common law is as potent in a court of equity as in a court of law: 1 Story's Equity Jurisprudence, sec. 64. Whatever may, at one time, have been the vague and general rule as to the limits and extent of equity jurisdiction, it is now well settled that "no court of chancery at this day would attempt to supply the defects of law by deciding contrary to its settled rules in any manner, to any extent, or under any circumstances, beyond the already settled principles of equity jurisprudence: 1 Pomeroy's Equity Jurisprudence, sec. 47.

³⁵⁴ In reference to the New York cases cited in *Ager v. Murray*, 105 U. S. 126, namely, *McDermutt v. Strong*, 4 Johns. Ch. 687, and *Spader v. Davis*, 5 Johns. Ch. 280, it may be said that they were both prior to *Hadden v. Spader*, 20 Johns. 554, in which Platt, J., said there was such a conflict of authority and dicta upon this question that he felt at liberty to decide it upon sound principles of justice and public policy, and that he was not prepared to extend the jurisdiction of equity to any other cases than those wherein the property itself was liable to execution at law,

and which had been also assigned in fraud of creditors, holding also that the power to subject choses in action of the debtor had not been conferred upon the courts, and suggesting the necessity for legislation. It has been supposed that this expression of opinion led to the statute which was afterward passed in New York conferring jurisdiction upon courts of chancery to entertain a bill like the one filed in this case.

It would seem to be reasonably clear from the authorities already cited and the discussion of them that, in the absence of a statute and in the absence of fraud or some other ground of equity jurisdiction, a court of equity has no power to subject the defendant's unassigned right of dower to the payment of her debts. But this conclusion will, we think, be placed beyond doubt by a brief consideration of some of the adjudications of the highest courts of other states. In the case of *Maxon v. Gray*, 14 R. I. 641, which was decided in 1885, the very question now before us was passed upon. That case, like this, was a bill in equity by judgment creditors for a decree for a sale of an unassigned right of dower, and, in an able and elaborate opinion, the court came to the conclusion, after reviewing many of the previous cases, that equity had no jurisdiction. To the same effect *Greene v. Keene*, 14 R. I. 388; 51 Am. Rep. 400. In *Creswell v. Smith*, 2 Tenn. Ch. 416, it was held that chancery has no power to reach stocks or things in action, even in the hands of third persons unaffected with fraud or trust, without the aid of a statute: ³⁵⁵ *Keightley v. Walls*, 27 Ind. 384; *Williams v. Reynolds*, 7 Ind. 622. In the case last cited, it is said equity will not subject choses in action to the payment of a judgment creditor, because equity only aids the law, and will, therefore, not interfere, except as to such property as may be sold on execution at law. In the case of *Buford v. Buford*, 1 Bibb. 305, the same view was enforced in the absence of a statute, and in concluding its opinion the court said: "The bare circumstances of a debt cannot be made the foundation of a bill." The views upon the question of jurisdiction expressed in all these cases are in accord with the rule as laid down by Mr. Adams. "Equity," he says, "does not create new rights which the common law denies, but it gives effective redress for the infringement of existing rights, where, by reason of the special circumstances of the case, redress at law is inadequate": *Adams' Equity*, 6; *Phelps' Juridical Equity*, sec. 158.

The plaintiffs having failed to bring their case within the limits of equity jurisdiction as established and practiced in this

state, their bill must be dismissed. "When a creditor," says Chancellor Sanford in *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531, "comes into this court for relief, he must come, not merely to obtain a decree or satisfaction of a judgment, but he must present facts which form a case for equity jurisdiction." Such facts the creditors who filed the bill now before us have entirely failed to set forth, and we therefore agree with the learned court below that the demurrer to the bill was properly sustained and the bill was properly dismissed.

Decree affirmed.

DOWER—EXECUTION—CREDITOR'S BILL.—Right to dower before assignment is a mere chose in action, and not the subject of execution: Note to *Moore v. Mayor*, 59 Am. Dec. 475; *McMahon v. Gray*, 150 Mass. 289; 15 Am. St. Rep. 202, and note. A widow's right to have dower assigned to her may be subjected to the payment of her debts by a proceeding in equity, by which a receiver may be appointed, with authority to proceed in her name to have such dower assigned to her, and to receive the rents and profits thereof: *McMahon v. Gray*, 150 Mass. 289; 15 Am. St. Rep. 202.

CREDITOR'S BILL TO REACH DEBTOR'S CHOSSES IN ACTION.—There is probably a preponderance of authority in favor of the view that equity has no power in ordinary cases to compel the appropriation of choses in action to the payment of their owner's debts: Note to *Donovan v. Finn*, 14 Am. Dec. 542; but they may be reached by aid of a statute: Note to *Erwin v. Oldham*, 27 Am. Dec. 459. In the absence of fraud, trust, or other ground of equitable relief, or special statutory jurisdiction, judgment creditors cannot reach choses in action of their debtors by equity proceedings: *Greene v. Keene*, 14 R. I. 888; 51 Am. Rep. 400. Property not subject to execution at law, such as choses in action, cannot be reached in equity, unless the case is otherwise of equitable jurisdiction, as where the property was fraudulently converted into choses in action to defraud creditors: *Donovan v. Finn*, 1 Hopk. Ch. 59; 14 Am. Dec. 531; but it is doubtful whether choses in action, as such, can be reached by a creditor's bill merely because fraudulently transferred, unless the case is otherwise of equitable jurisdiction: See monographic note to *Massey v. Gorton*, 90 Am. Dec. 294, on creditors' bills and proceedings in equity in aid of executions.

POTT v. SCHMUCKER.

[84 MARYLAND, 535.]

PARTNERSHIP—APPLICATION OF ASSETS TO PAYMENT OF DEBTS.—The individual property of a member of a firm is applicable, in the first instance, to the payment of his individual debts, just as the partnership assets are liable for the firm debts in preference to the debts due by the copartners personally.

PARTNERSHIP — SEPARATE BUSINESS — MEMBER'S DEBT TO FIRM—INSOLVENCY—COMPETITION OF CREDITORS.—If one partner of a firm engages in a separate venture of his own, becomes a debtor in the latter business to his own firm for advances or loans of money made by the firm to him, and finally becomes insolvent, the firm of which he is a member, though it is also one of his creditors, cannot share in his individual assets until his individual creditors are paid in full, where the debt to the firm was not surreptitiously or fraudulently created.

PARTNERSHIP—INSOLVENCY—CASES IN WHICH A CREDITOR FIRM MAY SHARE WITH INDIVIDUAL CREDITORS.—There are two cases in which a creditor firm of which an insolvent is a member may prove in competition with his individual creditors: 1. Where money has been fraudulently abstracted from one estate and applied for the benefit of the other; 2. Where some of the members of the partnership form a distinct body for carrying on a distinct trade and the articles of one trade have been furnished by one firm to the other.

PARTNERSHIP—IMPLIED CONSENT TO MANAGEMENT OF JOINT PROPERTY—RESULT AS TO CREDITORS.—If one partner puts the other in absolute possession of the partnership funds and leaves to him the sole management of the concern, this is prima facie an implied consent to any measure which the latter may adopt regarding the joint property; and joint creditors must abide by the consequences of such arrangement.

A CORPORATION IS VALIDLY FORMED if the requirements of the incorporation law have been substantially complied with.

CORPORATIONS—TESTING VALIDITY OF ARTICLES OF INCORPORATION.—The validity of articles of incorporation cannot be inquired into incidentally and collaterally.

CORPORATIONS—IDENTITY OF CORPORATION WITH ONE OWNING ALL ITS STOCK AND ASSETS.—In an appropriate case, and in furtherance of the ends of justice, a debtor corporation and the individual owning all its stock and assets, will be treated as identical.

INSOLVENCY—EQUITY OF BANK DEPOSITORS WHO HAVE PROVED THEIR CLAIMS—CREDITORS.—If a banking firm allows the money of depositors to be greatly overdrawn at a time when the firm knows itself to be insolvent, and the depositors afterward do not rescind the contract of debtor and creditor created by the deposit on the ground of fraud, but affirm it by proving their claims in insolvency proceedings by the bank, they, as creditors, have no greater equity than other creditors of the insolvent firm.

PARTNERSHIP — SEPARATE BUSINESS — MEMBER'S DEBT TO FIRM—INSOLVENCY—RIGHT OF INDIVIDUAL CREDITORS TO PRIORITY OF PAYMENT.—If a member of a firm conducts a separate business venture of his own, under the name of a corporation, of whose assets he is sole owner, and such

corporation becomes indebted to the firm, then upon the insolvency of both the firm and the corporation, the separate creditors of the latter are entitled to priority of payment out of the assets of the corporation as against the firm, and its trustee in insolvency, as well as against the individual who, in reality, owns all the assets of the corporation, and his trustee in insolvency, though such creditors of the corporation are, in fact, though not in form, the individual's own creditors.

PARTNERSHIP — SEPARATE BUSINESS — MEMBER'S DEBT TO FIRM—INSOLVENCY—RIGHT OF INDIVIDUAL CREDITORS TO PRIORITY OF PAYMENT—ILLUSTRATION.— A member of a banking firm went into a separate and distinct business of his own and organized a corporation for convenience in conducting the enterprise. The whole of the capital stock and the entire assets of the company belonged to him, and he conducted its business, which was regarded by him and every one else as his business. The corporation kept an account with the firm, and made overdrafts to a large amount, which were known to the other members of the firm and not objected to, and which, though entered on the bank-books as debits of the corporation, were regarded by the drawer, not as a debt due by the company to the bank, but as cash capital advanced to the concern for which he, and not the company, was a debtor to the firm. Both the firm and the corporation became insolvent and trustees in insolvency were appointed, one for the firm and the other for the organizer of the corporation. The assets of the corporation were collected by receivers and paid into court for distribution. In determining the proper application of such funds, the court held that, as the corporation was, in reality, the individual business of the partner who owned all of its capital stock, the creditors of the corporation were entitled to be paid out of its assets in the hands of the receivers before the trustee in insolvency of the banking firm could claim to be paid the indebtedness due to it by the corporation, and before the trustee in insolvency of the partner individually could demand any part of the funds.

W. Burns Trundle, Edgar H. Gans, Hinkley & Morris, and William J. O'Brien, Jr., for the appellants.

Samuel D. Schmucker and George Whitelock, for the appellee.

545 **McSHERRY, C. J.** This is another of the many cases which have resulted from the failure of the banking house of J. J. Nicholson & Son in January, 1892; but it differs widely from those that have preceded it, and involves quite distinct and dissimilar principles and doctrines.

In 1884, Johns H. R. Nicholson, one of the members of the firm of J. J. Nicholson & Son, purchased the assets, the goodwill, and the business of John B. Piet & Co., who had recently theretofore failed whilst largely indebted to Johns H. R. Nicholson individually. Mr. Nicholson thereafter continued the business of Piet & Co. on his own account, but under the name of the Baltimore Publishing Company, until March, 1885, when he procured a certificate of incorporation, in which the capital stock was

fixed at twenty-five thousand dollars. The whole of this stock ⁵⁴⁶ was taken by Johns H. R. Nicholson, but, to effect an organization of the corporation, whose charter name was the Baltimore Publishing Company, he allotted four shares of the stock to four of his employes to be held by them only so long as they remained in his service. He was the treasurer of the company, signed all notes and checks given by it, and furnished all the money needed to conduct its business. He owned the whole of the assets of the concern, and the business carried on in its name was his business, confessedly no one else having any interest therein whatever. He was in reality himself the Baltimore Publishing Company, and this fact was so stated and represented to the various persons who became, on the faith of this assurance, its creditors. When the banking house of J. J. Nicholson & Son failed on January 14, 1892, it was discovered that there appeared upon its ledgers an overdraft indebtedness of seventy-six thousand dollars apparently due to it by the Baltimore Publishing Company. The members of the firm were aware, as this overdraft indebtedness grew, that Johns H. R. Nicholson was overdrawing in the name of the Baltimore Publishing Company. When the Nicholsons suspended, they appointed trustees under a deed of trust for the benefit of creditors, but, being proceeded against under the insolvent law, and being adjudged insolvents, a permanent trustee in insolvency was elected, who displaced the conventional trustees. Before, however, the conventional trustees were superseded, they filed a bill in equity against the Baltimore Publishing Company, alleging that the company was insolvent and praying that it be so declared, and asking that receivers be appointed to take charge of its assets and to reduce them to money for the settlement of its indebtedness. To this bill an answer was filed, and subsequently receivers were appointed who converted the assets into money which they now have in the equity court for distribution. Later on Nicholson & Son and Johns H. R. Nicholson were adjudged insolvent, as already stated, and Mr. Samuel D. ⁵⁴⁷ Schmucker was elected their trustee in insolvency. Mr. Schmucker then filed a supplemental bill wherein he made two alternative claims with respect to the funds in the hands of the publishing company's receivers. These claims were: 1. That the charter of the publishing company was invalid, and that therefore the funds belonged, not to the corporation, but to Johns H. R. Nicholson individually, and consequently the title to them passed, upon his being adjudged an insolvent, to his trustee, Mr. Schmucker; and 2. If the charter was

valid, then Mr. Schmucker, as trustee in insolvency of the firm of J. J. Nicholson & Son, claimed to be a creditor of the publishing company to the amount of the above-mentioned overdraft, and, so claiming, asserted his right to participate *pari passu* with all other creditors of the publishing company in the distribution of the funds in the possession of the receivers. This supplemental bill was answered. At the hearing, the evidence taken under the original bill, as well as that taken under the supplemental bill, was considered and is in the record now before us. This evidence shows that Johns H. R. Nicholson treated this overdraft not as a debt due by the publishing company, but as capital of his own advanced to the company; and there is nothing in the record to contradict this, apart from the form of the entries on the books of the firm. The circuit court of Baltimore City decreed: 1. That the Baltimore Publishing Company's charter was valid; and 2. That the insolvent firm of Nicholson & Son, through the trustee, Mr. Schmucker, was entitled, as a creditor of the publishing company to the extent of the overdraft, to share *pari passu* in the receivership funds with the creditors of the publishing company. From the latter or second clause of this decree the creditors of the publishing company have appealed.

The question then is, are the funds derived from the sale of the publishing company's assets applicable, under the facts above stated, to the payment in the first place of the debts due by the Baltimore Publishing Company, exclusive ⁵⁴⁸ of the alleged overdraft indebtedness, or does the overdraft stand on the same footing with the undisputed debts of the publishing company, entitled to be paid *pari passu* with them?

If there had been no corporation, and if the business of the publishing company had been conducted openly and ostensibly as the individual business of Johns H. R. Nicholson in his own name, there can be no doubt, according to firmly settled principles, that the creditors of the firm of J. J. Nicholson & Son, of which firm Johns H. R. Nicholson was a member, would not have been entitled to be paid out of the funds arising from the sales of Johns H. R. Nicholson's individual property until his individual creditors were first paid therefrom in full. And this is so because the individual property of a member of a firm is applicable in the first instance to the payment of his individual creditors, just as the social assets are liable for the firm debts in preference to the debts due by the copartners personally. This doctrine is so generally accepted and so familiar that we need not

pause to demonstrate it: *McCulloh v. Dashiell*, 1 Harr. & G. 96; 18 Am. Dec. 271; *Hull v. Deering*, 80 Md. 424.

The application of this doctrine to varying conditions of facts has logically led to the development of a corollary, with which we are, on this appeal, more immediately and directly concerned. It has often happened, in the diversity of business enterprises, that one of the partners of a firm has also been engaged in a separate venture of his own, and that in the latter business he became a debtor to his own firm for advances or loans of money made by the firm to him. In other words, as an individual he was a debtor to himself and his copartner, besides being a debtor to others on account of his separate business. Upon becoming insolvent in his individual venture and owing creditors as well as owing his own firm for money advanced to him, the question has arisen as to whether his own firm—the firm of which he was a member and to a portion of the assets of which, including his own debt, he was entitled—could compete ⁵⁴⁰ or stand on the same footing with his individual creditors in the distribution of his individual assets; and the courts, certainly since the time of Lord Thurlow, who broke through previous rulings of Lord Hardwicke, have quite uniformly held, when the debt to the firm was not surreptitiously or fraudulently created, that until the individual creditors were first paid in full, the firm of which the insolvent was a member, though it was also one of his creditors, could not be permitted to claim satisfaction out of his individual assets. There are two conditions under which the creditor firm of which the insolvent is a member may prove in competition with the individual creditors; and these are: 1. Where money or effects have been fraudulently abstracted from one estate and applied for the benefit of the other; and 2. Where some of the members of a partnership form an entirely distinct firm carrying on a distinct trade from that of the general partnership, and where the articles of one trade have been furnished by one firm to the other: *Collyer on Partnership*, sec. 991. There was no fraudulent abstraction of the funds of J. J. Nicholson & Son by Johns H. R. Nicholson for the benefit of the publishing company. The overdraft account was made up of numerous items entered on the firm's books at various periods, and the transaction as it progressed was known to the other members of the firm and was never objected to or challenged. Much slighter evidence than this will repel an imputation of fraud. For instance: Where one partner puts the other in absolute possession of the partnership funds, and leaves to him the sole management of

the concern, this is *prima facie* an implied consent to any measure which the latter may adopt regarding the joint property; and joint creditors must abide by the consequences of such arrangement: *Ex parte Assignees*, 1 Ves. Jr. 166. The second of the two conditions above alluded to does not exist in this case. There were no articles of trade furnished by Nicholson & Son to Johns H. R. Nicholson or the publishing company. What was⁵⁵⁰ furnished was money, and Lord Eldon, in *Ex parte Sillitoe*, 1 Glyn. & J. 374, expressly laid down the doctrine that the right of the firm to prove in competition with other creditors arose where articles of one trade had been furnished to another trade; and he stated that there was no case in which the proof had been allowed where money had been advanced to the partnership by one or more of the partners. This was followed by Lord Brougham in *Ex parte Cook*, 1 Mont. Bk. 228.

The reason for the general doctrine is obvious. If the firm of which the insolvent debtor is a member were allowed to compete with that debtor's individual creditors in the distribution of his assets, he would to the extent of his interest in the firm, be in fact competing with his own creditors and would thereby withdraw from them for his own benefit just so much of his own assets as would be necessary to reimburse him his proportion of the very debt due by him personally to himself and his copartners as a firm. In a word, he would be repaying himself at the expense of his creditors. That he cannot be permitted to do this is made perfectly clear by Lord Eldon in *Ex parte Harris*, 2 Ves. & B. 210. He said: "There has long been an end of the law which prevailed in the time of Lord Hardwicke, whose opinion appears to have been that, if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other in each case. That has been put an end to, among other principles upon this certainly, that a partner cannot come into competition with separate creditors of his own, nor, as to the joint estate, with the joint creditors. The consequence is, that if one partner lends one thousand pounds to the partnership, they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so, if the partnership lend to an individual partner, there can be no proof for the joint estate against the separate estate; that is, in each case no proof to affect the creditor, though the individual⁵⁵¹ partners may certainly have the right against each other": See Collyer on Partnership, sec. 990, et seq.

Now, if the firm of Nicholson & Son had not failed but were still solvent, and if Johns H. R. Nicholson alone had become bankrupt, and if the Baltimore Publishing Company as a corporation had never existed, but the business conducted in its name were confessedly the individual business of Johns H. R. Nicholson, there can be no possible dispute that the firm of Nicholson & Son would not, under the principles alluded to, be permitted to prove this claim for an overdraft against the separate estate of Johns H. R. Nicholson until all his individual creditors were first paid in full. The insolvency of the firm can in no way alter this legal principle or affect its application. Thus in *Ex parte Collinge*, 4 De Gex, J. & S. 533, Holdsworth and Ashburner were partners. The firm became insolvent. A banking company was a creditor of Ashburner for one thousand pounds. His separate estate amounted to six thousand pounds. The assignees of the firm set up a claim against his separate estate for a debt of eleven thousand pounds due by him to the firm; and this claim of the assignees of the firm to compete with the individual creditors of Ashburner was disallowed.

We have on the record now before us practically the same situation that was presented in *Ex parte Collinge*, 4 De Gex, J. & S. 533, unless the fact that Johns H. R. Nicholson conducted the business of the publishing company, not in his own name, but in that of the corporation, distinguishes the two cases. We do not pause to discuss the objections made to the validity of the publishing company's charter further than to say we do not consider them tenable. And we do not consider them tenable because the requirements of the general incorporation law under which the company was formed were "fairly and substantially complied with": *Hughes v. Antietam Mfg. Co.*, 34 Md. 324. But, in addition to this, the validity of the articles of incorporation cannot be inquired into incidentally and collaterally: *Keene v. Van Renth*, 48 Md. 184.

⁵⁵² The testimony clearly and incontestably shows that the whole of the capital stock and the entire assets of the publishing company belonged to Johns H. R. Nicholson, the corporation having been formed merely for convenience in conducting the enterprise. He and everyone else connected with the concern regarded the business as his business, and the evidence shows without contradiction that he considered the overdraft now made the basis of Mr. Schmucker's claim as so much cash contributed to the concern's capital, and not as a debt due by the publishing company to the banking house of Nicholson & Son. If this be

so, and if it be competent for a court of equity to look back of the mere artificial and formal body corporate, and, upon seeing that Johns H. R. Nicholson was the sole and real owner of its assets and its stock, to treat the debts apparently due by it to the creditors who filled its orders for goods, loaned it money on its notes and supplied it stock in trade, as debts in fact due by Johns H. R. Nicholson on the credit of his ownership of the company's assets, there can be no difficulty in practically applying to this state of facts the legal principles we have been considering in respect to the inability of the trustee of the insolvent firm to compete with the individual creditors of one of its members. We need not go beyond the limits of Maryland for adjudged cases sustaining the right of a creditor or others, in an appropriate case, and in furtherance of the ends of justice, to treat the debtor corporation and the individual owning all its stock and assets as identical. Thus in *Hoffman Steam Coal Co. v. Cumberland Coal etc. Co.*, 16 Md. 456, 77 Am. Dec. 311, it appeared that one Sherman, a director of the Cumberland Company, having purchased lands from it, united with other persons in forming a new corporation, he subscribing for almost all the capital stock therein and becoming one of its officers and directors. It further appeared that on the next day, in pursuance of one entire plan, he conveyed the same lands to the new company in payment of his subscription for the stock. Upon a bill filed by the Cumberland Company ⁵⁵³ against Sherman, Dean, and the new company, to set aside the deed made by the Cumberland Company to Sherman and Dean, this court looked through the disguise of a new corporation in which Sherman and Dean had clothed themselves and said: "Sherman and Dean becoming the owners of four thousand nine hundred and ninety-six of the five thousand shares, into which the capital stock was divided, it was, in fact, but a contrivance whereby the same property was held by the same parties, but under a different name"; and the court proceeded to deal with the case precisely as though the title to the land had not been conveyed by Sherman and Dean to the Hoffman Company, but still stood in their names. And so in *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, where one person became the sole owner of all the capital stock of a private corporation and then executed a mortgage upon the corporate property. As a mortgage by the corporation the instrument was defective, but was valid as against the individual who had executed it. This court looked into the facts and decreed that the mortgage was binding on the corporate property merely because the

whole of the capital stock was owned by the person who signed the mortgage. It was said, in effect, that such sole owner might individually make a valid mortgage of all the property of the corporation, and that after such a mortgage was recorded it would be binding on all persons thereafter dealing with or trusting the corporation. In both of these cases it was necessary for the court to look beyond and back of mere external appearances, and, upon doing this and discovering that one individual owned the whole capital stock, the transactions dealt with as corporate transactions were treated precisely as they would have been treated had the proceedings been against the individual owning all the stock; not because there was necessarily no difference between any of the ulterior consequences that might arise where there was no corporation, and those that might exist where there was a corporation the whole of whose assets and stock were owned by one individual; but because the law will not in any case suffer ⁵⁵⁴ the corporate name—the mere shadow—to be interposed for the purpose of defeating substantial rights depending for their ultimate vindication, not upon the accidental form of a transaction, but upon its inherent equity and justice.

Giving heed and credence to the overwhelming and undisputed evidence in the record, there is no room to doubt that though the publishing company subsisted as a corporation, and in its corporate name became ostensibly a debtor to the appellants, it none the less represented the individual business of Johns H. R. Nicholson; and, unless we disregard and deliberately depart from the long-settled principles to which we have alluded, the creditors whom Johns H. R. Nicholson owes through the agency and under the name of the corporation must be paid first out of the proceeds of the assets individually owned by him and now in the receiver's hands, where they rightfully are for distribution, before the trustee in insolvency of Nicholson & Son can make claim to be paid the overdraft out of those same funds, and before the trustee of Johns H. R. Nicholson can demand any part of these funds under the adjudication declaring Johns H. R. Nicholson individually an insolvent.

But it has been strenuously insisted that against this obvious equity of the appellants, the trustee of Nicholson & Son has, as the representatives of the firm's creditors, "a defensive equity" sufficient to neutralize or counterbalance that of the creditors. And this defensive equity is founded on the fact that the creditors of the firm were depositors whose money the banking firm took on deposit when the firm itself was hopelessly insolvent and

was known by its members to be so. Upon this state of facts, it is contended the depositors were grossly defrauded, and that they consequently have the right to follow the funds and reclaim them. Whilst it is true that a bank, which, being insolvent and knowing it, takes funds on deposit, thereby commits a gross fraud on the depositors, yet it becomes the duty of the depositor to elect whether he will repudiate the transaction and reclaim the money deposited, or, affirming, permit ⁵⁵⁵ the relation of debtor and creditor between him and the bank to stand undisturbed. The relation between a bank and its depositors is that of debtor and creditor, and, if a fraud has been perpetrated by the bank in accepting the deposit, the depositor may rescind the contractual relation and recover back the money; but, if he affirms the contract, he surrenders his right of rescission. Now, all of these depositors have proved their claims in the insolvent proceedings and taken their dividends. They have consequently elected to adhere to the contract, and it is too late to rescind it now. These depositors have, therefore, no greater equities than any other contract creditor of Nicholson & Son, and certainly none that is superior to those which the appellants have against the fund realized from the sale of the assets upon the faith of which as being the property of Johns H. R. Nicholson, they credited the publishing company.

If the Baltimore Publishing Company was a corporation, and we think it was, then its ostensible assets cannot go into the hands of Nicholson & Sons, trustee in insolvency, or into the hands of Johns H. R. Nicholson's trustee, but are properly in a court of equity for distribution; and if that court can, as in a proper case it unquestionably may, look beyond and back of the charter and discover that the assets belong in reality to one individual, then that individual will not, nor will his trustee, be permitted to compete in the distribution of those assets with the creditors of the corporation who are in fact, though not in form, the individual's own creditors; and, as a consequence, a firm of which that individual is a member will be likewise forbidden to compete with these same individual creditors in respect to that same fund. As such a firm cannot so compete, the trustee of that firm, whether a conventional trustee or a trustee appointed under insolvent proceedings, will occupy no better position: *Houseal's Appeal*, 45 Pa. St. 484; and, therefore, until the creditors who contracted with the corporation on the faith of its assets and in the bona fide belief that those assets were owned by Johns H. R. Nicholson individually are paid in full, the trustee's claim in behalf

of the partnership ⁵⁵⁶ and of the partnership creditors and his claim as trustee of Johns H. R. Nicholson's individual estate must be deferred.

But there is another view of this case presented by the record that ought not to be overlooked. The testimony is unequivocal that Johns H. R. Nicholson, though he entered the items of this overdraft account in the books of the banking house as debits against the publishing company, regarded the overdraft not as a debt due by the company to the house of Nicholson & Son, but as cash capital advanced by him to the concern for which he and not the company was a debtor to the firm. He allowed his agents and employes to represent to persons from whom they sought credit for the concern that the only debts due by the company were debts for books and materials purchased, not exceeding fifteen thousand dollars, whilst the assets were stated to be at least one hundred thousand dollars. Upon the faith of these representations, which necessarily excluded every inference that there was an indebtedness due to the banking house, the very debts due to the present appellants were contracted. Under these circumstances, Johns H. R. Nicholson could not, either as surviving partner or individually compete in the distribution of these assets with the creditors who trusted to, and were influenced by, the representations referred to; and if he could not thus compete, it would be inequitable in the extreme to permit the trustee to maintain successfully a claim which Nicholson himself would be absolutely estopped to assert: *Devries v. Hiss*, 72 Md. 564.

For the reasons we have given, the decree appealed from will be reversed, and the cause will be remanded for a new decree conforming to the views herein expressed, the costs to be paid out of the funds of the court.

Decree reversed and cause remanded, the costs in this court and in the court below to be paid out of the funds in the hands of the receivers.

PARTNERSHIP—INSOLVENCY—APPLICATION OF ASSETS TO PAYMENT OF DEBTS—COMPETITION OF CREDITORS—RIGHT OF INDIVIDUAL CREDITORS TO PRIORITY OF PAYMENT.—In applying the assets of a partnership to the payment of debts, courts of equity first apply firm assets to firm debts, and then individual assets to individual debts: *Thayer v. Humphrey*, 91 Wis. 276; 51 Am. St. Rep. 887; *Goldthwaite v. Janney*, 48 Am. St. Rep. 56, and note; *Jackson Bank v. Durfey*, 72 Miss. 971; 48 Am. St. Rep. 596, and note. Generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner: *Thayer v. Humphrey*, 91 Wis. 276; 51 Am. St. Rep. 887. The equitable rule is that, in cases of insolvency, the individual creditors of an insolvent partnership shall be given precedence in the distribution of

individual assets: See monographic note to *Smith v. Smith*, 43 Am. St. Rep. 369, on the rights and remedies of partnership creditors: *Hundley v. Farris*, 103 Mo. 78; 23 Am. St. Rep. 863, and note; *Powers v. Large*, 69 Wis. 621; 2 Am. St. Rep. 767; *Payne v. Matthews*, 6 Paige, 19; 29 Am. Dec. 738. An insolvent partnership, composed of three of the four members of another insolvent partnership, cannot, as a creditor of the latter, share equally with the latter's other creditors in the distribution of its assets: *McCruden v. Jonas*, 173 Pa. St. 507; 51 Am. St. Rep. 774. A debt due from a partner to his firm passes, on its insolvency, like other debts, to the creditors of the firm, who are alone entitled to receive payment of such debt: *Ward v. Brandt*, 11 Mart. (La.) 331; 18 Am. Dec. 352.

CORPORATIONS—SOLE OWNER OF STOCK—LIABILITY.—If one stockholder purchases all the stock of a corporation, the corporate and individual property are ordinarily alike liable for the debt of such owner: *Louisville Banking Co. v. Eisenman*, 94 Ky. 88; 42 Am. St. Rep. 835.

CORPORATIONS—FORMATION—COLLATERAL ATTACK.—A substantial compliance with the statute is sufficient in the formation of corporations: *Windsor Electric Light Co. v. Tandy*, 86 Vt. 248; 44 Am. St. Rep. 838, and note. The validity of the incorporation of a company cannot be attacked collaterally: *Goodrich v. Reynolds*, 81 Ill. 490; 88 Am. Dec. 240; *Lafin etc. Powder Co. v. Sinsheimer*, 46 Md. 815; 24 Am. Rep. 522.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

RAOKEMANN v. RIVERBANK IMPROVEMENT COMPANY.

[167 MASSACHUSETTS, 1.]

PRINCIPAL AND AGENT—RESCISSION BECAUSE OF UNAUTHORIZED AGREEMENT OF AGENT.—If an agent employed to sell real property makes an unauthorized agreement or representation to induce, and which does induce, a purchase, the purchaser believing that the agent had authority to make it, and the principal having no knowledge that it had been made, the purchaser on a breach of such agreement has the right to rescind the purchase and recover the money paid. The principal cannot retain what is beneficial in the transaction and reject what is onerous.

A PRINCIPAL REJECTING THE MEANS BY WHICH HIS AGENT PROCURED A CONTRACT entitles the other party to rescind, whether the unauthorized act of the agent was fraudulent or was merely a matter of warranty or promise.

A RESCISSION OF THE PURCHASE OF LAND is not prevented by the fact that the purchaser has been in possession for a considerable length of time.

VENDOR AND VENDEE—AGREEMENT NOT TO SELL EXCEPT AT A SPECIFIED PRICE IS VALID.—An agreement in selling part of a tract of land that the vendor will not sell any of the residue, except for a specified price per front foot, is not void as against public policy in that it may remove a large tract from the market for a very long time. The agreement should be construed in view of the circumstances, and no limitation being fixed, it must last for a reasonable length of time.

DEED — AGREEMENT, WHEN NOT MERGED IN.—An agreement made before the sale of land that the grantor will not sell any part of the remaining tract, except at a specified price per front foot, does not contradict anything in the subsequent deed of the property, and therefore does not merge in such deed. It is a collateral agreement on a distinct subject, and, though oral, may be proved.

RESCISSION, PROPER REMEDY TO ENFORCE.—Where a purchaser of land who has given a note or mortgage in part payment of the purchase price wishes to rescind, his remedy is in equity.

C. A. Williams, for the defendant.

J. C. Gray, for the plaintiffs.

² ALLEN, J. This case comes up on demurrer. According to the averments of the bill, an agent employed by the defendant to offer the defendant's land for sale, in order to induce the plaintiffs to buy a lot at three dollars and fifty cents a foot, offered in behalf of the defendant that, if they would do so, the defendant would not sell any of its land shown on a plan at less than that price. The plaintiffs accepted the offer, and agreed to buy a lot on ³ the terms offered, and afterward took a deed thereof from the defendant. The agent's offer was not in writing, nor did the defendant give him any authority to make it, and at the argument the plaintiffs conceded that he had no implied authority; but the plaintiffs never doubted that he had authority. Within a little less than a year after the plaintiffs took their deed, the defendant was offering lots, and actually sold two lots, at less than that price. The plaintiffs were soon informed of these facts, and notified the defendant that such sales were a breach of its agreement. The defendant denied that its agent had any authority to make such an agreement, and repudiated the same. Up to this time the plaintiffs had no doubt that the agreement was made with the authority of the defendant, and there had been no communication, nor occasion for communication, between the plaintiffs and the defendant upon the subject of the agreement. Negotiations ensued, and about five months later the plaintiffs notified the defendant of their election to rescind the transaction, and demanded back the money paid by them, and the cancellation of a note given in part payment, and a discharge from the covenants of a mortgage given to secure the note.

The defendant contends that there was no contract until the principals made one, and that the defendant never contemplated that the agreement now relied on should form a part of the transaction. The bill sufficiently avers that there was a contract between the plaintiffs and the agent, and that it was understood by the plaintiffs that the agent's agreement with respect to the price in the future should form a part of the transaction. This was not so understood or contemplated by the defendant, and the agent had no express or implied authority to make the agreement. Accordingly, we are to assume that the plaintiffs accepted the deed with the understanding that they had an oral contract of the defendant, through its agent, in respect to the price at

which future sales should be made, when, in point of fact, they had not got one.

The question does not arise in this case whether the plaintiffs, retaining the land, could maintain an action for damages against the defendant for breach of its agent's contract. The plaintiffs make no claim for damages. Neither do they make ⁴ any charge of fraud. But they seek to rescind the transaction, on the ground that they did not get what they thought they were getting, namely, an agreement to keep up the price of the neighboring lots. The defendant repudiates the contract which its agent made in its behalf, as unauthorized and void. The plaintiffs concede the defendant's right to do this. The question is, Can the plaintiffs, under this state of things, be held to their purchase, or are they entitled to rescind it, and get back the consideration which they paid, upon reconveying the land to the defendant? Upon the averments of the bill, we think that they have this right of rescission. The defendant would not have secured the advantage of the sale to the plaintiffs except for the offer and promise of its agent. The defendant employed him to offer its land for sale. He made the offer of a lot to the plaintiffs, accompanied by the promise which has been mentioned. The plaintiffs agreed to take the land with the promise. It turns out that they got the land without the promise. The defendant cannot retain what is beneficial in the transaction, while disclaiming what is onerous. When it repudiates the means by which the plaintiffs were brought to contract with it, this entitles the plaintiffs to give up the contract altogether, unless there is some other objection to their doing so. The rule in this respect is the same, whether the unauthorized act of the agent was fraudulent, or merely a matter of warranty or promise: *Udell v. Ather-ton*, 7 Hurl. & N. 172; *Brady v. Todd*, 9 Com. B., N. S., 592, 606, ad finem; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. S. 145; *Houldsworth v. Glasgow Bank*, 5 App. Cas. 317; *Kennedy v. McKay*, 43 N. J. L. 288; 39 Am. Rep. 581; *Titus v. Cairo etc. R. R. Co.*, 46 N. J. L. 393, 420; *Krumm v. Beach*, 96 N. Y. 398; *Eberts v. Selover*, 44 Mich. 519; 38 Am. Rep. 278; *Knappen v. Freeman*, 47 Minn. 491.

Such rescission, however, is only allowable when it is possible to restore the other party to his former position. The defendant contends that enough appears on the face of the plaintiffs' bill to show that this cannot be done in the present case, because the plaintiffs were in possession of the lot purchased, and had the benefit of the agent's agreement, for nearly a year before

they sought to rescind. But these facts do not of themselves prevent a rescission. There may be a rescission of a purchase of land after the purchaser has been in possession for a considerable length of time: *Nealon v. Henry*, 131 Mass. 153; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; and although the land restored has fallen in value: *Neblett v. Macfarland*, 92 U. S. 101, 104; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. S. 145, 166. The bill discloses nothing to show that the defendant cannot be restored to its former position.

The defendant contends that the offer of the agent that the defendant would not sell any of its other land for less than three dollars and fifty cents a foot, if made, was void as against public policy, in that it might remove from sale in the market a very large tract of land in Boston for a very long time, namely, until the defendant could obtain that price for every foot of its remaining land. But such an agreement is to be construed in view of the circumstances, and, no limit of time being fixed, it would only last for a reasonable length of time: *Park v. Whitney*, 148 Mass. 278; *Loring v. Boston*, 7 Met. 409; *Atwood v. Cobb*, 16 Pick. 227, 231; 26 Am. Dec. 657; *Sugden on Vendors and Purchasers*, 14th ed., 271; 1 *Chitty on Contracts*, 11th Am. ed., 434; 2 *Chitty on Contracts*, 11th Am. ed., 1062. So construed, it is not open to objection on the ground of public policy: *Winsor v. Mills*, 157 Mass. 362, 364. On the face of the bill, we cannot say that one year was an unreasonable time.

It is also contended that the agreement of the agent, if made, was merged in the defendant's deed, and cannot be proved by parol evidence. It is clear that the agreement contradicts nothing in the deed because the deed contains nothing upon this subject. The agreement appears to have been collateral, and on a distinct subject, and, though merely oral, it might be proved: *Durkin v. Cohleigh*, 156 Mass. 108; 32 Am. St. Rep. 436, and cases there cited.

Finally, it is contended that the plaintiffs' proper remedy was at law. But the plaintiffs sought not only a return of the money which they had paid, but a cancellation of the note and a discharge from the covenants of the mortgage. A bill in equity is the proper remedy under such circumstances.

According to the terms of the report, the defendant may file an answer to the bill.

Demurrer overruled.

AGENCY—MISREPRESENTATIONS BY AGENT—RESCISSION OF CONTRACT.—If an agent obtains possession of the property of another, by making a stipulation or condition which he is not authorized to make, the principal must either return the property, or remain subject to the condition upon which it was parted with by the former owner: *Meyerhoff v. Daniels*, 178 Pa. St. 555; 51 Am. St. Rep. 782, and note; also, note to *Wheeler and Wilson Mfg. Co. v. Anghey*, 27 Am. St. Rep. 640. One adopting and receiving the benefits of the representations of another must accept their burdens: *Eastman v. Provident etc. Relief Assn.*, 65 N. H. 176; 23 Am. St. Rep. 29, and note, and *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32.

VENDOR AND PURCHASER—RESCISSION BY VENDEE IN POSSESSION.—An executory contract for the purchase of a tract of land may be rescinded by the vendee, when he enters into possession, relying upon erroneous and fraudulent representations of the vendor: *Newton v. Tolles*, 66 N. H. 136; 49 Am. St. Rep. 593. The vendee must return the property in substantially the same condition in which he received it, though his right to rescind a contract for the purchase of land is not defeated by the fact that the land has depreciated in value while out of the vendor's possession: *Goodrich v. Lathrop*, 94 Cal. 56; 28 Am. St. Rep. 91, and note.

EQUITY—JURISDICTION—RESCISSION OF CONTRACTS.—As to the extent of equity's jurisdiction in the rescission of contracts, see extended note to *Hough v. Hunt*, 15 Am. Dec. 572; also note to *Bryant v. Isburgh*, 74 Am. Dec. 657.

CONTRACTS—VOID AS AGAINST PUBLIC POLICY.—Contracts in restraint of trade depend for their validity upon the reasonableness of their restrictions under the conditions in each case: *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560; 51 Am. St. Rep. 193, and note. Contracts are against public policy, and therefore void, whenever their subject matter tends to produce injustice or oppression, restraint of liberty or of legal right, to obstruct or prevent the administration of law, to interfere with or control executive, legislative, or other official action, or to prevent competition: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note.

DEEDS—AGREEMENTS—WHEN MERGED IN.—The rule is generally recognized, and almost universally applied, that all articles of agreement for the sale of land are merged in, and extinguished by, a subsequent deed thereof between the parties. Such a deed, when delivered and accepted, is deemed, in the absence of fraud and mistake, to express the final and entire contract between the parties, and any inconsistencies between the original contract of sale and the subsequent deed are, in general, to be explained by the latter: Extended note to *Clifton v. Jackson Iron Co.*, 16 Am. St. Rep. 622; *Slocum v. Bracy*, 55 Minn. 249; 43 Am. St. Rep. 490, and note.

RUSSELL v. COLE.

[167 MASSACHUSETTS, 6.]

FRAUDULENT TRANSFER TO A PARTNERSHIP OF WHICH TRANSFERRER IS A MEMBER.—Though the object of a person in forming a partnership with another and transferring property to him is fraudulent as against his creditors, and in contravention of the statute relating to insolvency, the transfer cannot be avoided, if the other partner did not know of, nor participate in, the fraud, and purchased in good faith and for a valuable consideration.

EXECUTION.—THE PROPERTY OF A PARTNERSHIP CANNOT BE ATTACHED UNDER A CLAIM AGAINST ONE OF THE PARTNERS, and an officer levying such an attachment acquires no title.

A PARTNERSHIP MAY MAINTAIN AN ACTION IN THE NAME OF ALL THE PARTNERS, notwithstanding proceedings in insolvency against one of them, and notwithstanding he was guilty of fraud in forming the partnership to prevent the attachment of the property for which the firm brings an action.

INSOLVENCY OF PARTNERSHIP, WHAT IS NOT.—It is only when the partnership is insolvent through the insolvency of all the members thereof that a court of insolvency in Massachusetts acquires jurisdiction to settle the affairs of the partnership. Therefore, a court having jurisdiction of proceedings against one only of the partners, the other and the partnership being solvent, acquires no title over the partnership property.

ATTACHMENT OF PARTNERSHIP PROPERTY UNDER A WRIT AGAINST ONE PARTNER ONLY—MITIGATION OF DAMAGES.—If an officer, under a writ against one partner only, attaches partnership property, he cannot, in an action of tort against him therefor, prove in mitigation of damages that he delivered the property to an assignee in insolvency of the member against whom the writ issued.

PARTNERSHIP.—ON THE INSOLVENCY OF A MEMBER OF A PARTNERSHIP, the solvent member is entitled to the possession of the property, and is bound to wind up its affairs and to discharge its liabilities. The assignee of the insolvent partner has no right to the possession of the property, and his only remedy is by proceedings in equity.

Tort by Russell and Martin, copartners, doing business under the name of Charles E. Russell & Co., to recover for the conversion of personal property. The defendant, a deputy sheriff, attached the property under a writ against the plaintiff Martin. It appeared that in August, 1893, Martin was carrying on business as a merchant, managing two stores; that he had become embarrassed, and was insolvent and in expectation of attachment of his stock. Before that time he had made a proposition to Russell to take the latter into partnership, and during the negotiation an inventory of stock was made, aggregating nearly six thousand dollars, estimating the goods at the prices paid for them by Martin. The latter's proposition was to take Russell in as an equal

partner on the payment of one thousand dollars. On August 31st, Russell accepted Martin's offer, and an agreement was entered into in writing whereby a partnership was formed, and Russell gave Martin an order on a savings bank wherein he had on deposit nearly a thousand dollars, and the book on the bank evidencing the deposit was received by Martin about 1 o'clock of that day. An hour later, an attachment against the plaintiff Martin was levied upon the property. It was conceded that Martin's object in forming the partnership was to prevent an attachment of the goods and to evade the insolvency law of the state. Russell was in possession when the attachment was levied, and the evidence was not regarded as sufficient to prove any knowledge on his part of the purpose of Martin in forming the partnership. Proceedings in insolvency were, after the levying of the attachment, instituted against Martin, and his estate was subjected to administration in the insolvency court. The defendant had delivered the attached property to Martin's assignee in insolvency. The trial court ruled that the plaintiffs, if entitled to recover at all, were entitled to recover the full value of the goods. The jury returned a verdict in favor of the plaintiffs, and the defendant alleged exceptions.

C. H. Sprague, for the defendant.

C. A. De Courcy and W. Coulson, for the plaintiffs.

* KNOWLTON, J. The conveyance by Martin to Russell was, on the part of Martin, fraudulent as against creditors and in contravention of the statute relating to insolvency. But Russell had no knowledge of this fact, and did not in any way participate in the fraud. The contract, therefore, took effect according to its terms, Russell became a copartner with Martin, and the goods sold became partnership property. The rights of Russell, who bought in good faith for a valuable consideration, were not ⁹ in any way affected by the fraud of Martin, of which he was ignorant.

The property which thus became assets of the partnership under the contract could not afterward be attached on a claim against one of the partners, and the defendant, as attaching officer, acquired no valid title: *Sanborn v. Royce*, 132 Mass. 594; *Pelletier v. Couture*, 148 Mass. 269, 271.

The action was rightly brought in the name of both members of the firm, notwithstanding the proceedings in insolvency against Martin: *Fish v. Gates*, 133 Mass. 441; *Fay v. Duggan*, 135 Mass. 242; *Hyde v. Moxie Nerve Food Co.*, 160 Mass. 559.

The fact that Martin was guilty of a fraud in forming the partnership before the attachment was made does not prevent the maintenance of the action. The principle of the decision in *Homer v. Wood*, 11 Cush. 62, is not to be extended to cases like the present. As, according to the finding of the auditor, the goods became partnership property even as to creditors, notwithstanding the fraud of Martin, the suit against the defendant for attaching it wrongfully does not involve any question in regard to the right of Martin to rescind or repudiate the contract, nor bring his previous conduct within the issue. The defendant's act in attaching the partnership property was a trespass, and the owners of the property, or the parties in possession of it, might sue for damages without regard to the question whether one of them in a previous transaction had been guilty of a wrong against third parties: *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30; *Newcomb v. Boston etc. Dept.*, 146 Mass. 596, 602; 4 Am. St. Rep. 354; *Stillings v. Turner*, 153 Mass. 534.

The remaining question in the case is, whether the defendant is entitled to show, in mitigation of damages, that he delivered the property to the assignee in insolvency of Martin. After the commencement of the proceedings in insolvency, Russell alone had a right to the possession of the property. The assignee of Martin was only entitled to a share in the surplus of the partnership assets, if anything remained after paying the debts. The partnership, being solvent through the solvency of the partner Russell, was not brought into the court of insolvency, and that court acquired no jurisdiction to settle its affairs. It is to be remembered that our courts of insolvency are creatures of the 10th statute, and that they have no jurisdiction except that which the statute gives to them. Their only jurisdiction over partnerships is conferred by the Public Statutes, chapter 157, section 120, et infra. It is only "when two or more persons who are partners become insolvent," that is, when the partnership is insolvent through the insolvency of all the members of the firm, that a court of insolvency acquires jurisdiction to settle the affairs of the partnership; and, in such a case, a warrant is issued upon which the joint stock and property of the firm and the separate estate of each of the partners are taken.

Until the enactment of the statutes of 1894, chapter 164, courts of insolvency had no jurisdiction in equity, and that statute confers no jurisdiction to interfere in the affairs of a partnership which is not brought into the court of insolvency by regular proceedings by or against it, except in cases where, incidentally to the proceedings in insolvency, there is a ground for equitable relief under the principles which govern other courts of equity.

When a partnership is dissolved by the death or insolvency of one of its members, the surviving partners in case of death, or the solvent partners in case one of the firm is in insolvency, are entitled to the possession of the partnership property, and are bound to pay all of the firm's debts. It is their duty to wind up the affairs of the partnership, and to pay over to the representative of the deceased or insolvent partner his share of the assets, if there are any after paying the firm's liabilities: *Fern v. Cushing*, 4 Cush. 357; *Dearborn v. Keith*, 5 Cush. 224; *Hanson v. Paige*, 3 Gray, 239, 242; *Cunningham v. Munroe*, 15 Gray, 471, 479; *Nutting v. Ashcroft*, 101 Mass. 300; *Pelletier v. Couture*, 148 Mass. 269, 271; *Amsinck v. Bean*, 22 Wall. 395; *Lindley on Partnership*, 2d Am. ed., 669, et seq. If they fail to do their duty in these particulars, the executor, administrator, or assignee may have a remedy in a court of equity. So long as the solvent partners are ready and willing properly to settle the business and dispose of the property of the partnership, and properly to account for and pay over the proceeds, an assignee in insolvency, under our statute, has no right to the possession of the partnership property. The partnership property and the solvent members of the firm are not within the jurisdiction of the court of insolvency. They can be brought within its jurisdiction only upon proceedings in ¹¹ equity under the statutes of 1894, chapter 164, founded upon facts which would give jurisdiction to a court of general jurisdiction in equity. Some of the dicta in *Wilkins v. Davis*, 15 Nat. Bank. Reg. 60, 2 Low. 511, are not in accordance with the decisions and practice under the statutes of Massachusetts. It follows that the surrender of the property by the defendant to Martin's assignee in insolvency was irregular and unauthorized. It cannot avail the defendant as a defense in this action by way of mitigation of damages or otherwise. In the opinion of a majority of the court, the plaintiff Russell was entitled to have from the defendant all of the property taken under the attachment, and, it not having been returned to him, he may recover the full value of it.

Exceptions overruled.

PARTNERSHIP—DISSOLUTION—RIGHT OF LIQUIDATING PARTNERS.—A partnership is dissolved by the bankruptcy of one of its members: *Eustis v. Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327. Contra: *Siegel v. Ohlsey*, 29 Pa. St. 279; 70 Am. Dec. 124, and *Arnold v. Brown*, 24 Pick. 89; 35 Am. Dec. 296. The assignee of the bankrupt and the solvent partners become tenants in common or joint owners of the partnership property, and must unite in suits respecting it: *Halsey v. Norton*, 45 Miss. 703; 7 Am. Rep. 745. After dissolution, a partnership has a limited existence for the purpose of

making good all outstanding engagements, of taking and settling all accounts, and collecting all the property, means, and assets of the partnership existing at the time of its dissolution for the benefit of all interested: *Western Stage Co. v. Walker*, 2 Iowa, 504; 65 Am. Dec. 789. See monographic note to *Gilmore v. Ham*, 40 Am. St. Rep. 561, on "The powers, rights, liabilities, and remedies of partners after the dissolution of the firm."

FRAUDULENT CONVEYANCES—NECESSITY OF GRANTEE'S KNOWLEDGE OF GRANTOR'S FRAUDULENT INTENT.—A sale, though made by a vendor with fraudulent intent, will not be declared void unless the vendee had actual knowledge and notice of such intent: *State v. Mason*, 112 Mo. 374; 84 Am. St. Rep. 390, and extended note.

The Levy on Partnership Assets of a Writ against One Partner Only.

We have heretofore treated in this series of the rights and remedies of partnership creditors, and have shown that they are entitled to precedence over the creditors of the individual members of the partnership in seeking satisfaction out of the firm assets: Note to *Smith v. Smith*, 48 Am. St. Rep. 364-380. Upon that subject the authorities are numerous and consistent, and there is little or no difficulty in ascertaining and formulating the rules sustained by them. We propose here to treat of the right of a creditor of a member of a firm to reach the interest of that member, and make it respond for the satisfaction of the obligation held by such creditor.

Real property, technically speaking, can never belong to a partnership, though it may, in equity, be treated as partnership property, and members and creditors of the partnership may there insist upon its being applied to the extinction of partnership obligations. If, however, an execution or attachment should issue against a member of a partnership, the levy thereof against real property standing in the name of the partners under such circumstances that it would, in equity, be regarded as partnership property, must be made in precisely the same manner as if such real estate were not equitably partnership property. Therefore, if there be a levy upon the interest of a member of a firm in real property belonging to it, and a subsequent levy under a writ against the partnership, followed by a sale thereunder, and the title of the different purchasers thereat is drawn into question in an action of ejectment or other proceeding at law, the writ first levied must be conceded precedence: *Peck v. Fisher*, 7 Cush. 386; *Golden State etc. Works v. Davidson*, 73 Cal. 389. In a proper case, equity might interpose to deprive the individual creditor of the fruits of his purchase: *Bopp v. Fox*, 63 Ill. 540; *Price v. Hicks*, 14 Fla. 565; but before equity will do so, it would doubtless be necessary to charge the purchaser with notice of the partnership equities at or prior to the acquisition of his title. As, however, an officer acting under an execution or attachment, in seeking to make a levy upon real estate standing in the name of the members of a partnership, need not take any notice of the partnership in making his levy, we shall not give any further attention to this portion of our subject, and shall confine our observations to proceedings directed against the interest of a partner in the personal property of the partnership.

The Interest of a Partner is Subject to Execution.—In no case, so far as we are aware, has it ever been suggested that the interest of a partner in the firm property is not subject to execution and attachment, for the satisfaction of his individual debt, to the same extent as if it were his individual property: *Jones v. Thompson*, 12 Cal. 191; *Shaw v. McDonald*, 21 Ga. 395; *Jones v. Stratton*, 32 Ill. 202; *Burgess v. Atkins*, 5 Blackf. 337; *Watson v. Gabby*, 18 B. Mon. 658; *Douglas v. Winslow*, 20 Me. 90; *Dow v. Sayward*, 12 N. H. 271; *Moody v. Payne*, 2 Johns. Ch. 548; *Wilson v. Conine*, 2 Johns. Ch. 280; *Walsh v. Adams*, 3 Denio, 125; *Scrugham v. Carter*, 12 Wend. 131; *Nixon v. Nash*, 12 Ohio St. 647; 80 Am. Dec. 390; *Knox v. Summers*, 4 Yeates, 477; *Knerr v. Hoffman*, 65 Pa. St. 126; *Haskins v. Everett*, 4 Sneed, 531; *Chapman v. Koops*, 3 Bos. & P. 289; *Holmes v. Mentze*, 4 Ad. & E. 431; *Parsons on Partnership*, 352.

Exemptions.—In some states, the interest of a partner may be subject to levy, though it would not be subject thereto were the property levied upon his alone. We refer here to the question whether it may be exempt from execution or attachment under the laws of the state exempting from such writs property of a certain character or value. It has sometimes been insisted that the terms and purposes of these exemption laws were such as to indicate that they were applicable only when the debtor was the sole owner of the property claimed to be exempt: *Gupatil v. McFee*, 9 Kan. 30; *Pond v. Kimball*, 101 Mass. 105; *Bonsall v. Comly*, 44 Pa. St. 442. As each of the partners has an interest in the satisfaction of the firm obligations out of the firm assets, there is a propriety in holding that no one of the partners, against the consent of the others, has any right to insist that a portion of the partnership assets is exempt from attachment or execution issued upon a partnership obligation: *Till's case*, 3 Neb. 261; *Burns v. Harris*, 67 N. C. 140. Where, however, the claim to exemption is not prejudicial to the other members of the partnership, there seems to be no reason for denying it on the ground that the debtor owns a part, instead of the whole, of the property. Exemption statutes are in most states liberally construed, so as to promote the policy on which they are based, and accomplish the purposes to which they are directed. Prominent among these is the protection of the poor, by allowing them the implements of their trade and the other means essential to enable them to gain a livelihood, and where a man is supporting his family by the aid of a team or of tools, or of provisions which he would be entitled to retain if owned by him in severalty, it seems to be a clear perversion of the spirit of the exemption laws to deprive him of a moiety of the property because he is unable to own the whole. Hence, as a general rule, a part interest is, in most of the states, as much exempt from execution as though it were an interest in severalty; and this is true whether it be held in copartnership or cotenancy, and whether the execution be for the debt of one owner or for the debt of all owners: *Howard v. Jones*, 50 Ala. 67; *Radcliffe v. Wood*, 25 Barb. 52; *Stewart v. Brown*, 37 N. Y. 350; 93 Am. Dec. 579; *Burns v. Harris*, 67 N. C. 140; *State v. Kenan*, 94 N. C. 296;

Gilman v. Williams, 7 Wis. 329; 76 Am. Dec. 219; **Gaylord v. Imhoff**, 1 Cin. Rep. 404.

If the levy is sought to be made upon real estate owned by the members of the partnership, and it is claimed by the defendant to be a homestead, and as such exempt from execution, the authorities are not agreed as to whether the exemption can be maintained. A few of them insist that the statutes creating the right to homestead exemption contemplate that the homestead shall exist only upon property held by the claimant in severalty. This claim seems to us altogether unreasonable, and it has been abandoned except in a very few states, and even in those the legislature has interposed to correct the misdecision of the courts, by amending the statutes upon the subject so as to employ language clearly exempting the real property used, irrespective of the extent of the title of the claimant: *Freeman on Executions*, sec. 243.

The Nature of a Partner's Interest.—It is well-known that a partner has not any absolute interest or title in any of the personal assets of the partnership property, and that his interest consists of his right to have the partnership assets applied to the extinction of the partnership obligations, and thereafter to have the assets disposed of and his moiety of the proceeds awarded and paid over to him. It is also well settled that a creditor, whether proceeding by attachment or execution, does not acquire any right or title to the property seized in addition to that to which his debtor was entitled. A partner has no right during the existence of the partnership to the exclusive possession or use of any of its personal assets, and hence it would seem to follow that his creditor cannot acquire any right to such exclusive possession or use, and therefore it would seem that an officer proceeding under a writ against a member of a partnership would have no right to take the personal assets, or any of them, from the custody of the partnership, for to do so is to substantially interfere with the property rights of the members of the firm who are to no extent liable under the writ. On the other hand, it is conceded that in some manner, whatever beneficial interest a member of a firm has in its assets, is subject to execution and attachment, and there is great difficulty in effectively subjecting it to either, unless the property can be taken into the custody of an officer, and preserved, and the possession retained, at least, until such time as a sale can be made.

When the Writ Which it is Sought to Levy is an Attachment, there is peculiar hardship in permitting the officer to take exclusive possession of the partnership property, or, indeed, to interfere with the possession in any manner prejudicial to the interest of the partnership, for the issuing of the writ does not necessarily imply that any claim exists even as against the defendant therein, and if the claim is disputed, the ordinary progress of litigation is such that it must be a considerable, and it may be a very long, time before it can be ascertained whether the writ issued upon a just demand, and will be followed by a judgment and execution against the defendant; and it would seem to be especially inequitable to deprive the partnership of the possession of its property while the supposed

indebtedness of a single member thereof against whom a writ is issued is contested, and the proceeding may result in his favor. There are cases holding, therefore, that under an attachment against one member of a firm, its assets cannot be seized and taken into the possession of the attaching officer: *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Dow v. Sayward*, 14 N. H. 1; *Newman v. Bean*, 21 N. H. 98; *Treadwell v. Brown*, 43 N. H. 290; and in the later of these cases it was held sufficient for the officer to do some significant act indicative of his purpose to attach the interest of the defendant in the firm property, but that the attachment could not be levied by merely summoning the other partner as a trustee. Notwithstanding the seizing of the property of the partnership under a writ of attachment against one of its members only must usually operate with greater hardship than a like seizing under a writ of execution, we have not been able to discover any case making a distinction in this respect between the two writs, and, in the absence of special statutes upon the subject, we must accept the rules applicable to the levy of writs of execution as equally applicable to the levy of writs of attachment: *Cogswell v. Wilson*, 17 Or. 31; *Randall v. Johnson*, 13 R. I. 338; *Trafford v. Hubbard*, 15 R. I. 326; *Reed v. Shepardson*, 2 Vt. 120; 19 Am. Dec. 697; *Graden v. Turner*, 15 Wash. 136.

Possession Which may be Taken Under the Writ.—The decided weight of authority, in the absence of any statutory enactment upon the subject, is to the effect that an officer seeking to levy a writ of attachment against a member of a firm may take exclusive possession of the chattels of the firm, and retain them, at least, until the day of the sale: *Andrews v. Keith*, 34 Ala. 722; *Clark v. Cushing*, 52 Cal. 617; *Wright v. Ward*, 65 Cal. 525; *Davis v. White*, 1 Houst. 228; *Newhall v. Buckingham*, 14 Ill. 405; *White v. Jones*, 38 Ill. 159; *Branch v. Wiseman*, 51 Ind. 3; *Williams v. Lewis*, 115 Ind. 45; 7 Am. St. Rep. 403; *Hershfield v. Claflin*, 25 Kan. 166; 37 Am. Rep. 237; *Hacker v. Johnson*, 66 Me. 21; *Fogg v. Lowry*, 68 Me. 78; 28 Am. Rep. 19; *People's Bank v. Shryock*, 48 Md. 427; 30 Am. Rep. 476; *Barrett v. McKenzie*, 24 Minn. 20; *Atkins v. Saxton*, 77 N. Y. 195; *Smith v. Orser*, 42 N. Y. 132; *Nixon v. Nash*, 12 Ohio St. 647; 80 Am. Dec. 390; *Place v. Sweetzer*, 16 Ohio, 142; *Randall v. Johnson*, 13 R. I. 338; *Trafford v. Hubbard*, 15 R. I. 326; *Saunders v. Bartlett*, 12 Helsk. 317; *De Forest v. Miller*, 42 Tex. 34; *Reed v. Shepardson*, 2 Vt. 120; 19 Am. Dec. 697; *Graden v. Turner*, 15 Wash. 136; *United States v. Williams*, 4 McLean, 236; *Stewart v. Moore*, 1 Handy, 22; *Bachurst v. Clinkard*, 1 Show. 173; *Mayhew v. Herrick*, 7 Com. B. 229; *Parker v. Pistor*, 3 Bos. & P. 288; *Pope v. Haman*, Comb. 217; *Heydon v. Heydon*, Salk. 392.

In a few of the states, though their statutes do not specially provide for the mode of levying a writ against a partner upon his interest in the firm, the courts have reached the conclusion that the nature of the interest was not such as to justify the officer in seeking and taking into his exclusive possession the assets of the partnership, or any part thereof: *Russell v. Cole*, 167 Mass. 6; ante, p. 432; *Sanborn v. Royce*, 132 Mass. 594; *Gibson v. Stevens*, 7 N. H.

362; *Garvin v. Paul*, 47 N. H. 158; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653, and note; *Treadwell v. Brown*, 48 N. H. 290; *Richard v. Allen*, 117 Pa. St. 199; 2 Am. St. Rep. 652; *White v. Rech*, 171 Pa. St. 82. This is the conclusion probably intended to be affirmed by the supreme court of Michigan, though the utmost which has been stated in the opinion of the court is, that a levy cannot be maintained upon any specific chattel (*Hutchinson v. Dubois*, 45 Mich. 143; *Haynes v. Knowles*, 36 Mich. 407; *Sirrine v. Briggs*, 31 Mich. 443), a position which we shall hereafter show is admitted by some courts, which, nevertheless, hold that the officer has the right to take and maintain exclusive possession of all the chattels of the partnership under a writ against one member only. In several other states, the seizing of the property of the partnership is no longer permitted, but the rule as there maintained is the result of special statutes upon the subject prescribing the mode in which the levy may be made and exonerating the officer from taking possession of the property: *Willis v. Henderson*, 43 Ga. 325; *Anderson v. Cheney*, 51 Ga. 372; *Richards v. Haines*, 80 Iowa, 574; Iowa Code, sec. 3291; *Blumenfeld v. Seward*, 71 Miss. 342; *Middlebrook v. Zapp*, 79 Tex. 321; *Weir etc. Co. v. Armentrout*, 9 Tex. Civ. App. 117.

May the Levy be upon Specific Chattels?—The next question is, assuming it to be proper for an officer under a writ against one member of the partnership to seize its personal property, May such seizure be of a specific chattel or chattels, or must it extend to all the personal assets of the partnership? Upon this question the authorities are the more evenly divided. Some of them assert that the levy may be upon any of the personal property, and that if followed by a sale thereof under a writ, it will transfer the legal title to the moiety of the defendant, and confer upon the purchaser a right to take and hold the property, leaving the other partners without any other means of enforcing the rights of the partnership than by proceedings in chancery: *Hershfield v. Clafin*, 25 Kan. 166; 37 Am. Rep. 237; *Fogg v. Lawry*, 68 Me. 78; 28 Am. Rep. 19; *Wiles v. Maddox*, 26 Mo. 77; *Walsh v. Adams*, 3 Denio, 125; *Phillips v. Cook*, 24 Wend. 389; *Randall v. Johnson*, 13 R. I. 338; *Haskins v. Everett*, 4 Sneed, 531. Others maintain that the only interest which can be acquired by the purchaser is a right to an accounting, that this accounting must necessarily embrace all the affairs of the partnership, and therefore that no levy can be made upon any specific chattel, but that the whole of the personal property of the partnership must be seized and sold: *Gerard v. Bates*, 124 Ill. 150; 7 Am. St. Rep. 350; *Stomph v. Bauer*, 76 Ind. 157; *Williams v. Lewis*, 115 Ind. 45; 7 Am. St. Rep. 403, and citations; *Thomas v. Lusk*, 13 La. Ann. 277; *Levy v. Cowan*, 27 La. Ann. 556; *Sanborn v. Royce*, 132 Mass. 594; *Atwood v. Meredith*, 37 Miss. 635; *Blumfield v. Seward*, 71 Miss. 342. The results of this rule, if rigidly applied, must be somewhat startling. Though the debt were trifling in amount, it would require the entire property of a great partnership to be seized and the interest of the defendant therein sold, and in cases where the personal property of the partnership was located in different places, though widely distant from

one another, it would seem to require a levy and seizure everywhere to give validity to a seizure or sale anywhere.

Levy must be Restricted to Defendant's Interest.—Though, by the laws of the state in which the officer acts, he may take exclusive possession of the property under a writ against one of its owners, he must confine his levy and sale to the interest of the defendant. If he assumes to levy upon or to sell the whole property, his act, as against the partners not named in the writ, is wrongful. They may regard him as a trespasser upon their rights or as guilty of an unlawful conversion of their property, and may, therefore, maintain an action against him to recover damages sustained by them from such conversion: *Smyth v. Tankersley*, 20 Ala. 212; 56 Am. Dec. 193; *Sheppard v. Shelton*, 34 Ala. 652; *Daniel v. Owens*, 70 Ala. 297; *Neary v. Cahill*, 20 Ill. 214; *Edgar v. Caldwell*, Morris, 434; *Melville v. Brown*, 15 Mass. 82; *Mussey v. Cummings*, 34 Me. 74; *Atkins v. Saxton*, 77 N. Y. 195; *Fiero v. Betts*, 2 Barb. 633; *Walsh v. Adams*, 3 Denio, 125; *Waddell v. Cook*, 2 Hill, 48; 37 Am. Dec. 372; *Snell v. Crowe*, 3 Utah, 26; *Frisbie v. Langworthy*, 11 Wis. 375; *Dean v. Whitaker*, 1 Car & P. 347; *Bates v. James*, 3 Duer, 45; *Moulton v. Robinson*, 7 Fost. 550; *Paine v. Middlesex*, Russ. & M. 99; *Freeman on Cotenancy and Partition*, sec. 214.

Title Passing by Execution Sale.—Whatever be the mode of levy and sale authorized by the statutes or decisions of the state in which it takes place, there can be no doubt that the interest subject to the writ is, at least in equity, in no respect any greater than that held by the defendant, that it is subject to the paramount claims against the partnership, and is, in fact, nothing beyond the right to demand an accounting and to share in the surplus that may remain after all the partnership obligations have been discharged: *Farley v. Moog*, 79 Ala. 148; 58 Am. Rep. 585; *Tait v. Murphy*, 80 Ala. 440; *Robinson v. Tevis*, 38 Cal. 611; *Barber v. Bank*, 9 Conn. 407; *Filley v. Phelps*, 18 Conn. 294; *Chandler v. Lincoln*, 52 Ill. 74; *State v. Emmons*, 99 Ind. 452; *Marston v. Dewberry*, 21 La. Ann. 518; *Pierce v. Jackson*, 6 Mass. 242; *Barrett v. McKenzie*, 24 Minn. 20; *Lane v. Lenfest*, 40 Minn. 375; *Bowman v. O'Reilly*, 31 Miss. 261; *Jarvis v. Hyer*, 4 Dev. 367; *Price v. Hunt*, 11 Ired. 42; *Atwood v. Impson*, 20 N. J. Eq. 150; *Eighth Nat. Bank v. Fitch*, 49 N. Y. 539; *Deal v. Bogue*, 20 Pa. St. 228; 57 Am. Dec. 702; *Whigham's Appeal*, 63 Pa. St. 199; *Durburrow's Appeal*, 84 Pa. St. 404; *Knox v. Schepler*, 2 Hill (S. C.), 595; *Boro v. Harris*, 13 Lea, 36; *United States v. Hack*, 8 Pet. 271; *Bank v. Carrollton R. R.*, 11 Wall. 624; *Osborn v. McBride*, 3 Saw. 590; 16 Nat. Bank Reg. 22; *Clagett v. Kilbourne*, 1 Black, 346; *Lyndon v. Gorham*, 1 Gall. 367; *Dutton v. Morrison*, 17 Ves. 193; *Garbett v. Veale*, 5 Q. B. 408; 8 Jur. 335; *Skipp v. Harwood*, 2 Swanst. 586; *In re Wait*, 1 Jacob & W. 605; *Taylor v. Fields*, 4 Ves. 396; *Hankey v. Garrett*, 1 Ves. Jr. 239.

Possession, Right to Deliver to Purchaser.—Of course, in those states in which an officer is not entitled to seize and take into his possession property of a partnership under a writ against one of its members, it must necessarily follow that the purchaser at an execution sale does not acquire any right to such possession. In those

states, however, in which the officer has the right to take and hold possession of the property until he can make a sale thereof under execution, it is generally conceded that he may deliver such possession to the purchaser, who, in a qualified sense, becomes a cotenant with the copartners who are not parties to the writ: *Clark v. Cushing*, 52 Cal. 617; *Wright v. Ward*, 65 Cal. 525; *Hershfield v. Clafin*, 25 Kan. 166; 37 Am. Rep. 237; *Fogg v. Lowry*, 68 Me. 78; 28 Am. Rep. 19; *Moore v. Pennell*, 52 Me. 162; 83 Am. Dec. 500; *People's Bank v. Shryock*, 48 Md. 427; 30 Am. Rep. 476; *Atkins v. Saxton*, 77 N. Y. 195; *Randall v. Johnson*, 13 R. I. 338; *Saunders v. Bartlett*, 12 Heisk. 316. Whether the latter are entitled to resume possession in the event that the property is needed in liquidating the partnership liabilities or for other partnership purposes, and, if so, by what remedies their rights may be enforced, are unsolved judicial problems, unless they may be regarded as solved by the decision of the supreme court of Minnesota, which, in one of its opinions, has said that if the purchaser "take possession, the remaining partners have the right to use the firm name to recover the property or its value": *Lane v. Lenfest*, 40 Minn. 875.

A Writ may be against All the Members of the Partnership, though not based upon a partnership obligation. In one case, it was held that a levy and sale under such a writ did not confer upon the purchaser any title paramount to the rights of the firm creditors, and that he could not take any interest in the property as against an assignee in bankruptcy of the firm: *Osborn v. McBride*, 8 Saw. 590. A conclusion directly the reverse of this has been reached in New York. It is there held that the preference which a firm creditor has over creditors of the individual members of a firm in the payment of their debts out of the assets of the firm is a derivative one and practically a subrogation to the equity of each individual partner to have the firm assets applied primarily to the payment of its debts; that where an execution or other writ is against all the members of the firm, none of them has any equity of this character, and therefore such writ may be levied and enforced by the sale of the firm property, though not based upon a firm obligation; and that neither the creditors nor the members of the firm have any right to object to, or any power to assail, the title of the purchaser: *Saunders v. Riley*, 105 N. Y. 12; 59 Am. Rep. 472; *Davis v. Delaware etc. Co.*, 109 N. Y. 47; 4 Am. St. Rep. 418.

Garnishment. —If a debt is due to a partnership, the interest of one of the partners therein cannot be reached by garnishment. To permit such garnishment would necessarily be to allow the partner's creditor to collect the debt, or some part thereof, from one whose obligation was not to the partner alone, but to the firm. This would result either in dividing the obligation or in withdrawing the firm asset, so that it might not be recovered by the firm, and neither result will be permitted: *Winston v. Ewing*, 1 Ala. 129; 34 Am. Dec. 768; *People's Bank v. Shryock*, 48 Md. 427; 30 Am. Rep. 476; *Warner v. Perkins*, 8 Cush. 518; *Wellover v. Soule*, 30 Mich. 481; *Hirth v. Pfeifle*, 42 Mich. 31; *Sheedy v. Second Nat. Bank*, 62 Mo. 18; 21 Am. Rep. 407; *Atkins v. Prescott*, 10 N. H. 120; *Myers v. Smith*, 29

Ohio St. 120; Pettas v. Spaulding, 21 Vt. 66; Bates on Partnership, sec. 1108.

Priority of Writs against the Partnership.—The levy of a writ against a partner upon his interest in its personal property cannot prejudice the creditors of the firm. The property still remains answerable for the partnership debts, and a writ of attachment or execution for a partnership debt takes precedence over any previous levies or sales under writs against one member of the partnership only; and a purchaser under the former writ acquires title paramount to that of the purchaser of the latter writ, irrespective of the dates of the respective levies and sales: Conroy v. Woods, 18 Cal. 626; 73 Am. Dec. 605; Switzer v. Smith, 35 Iowa, 269; Cox v. Russell, 44 Iowa, 558; Pierce v. Jackson, 6 Mass. 242; First Nat. Bank v. Brenneisen, 97 Mo. 145; Williams v. Gage, 49 Miss. 777; Roop v. Herron, 15 Neb. 73; Watt v. Johnson, 4 Jones, 190; Coover's Appeal, 29 Pa. St. 9; 70 Am. Dec. 149; Washburn v. Bank of Belows Falls, 19 Vt. 278; Powers v. Large, 69 Wis. 621; 2 Am. St. Rep. 767.

VEGELAHN v. GUNTNER.

[167 MASSACHUSETTS, 92.]

EMPLOYER AND EMPLOYEE.—NO ONE CAN LAWFULLY INTERFERE by force or intimidation to prevent employers or persons employed, or wishing to be employed, from the exercise of the right of employing or seeking, or remaining in, employment at such prices as may be mutually agreed upon.

EMPLOYERS AND EMPLOYEES—NUISANCE IN PATROLLING EMPLOYER'S PREMISES.—An injunction will issue against the maintenance in front of complainant's place of business of a patrol to prevent the carrying on of the business unless and until he shall adopt a certain scale of prices to be paid to his employes, where the patrol is employed as one of the means of carrying out a plan to coerce the complainant, and is used in addition with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts.

INJUNCTION AGAINST CRIMINAL ACTS.—The fact that the defendants' acts may subject them to indictment does not prevent a court of equity from issuing an injunction.

EMPLOYERS AND EMPLOYEES—ATTEMPTING TO PREVENT PERSONS FROM ACCEPTING EMPLOYMENT.—A conspiracy to prevent persons from entering the complainant's employment and to prevent persons in such employment from continuing therein is unlawful, though such persons are not bound by contract to enter into, or continue in, such employment; and acts in furtherance of such conspiracy and by maintaining a patrol in front of his premises may be enjoined.

Suit in equity against two trades unions and several members thereof to prevent them from maintaining a patrol in front of the complainants' place of business and seeking to prevent persons from entering into his employment or remaining therein

unless he should adopt a scale of prices to be paid to the workmen. He was a manufacturer of furniture in Boston, and, as such, employed a large number of men. On October, 14, 1894, he received a communication from his employes, submitting a price list for his consideration, and requesting that nine hours should thereafter constitute a day's work. Afterward, certain of his employes, including the defendants, left his employment in a body. He attempted to engage other persons to take the place of those vacated. The defendants, to thwart such attempt, placed and maintained a patrol in the street in front of the complainant's place of business. The trial judge held that the employment of persuasion and social pressure, though sufficient to affect the complainant to his disadvantage, was not unlawful, but that defendants were not entitled to pursue their purpose by threats of personal injury or other harm. The injunction issued by the trial court, therefore, permitted the maintenance of the patrol if the defendants' efforts were confined to persuasion and social pressure.

T. H. Russell, for the defendants.

E. B. Hale, for the plaintiff.

107 ALLEN, J. The principal question in this case is, whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past six in the morning till half past five in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued, if not enjoined. There was also some evidence of persuasion to break existing contracts.

The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persua-

sion to break existing contracts. It was thus one means of intimidation indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself: *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *Low v. Rees Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. In Massachusetts, as in some other states, it is even made a criminal offense for one by intimidation or force to prevent or seek to prevent a person from entering into or continuing in the employment of a person or corporation: Pub. Stats., c. 74, sec. 2. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689. It was declared to be unlawful in *Regina v. Druitt*, 10 Cox C. C. 592, *Regina v. Hibbert*, 13 Cox C. C. 82, and *Regina v. Bauld*, 13 Cox C. C. 282. It was assumed to be unlawful in *Trollope v. London etc. Federation*, 11 L. T. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases, and, when instituted for the purpose of interfering with his business, it became a private nuisance: See *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Barr v. Essex Trades Council*, 8 Dick. 101; *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678; *Wick China Co. v. Brown*, 164 Pa. St. 449; *Coeur d'Alene etc. Min. Co. v. Miners' Union*, 51 Fed. Rep. 260; *Temperton v. Russell* (1893), 1 Q. B. 715; *Flood v. Jackson*, 11 L. T. 276; *Wright v. Hennessey*, 52 Alb. L. J. 104, a case before Baron Pollock;

Judge v. Bennett, 86 Week. Rep. 103; **Lyons v. Wilkins** (1896), 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. ²⁰ But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. Various decided cases fall within the former class, for example: **Worthington v. Waring**, 157 Mass. 421; 34 Am. St. Rep. 294; **Snow v. Wheeler**, 113 Mass. 179; **Bowen v. Matheson**, 14 Allen, 499; **Commonwealth v. Hunt**, 4 Met. 111; 38 Am. Dec. 346; **Heywood v. Tillson**, 75 Me. 225; 46 Am. Rep. 373; **Cote v. Murphy**, 159 Pa. St. 420; 39 Am. St. Rep. 686; **Bohn Mfg. Co. v. Hollis**, 54 Minn. 223; 40 Am. St. Rep. 319; **Mogul S. S. Co. v. McGregor** (1892), App. Cas. 25; **Curran v. Treleaven** (1891), 2 Q. B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime: **Sherry v. Perkins**, 147 Mass. 212; 9 Am. St. Rep. 689; **In re Debs**, 158 U. S. 564, 593, 599; **Baltimore etc. R. R. Co. v. Fifth Baptist Church**, 108 U. S. 317, 329; **Cranford v. Tyrrell**, 128 N. Y. 341, 344; **Gilbert v. Mickle**, 4 Sand. Ch. 357; **Port of Mobile v. Louisville etc. R. R. Co.**, 84 Ala. 115, 126; 5 Am. St. Rep. 342; **Arthur v. Oakes**, 63 Fed. Rep. 310; **Toledo etc. Ry. Co. v. Pennsylvania Co.**, 54 Fed. Rep. 730, 744; **Emperor of Austria v. Day**, 3 De Gex, F. & J. 217, 239, 240, 253; **Hermann Loog v. Bean**, 26 Ch. D. 306, 314, 316, 317; **Monson v. Tussaud** (1894), 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy

to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue ¹⁰⁰ in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts: *Walker v. Cronin*, 107 Mass. 555, 565; *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689; *Temperton v. Russell* (1893), 1 Q. B. 715, 728, 731; *Flood v. Jackson*, 11 L. T. 276.

In the opinion of a majority of the court the injunction should be in the form originally issued.

So ordered.

FIELD, CHIEF JUSTICE, dissented. He first referred to numerous decisions, and reached the conclusion that they did not warrant any injunction in excess of that issued in the subordinate court. "When one man orally advises another not to enter into a third person's employment, it would, I think, be a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice, except in those cases where the words spoken were false. In the present case, if the establishment of a patrol is using intimidation or force within the meaning of our statutes, it is illegal or criminal; if it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable, but something more is necessary to justify issuing an injunction; if it is in violation of any ordinance of the city regulating the use of street, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to go to the plaintiff's premises to apply for work, and of informing them of the actual facts of the case in order to induce them not to enter the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal, and I see no ground for issuing an injunction against it."

MR. JUSTICE HOLMES also expressed his dissent, saying, that "whatever the true result may be, it will be of advantage to sound thinkers to have the less popular view of the law stated." He differed from the majority of the court respecting the effect of the patrol maintained by the defendants, and thought that "two men walking together up and down a sidewalk, and speaking to those who enter a certain shop," do not necessarily convey a threat of force. With respect to the right of persons in business to reach their ends, though with some injury to others, he said: "The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is not done for its own sake, but

as an instrumentality in reaching the end of victory in the battle of trade. In such a case, it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him, either as customers or servants: *Commonwealth v. Hunt*, 4 Met. 132, 133; 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen, 499; *Heywood v. Tilson*, 75 Me. 225; 46 Am. Rep. 373; *Mogul Steamship Co. v. McGregor* (1892), App. Cas. 25. I pause here to remark that the word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had been begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to 'compulsion,' it depends on how you 'compel': *Commonwealth v. Hunt*, 4 Met. 111, 133; 38 Am. Dec. 346. So as to 'annoyance' or 'intimidation'; *Connor v. Kent*, *Curran v. Treleaven*, 17 Cox C. C. 354, 367, 368, 370. In *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, it was found as a fact that the display of banners which was enjoined was a part of a scheme to prevent workmen from entering or remaining in the plaintiff's employment, 'by threats and intimidation.' The context showed that the words as there used meant threats of personal violence, and intimidation by causing fear of it. I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly, the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests. So far, I suppose, we are agreed. But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle: *Commonwealth v. Hunt*, 4 Met. 111; 38 Am. Dec. 346; *Randall v. Hazelton*, 12 Allen, 412, 414. There was a combination of the most flagrant and dominant kind in *Bowen v. Matheson*, 14 Allen, 499, and in *Mogul Steamship Company*

v. McGregor (1892), App. Cas. 25, and combination was essential to the success achieved. But it is not necessary to cite cases; it is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed. One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile *Temperton v. Russell* (1893), 1 Q. B. 715, and the cases which follow it with the *Mogul Steamship Company* case. But *Temperton v. Russell* (1893), 1 Q. B. 715, is not a binding authority here, and therefore I do not think it necessary to discuss it. If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw, in *Commonwealth v. Hunt*, 4 Met. 111; 38 Am. Dec. 346. I repeat at the end, as I said at the beginning, that this is the point of difference in principle, and the only one, between the interlocutory decree and the final decree: See *Regina v. Shepherd*, 11 Cox C. C. 323; *Connor v. Kent*, *Gibson v. Lawson*, *Curran v. Treleaven*, 17 Cox C. C. 354."

CONSPIRACY—INTERFERING BETWEEN EMPLOYER AND EMPLOYEE.—Devices to prevent persons from entering into or continuing in the employment of another, as by threats, intimidation,

display of banners, and the like, are illegal both at common law and by the statute of Massachusetts: *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689, and note; *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23. If two or more persons conspire by their intimidations or molestation to deter or influence another in the way he should employ his industry, his talents, or his capital, they are guilty of a criminal offense: *Crump v. Commonwealth*, 84 Va. 927; 10 Am. St. Rep. 895, and note. See, also, note to *Bohn Mfg. Co. v. Hollis*, 40 Am. St. Rep. 325.

INJUNCTION AGAINST INTERFERENCE BETWEEN EMPLOYER AND EMPLOYEES.—Discharged union workmen will be restrained by injunction from gathering about their former employer's place of business, and from following to and from their work, nonunion workmen subsequently employed by him, and from gathering about the boarding place of such workmen, or in any manner interfering with them by means of threats, menaces, intimidation, ridicule, or annoyance on account of their working for such employer: *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678; also, *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212; 52 Am. St. Rep. 622, and note.

INJUNCTION—CRIMINAL ACTS AS SUBJECT TO.—If an act complained of threatens an irreparable injury to the property of an individual, its commission may be enjoined, although a violation of criminal law: *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212; 52 Am. St. Rep. 622, and note; also, *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433. See the extended note to *Orighton v. Dahmer*, 35 Am. St. Rep. 670.

LAWTON v. ESTES.

[167 MASSACHUSETTS, 181.]

FRAUD—PARTICEPS CRIMINIS WILL NOT BE RELIEVED FROM.—If several cotenants join in an agreement by which the property of the cotenancy is sold at a tax sale to one of their number for the purpose of defrauding other cotenants, none of such persons will be granted relief in equity as against a person who, in pursuance of the scheme, acquired the tax title.

Suit in equity by John W. Lawton and others against John H. Estes to compel him to hold certain land purchased at tax sale in trust for the plaintiffs and to convey to them their respective interests therein. Relief was denied the plaintiffs Joseph D. and Benjamin Estes on the ground that the purchase at the tax sale was made for the purpose of defrauding certain persons, in which purpose, such plaintiffs participated.

A. S. Phillips and W. E. Fuller, Jr., for Joseph D. Estes.

M. Reed, for the defendant.

182 MORTON, J. The question is, whether, upon the special findings of fact which it is agreed are to be treated as in the nature of a report, the decree was right as to Joseph D. Estes.

A valid sale for taxes to a stranger creates a paramount title in this state after the period for redemption has expired: *Langley v.*

Chapin, 134 Mass. 82. There is nothing here to show that the sale was not valid, and the period for redemption expired several years ago. The sale was not, however, to a stranger. The defendant was a co-owner of the reversion with the appellant and the other plaintiffs; and the appellant contends that the purchase by the defendant at the tax sale constituted him a trustee for his cotenants, with the right of redemption in them. The prayer of the bill is, that he may be declared a trustee, and ordered to convey.

But we think that the appellant is not in a position to take advantage of this contention. It is found as a fact that he knew of and assented to the proceedings in regard to the tax sale and to the purchase by the defendant, and that he and Benjamin joined in the scheme to defraud the other cotenants. Now that the scheme has failed, he seeks the aid of a court of equity to compel his partner in the attempted fraud to restore to him property which he had suffered him to acquire for the purpose ¹⁸⁸ of promoting and carrying out the contemplated fraud. To obtain the relief which he seeks, he is obliged to rely upon the fraud to which he was a party. In such a case, it is plain that equity will not aid him to recover what he has lost, and, as between him and the defendant, will not disturb the possession of the latter: *Wall v. Provident Inst. for Savings*, 3 Allen, 96; *Wheeler v. Sage*, 1 Wall. 518; *Goddard v. Putnam*, 22 Me. 363; *Osborne v. Moss*, 7 Johns. 161; 5 Am. Dec. 252. It may be, as the counsel for the appellant suggests, though we do not find it necessary to decide the question, that, if he had seasonably repudiated the attempted fraud and notified his cotenants, he could have recovered from the defendant: *Taylor v. Bowers*, 1 Q. B. Div. 291. But he did not do that. He was willing that the scheme should succeed, and expected to be benefited by it if it did.

Decree affirmed.

FRAUDULENT CONVEYANCES AS TO PARTIES IN PARI DELICTO—WHEN WILL BE RELIEVED AGAINST.—It is an established general principle that as between parties in *pari delicto*, standing upon an equal footing, no relief will be given by the courts. In such a case, the parties will be left in the position where they have knowingly and willfully placed themselves: *Note to Harper v. Harper*, 7 Am. St. Rep. 587. If the fraudulent contract or conveyance sought to be relieved against is executory, it will not be enforced, and, if executed, it will not be relieved against. If it has been performed in part, it will be given effect so far as executed and held void so far as it remains unexecuted: *Williams v. Olink*, 90 Mich. 297; 80 Am. St. Rep. 443, and note.

POLSON v. STEWART.

[167 MASSACHUSETTS, 211.]

CONFLICT OF LAWS.—A COVENANT MADE BY A HUSBAND AND WIFE in the state of their domicile to surrender all his marital rights in her lands, situated in another state, if valid where made, is valid in the state where such land is situated, though it would not have been valid had the parties been residents of that state.

HUSBAND AND WIFE—COVENANT TO SURRENDER INTEREST IN WIFE'S PROPERTY.—If a husband covenants to surrender, convey, and transfer to his wife and her heirs all interests in and to specific real property which he may have acquired by reason of his marriage, and that she is to have full and absolute control and possession of such property, free and discharged of all his rights, claims, and demands of every nature, he thereby releases not only the rights which he then had, but also those which he might have acquired upon her death.

CONSIDERATION.—AN AGREEMENT NOT TO BRING a well-founded suit for divorce is both a legal and a sufficient consideration.

Suit in equity for the specific performance of a covenant made by the defendant in favor of his wife in her lifetime, to enjoin him from asserting any title to real property, and to compel him to convey to the complainant. The defendant demurred, and the decision of the demurrer was reserved for the consideration of the full court.

G. B. Upham, for the defendant.

J. Fox, for the plaintiff.

213 HOLMES, J. This is a bill to enforce a covenant made by the defendant to his wife, the plaintiff's intestate, in North Carolina, to surrender all his marital rights in certain land of hers. The land is in Massachusetts. The parties to the covenant were domiciled in North Carolina. According to the bill, the wife took steps which, under the North Carolina statutes, **214** gave her the right to contract as a feme sole with her husband as well as with others, and afterward released her dower in the defendant's lands. In consideration of this release, and to induce his wife to forbear suing for divorce, for which she had just cause, and for other adequate considerations, the defendant executed the covenant. The defendant demurs.

The argument in support of the demurrer goes a little further than is open on the allegations of the bill. It suggests that the instrument which made the wife a "free trader," in the language of the statute, did not go into effect until after the execution of the release of dower and of the defendant's covenant. But the

allegation is, that the last-mentioned two deeds were executed after the wife became a free trader, as they probably were in fact, notwithstanding their bearing date earlier than the registration of the free trader instrument. We must assume that, at the date of their dealings together, the defendant and his wife had as large a freedom to contract together as the laws of their domicile could give them.

But it is said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res: *Ross v. Ross*, 129 Mass. 243, 246; 37 Am. Rep. 321; *Hallgarten v. Oldham*, 135 Mass. 1, 7, 8; 46 Am. Rep. 433. But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are are on the same side. The most important intimations to the contrary which we have seen are a brief note in *Story on Conflict of Laws*, section 436, note, and the doubts expressed in Mr. Dicey's very able and valuable book. Lord Cottenham stated and enforced the rule in the clearest way in *Ex parte Pollard*, 4 Deac. 27, 40 et seq; *Mont. & C.* 239, 250. So Lord Romilly in *Cood v. Cood*, 33 Beav. 314, 322. So in Scotland, in a case like the present, where the contract enforced was the wife's: *Findlater v. Seafield*, Fac. Dec. 553, Feb. 8, 1814. See, also, *Cunninghame v. Semple*, 11 Mor. 4462; *Erskine's Institute*, bk. 3, tit. 2, sec. 40; *Westlake on Private International Law*, 3d ed., sec. 172; *Rorer on Interstate Law*, 2d ed., 289, 290.

If valid by the law of North Carolina, there is no reason why the contract should not be enforced here. The general principle is familiar. Without considering the argument addressed to us that such a contract would have been good in equity if made here (*Holmes v. Winchester*, 133 Mass. 140; *Jones v. Clifton*, 101 U. S. 225; *Bean v. Patterson*, 122 U. S. 496, 499), we see no ground of policy for an exception. The statutory limits which have been found to the power of a wife to release dower (*Mason v. Mason*, 140 Mass. 63; *Peaslee v. Peaslee*, 147 Mass. 171, 181) do not prevent a husband from making a valid covenant that he will

not claim marital rights with any person competent to receive a covenant from him: *Charles v. Charles*, 8 Gratt. 486; 56 Am. Dec. 155; *Logan v. Birkett*, 1 Mylne & K. 220; *Marshall v. Beall*, 6 How. 70. The competency of the wife to receive the covenant is established by the law of her domicile and of the place of the contract. The laws of Massachusetts do not make it impossible for him specifically to perform his undertaking. He can give a release which will be good by Massachusetts law. If it be said that the rights of the administrator are only derivative from the wife, we agree, and we do not for a moment regard anyone as privy to the contract except as representing the wife. But if then it be asked whether she could have enforced the contract during her life, an answer in the affirmative is made easy by considering exactly what the defendant undertook to do. So far as occurs to us, he undertook three things: 1. Not to disturb his wife's enjoyment while she kept her property; 2. To execute whatever instrument was necessary in order to release his rights if she conveyed; and 3. To claim no rights on her death, but to do whatever was necessary to clear the title from such rights then. All these things were as capable of performance in Massachusetts as they would have been in North Carolina. Indeed, all the purposes of the covenant could have been ²¹⁶ secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited. It will be seen that the case does not raise the question as to what the common law and the presumed law of North Carolina would be as to a North Carolina contract calling for acts in Massachusetts, or concerning property in Massachusetts, which could not be done consistently with Massachusetts law.

With regard to the construction of the defendant's covenant we have no doubt. It is "to surrender, convey, and transfer to said Kitty T. Polson Stewart, Jr., and her heirs, all the rights of him, the said Henry Stewart, Jr., in and to the lands and property above described, which he may have acquired by reason of the aforesaid marriage, and the said Kitty T. Polson Stewart, Jr., is to have the full and absolute control and possession of all of said property free and discharged of all the rights, claims, or demands of every nature whatsoever of the said Henry Stewart, Jr." Notwithstanding the decision of the majority in *Rochon v. Lecatt*, 2 Stew. 429, we think that it would be quibbling with the manifest intent to put an end to all claims of the defendant if we were to distinguish between vested rights which had and those which had not yet become estates in the land, or between claims during the life of the wife and claims after her death. It is

plain, too, that the words import a covenant for such further assurance as may be necessary to carry out the manifest object of the deed: See *Marshall v. Beall*, 6 How. 70; *Ward v. Thompson*, 6 Gill & J. 349; *Hutchins v. Dixon*, 11 Md. 29; *Hamrico v. Laird*, 10 Yerg. 222; *Mason v. Deese*, 30 Ga. 308; *McLeod v. Board*, 30 Tex. 238; 94 Am. Dec. 301.

Objections are urged against the consideration. The instrument is alleged to have been a covenant. It is set forth, and mentions one dollar as the consideration. But the bill alleges others, to which we have referred. It is argued that one of them, forbearance to bring a well-founded suit for divorce, was illegal. The judgment of the majority in *Merrill v. Peaslee*, 146 Mass. 460, 463, 4 Am. St. Rep. 334, expressly guarded itself against sanctioning such a notion, and decisions of the greatest weight referred to in that case show that such a consideration is both sufficient and legal: *Newsome v. Newsome*, L. R. 2 P. & D. 306, 312; ²¹⁷ *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; *Besant v. Wood*, 12 Ch. Div. 605, 622; *Hart v. Hart*, 18 Ch. Div. 670, 685; *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675; *Sterling v. Sterling*, 12 Ga. 201. Then it is said that the wife's agreement in bar of her dower was invalid, because it had not the certificate that she had been examined, etc., as required by the North Carolina statutes annexed to the bill. Whether it was invalid or not, the defendant was content with it, and accepted the execution of it as a consideration. This being so, it would be hard to say that it was not one, even if without legal effect. Whether void or not, it is alleged to have been performed; and finally, if it was void, it was void on its face, as matter of law, and the husband must be taken to have known it, so that the most that could be done would be to disregard it; if that were done, the other considerations would be sufficient: See *Jones v. Waite*, 5 Bing. N. C. 341, 351.

Demurrer overruled.

CHIEF JUSTICE FIELD dissented. He stated that the decision in *Whitney v. Closson*, 138 Mass. 49, showed that the contract sued upon would not have been enforced if the husband and wife had been domiciled in Massachusetts when it was made, and that it seemed to him illogical not to permit a conveyance of Massachusetts lands directly between husband and wife wherever they may have their domicile, and yet to hold that they may contract to convey such land from one to the other, and that the courts of that state will specifically enforce such contract. "It is possible," he said, "to abandon the rule of *lex rei sitae*, but to keep it for conveyances of land and to abandon it for contracts to convey land seems to me unwarrantable."

HUSBAND AND WIFE—RELEASE BY HUSBAND OF HIS RIGHTS IN WIFE'S PROPERTY.—A husband may relinquish his marital rights in the property of his wife, and, when he has done so, has no right to administer upon her property: *Charles v. Charles*, 8 Gratt. 486; 56 Am. Dec. 155, and note; *McLeod v. Board*, 30 Tex. 238; 94 Am. Dec. 301, and note; *Veal v. Veal*, 89 Ky. 314; 25 Am. St. Rep. 534, and note.

HUSBAND AND WIFE—CONTRACTS BETWEEN—CONSIDERATION.—A note executed by a husband for the benefit of his wife in consideration of her discontinuing an action for absolute divorce, and returning to live with him, is valid: *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675; *Phillips v. Meyers*, 82 Ill. 67; 25 Am. Rep. 295.

HUSBAND AND WIFE—CONFLICT OF LAWS—REALTY OF WIFE.—It is an established rule that the validity of a disposition of real estate must always be determined by the law of the state or county of which it is a part: *Extended notes to In re Walkerly*, 49 Am. St. Rep. 124, and *In re Ingram*, 12 Am. St. Rep. 98. The courts of each state have exclusive jurisdiction over questions relating to the rights, titles, and interests in and to lands within its limits: *Note to Sentenis v. Ladew*, 37 Am. St. Rep. 572; also, *La Selle v. Woolery*, 14 Wash. 70; 53 Am. St. Rep. 855, and note.

OGDEN v. McHUGH.

[167 MASSACHUSETTS, 276.]

IF A MARRIAGE IS SOLEMNIZED UNDER THE MISTAKEN BELIEF THAT THE HUSBAND OF THE WIFE HAD DIED, both parties being equally informed of the previous marriage and of the circumstances from which the death of her husband was inferred, and the marriage is followed by the assumption of marital duties and privileges until the death of the man, his heirs cannot in equity compel her to surrender property or rights vested in her by an antenuptial contract, upon the ground that it was entered into upon a mistaken assumption that her husband was dead.

Suit in equity to recover real property alleged to have been acquired by the defendant Margaret McHugh under a conveyance executed by Henry Ogden, father of the plaintiffs, through the influence of fraud and mistake. For five years prior to 1873 the defendant had been the wife of James McHugh, and this fact was known to Henry Ogden who had been present at their marriage. McHugh in that year deserted defendant, and was not heard of by her after 1876. In 1888, she and Ogden, believing that her husband had died, engaged to marry each other, and an antenuptial contract resulted, by which he agreed to make certain provisions for her out of his property. He thereafter caused the property to be conveyed to her. They lived together as husband and wife until his death in the mutual belief that McHugh was dead. Such, however, was not the fact. The trial

judge ruled that the bill should be dismissed, and the plaintiffs appealed.

A. J. Jennings and J. M. Morton, Jr., for the plaintiffs.

J. W. and C. R. Cummings, for the defendant.

278 BARKER, J. The decree dismissing the bill was right. If the plaintiffs, as heirs at law of their deceased father, could, under any circumstances, maintain a bill to set aside a deed which he had made in performance of a contract into which he had entered under a mistake, they have no better right than he would have if living. When he made the contract, and when he performed it by causing the land to be conveyed to the defendant Margaret McHugh, he knew of the fact that the only **279** evidence of the death of her former husband was his absence from the year 1876 until the time of the marriage in 1888. He took the chance that the former husband was yet alive, and he was equally responsible with the defendant for all the consequences to her and to himself resulting from the marriage ceremony and his living with her as his wife. While there was no marriage, there was during the years from the ceremony in 1888 to his death in 1893 the exact condition of things which, in view of the possibility that the husband was alive, he must have contemplated when he made the contract. This situation gave him the companionship and services of the defendant, with no obligation to compensate her therefor: *Cooper v. Cooper*, 147 Mass. 370; 9 Am. St. Rep. 721. It gave him the possibility of having by her legitimate issue: Pub. Stats., c. 145, sec. 14; *Glass v. Glass*, 114 Mass. 563. On the other hand, it is now impossible to place her in the condition in which she would have been but for her acts done in performance of the contract. Neither the supposed husband nor his administrators or heirs have lost the benefit which he expected to derive, that she should have from his estate nothing except such property as he should see fit to give her in his lifetime. She can get nothing from his estate either by way of compensation for her years of service or of a distributive share.

While there was a mutual mistake in that both parties believed that the husband was dead, both knew fully upon what that belief rested, and what the consequences would be if a marriage ceremony followed by cohabitation as husband and wife should occur, and it should appear that the former husband was in fact alive. It would be unjust, under such circumstances, to take away what she received in return for acts which were of value to the other contracting party, which were a detriment to herself, and which only failed being complete performance on her

part through the operation of a rule of law which all parties had in mind, and which they all had good reason to suppose was not applicable, because of facts which each knew and relied upon equally with the other.

Decree affirmed.

MARRIAGE AND DIVORCE—MARRIAGE UNDER MISTAKEN BELIEF THAT NEITHER HAS SPOUSE LIVING.—Where a woman, acting upon reliable information that her former husband is dead, marries again, the marriage is legal, in the absence of evidence that the former husband is alive; especially is this so after the lapse of many years: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note; also, *Cartwright v. McGown*, 121 Ill. 383; 2 Am. St. Rep. 106, and note. Where the grantee of a widow, who has acquired land through a second marriage contracted by her, sues to quiet title thereto as against the relatives of the second husband, who assert the invalidity of the marriage, a transcript showing that her first husband obtained a decree of divorce from her in the courts of another state, after the execution of the conveyance by her, does not, if admitted in evidence at all, overcome the presumption that she had herself, prior to her second marriage, obtained a divorce in the courts of the state where the suit is brought: *Boulden v. McIntire*, 119 Ind. 574; 12 Am. St. Rep. 453.

TRADERS' NATIONAL BANK v. ROGERS.

[187 MASSACHUSETTS, 315.]

FORGERY, RATIFICATION OF.—Omission by an apparent indorser on being shown a note to inform the holder that the indorsement was a forgery does not amount to an affirmation of the signature, if such indorser is not proved to have received any benefit from the forgery or to have authorized the forger to act as his agent for any purpose.

FORGERY—EVIDENCE OF RATIFICATION.—The fact that a person whose name has been forged does not at once repudiate the signature is admissible as bearing upon the question whether he assumed the signature as his own, but it is not conclusive. Nor is the statement of such person that the note will be paid conclusive evidence of his ratification of the forgery.

AN ESTOPPEL TO DENY THE GENUINENESS OF A SIGNATURE DOES NOT ARISE from the failure to at once repudiate it, nor from saying that the note on which it appeared will be paid, if there was no intention to mislead, and the statement was not acted upon by anyone to his prejudice.

Action of contract upon a promissory note purporting to be indorsed by the defendant and H. S. Walker. He denied the genuineness of the signature. The trial judge found that the defendant, when his attention was called to the note by the plaintiff bank, said it would be paid, but that on the day following he asked leave to examine it again, and, after such examination, pronounced it a forgery, that the remark made by the de-

defendant was without any intention to mislead any one; and that the plaintiff had not acted upon any statement made by the defendant respecting the genuineness of the signature. Judgment for the defendant Walker.

A. A. Strout and W. R. Bigelow, for the plaintiff.

C. R. Elder, for the defendant.

³²⁰ ALLEN, J. 1. The plaintiff contends that, if the defendant, when the note was first shown to him, knew that the indorsement of his name upon it was a forgery, he was bound to inform the plaintiff of this fact, and that his omission to do so amounted of itself to an affirmation of the signature. There was nothing to show that the defendant had received any benefit from the forgery, or that the forger was his agent for any purpose. Under these circumstances, the defendant was not bound, as a matter of legal duty, to repudiate or disclaim at ³²¹ once the genuineness of the signature. His failure to do so was evidence in the nature of an admission, which might be considered as bearing upon the question whether he assumed the signature as his own; but it was not conclusive: *Greenfield Bank v. Crafts*, 2 Allen, 269, 273; *Harrod v. McDaniels*, 126 Mass. 413. Nor was the defendant's statement that "the note will be paid" conclusive evidence of a ratification of the signature. It was consistent with the idea that the defendant was surprised at finding his name upon the note, and left the bank saying as little as possible, but meaning only to give the impression that he thought the note would be taken up by some one other than himself. Indeed, his words and manner would seem to have left this impression upon Mr. Jaquith himself. It was competent for the court to find, as it did, upon the evidence, that it was not satisfied that the defendant made the remark with the intent to give the plaintiff's officers to understand that the signature was his, and genuine, or with intent to induce the bank to assume that his statement was an admission of the genuineness of the signature; and this finding negatives ratification: *Creamer v. Perry*, 17 Pick. 332; 28 Am. Dec. 297; *Wellington v. Jackson*, 121 Mass. 157; *Greenfield Bank v. Crafts*, 4 Allen, 447, 455; *Smith v. Tramel*, 68 Iowa, 488.

2. It was also competent for the court to find, as it did, upon the evidence, that it was not satisfied that the defendant made the remark above mentioned with intent to mislead the plaintiff, or that the plaintiff relied and acted upon his statement as an admission of the genuineness of his signature. According to the rule of law as established in this commonwealth, this negatives

an estoppel: *Lincoln v. Gay*, 164 Mass. 537; 49 Am. St. Rep. 480; *Stiff v. Ashton*, 155 Mass. 120; *Fall River Nat. Bank v. Buffington*, 97 Mass. 498.

Exceptions overruled.

FORGERY—WHAT AMOUNTS TO A RATIFICATION OF.—There can be no ratification of a forged promissory note which can be held binding upon the person whose name was forged, in the absence of an estoppel in pais, or without a new consideration for the promise: *Henry v. Heeb*, 114 Ind. 275; 5 Am. St. Rep. 613, and extended note thereto. A mere promise to pay a forged note, when such promise is given by the supposed maker of the note without any new consideration, and after the promisee has acquired the note, is not binding: *Workman v. Wright*, 83 Ohio St. 405; 31 Am. Rep. 546, and extended note.

FORGERY—ESTOPPEL TO DENY GENUINENESS—WHEN ARISES.—A person whose signature is forged to an instrument is not estopped to deny the genuineness of the signature, unless, with a full knowledge of the facts, he so acts, or makes such admissions, that the holder of the instrument is thereby given reasonable ground for changing his position for the worse, and does so change it: See extended notes to *Henry v. Heeb*, 5 Am. St. Rep. 618, and *Workman v. Wright*, 31 Am. Rep. 549.

MOORS v. READING.

[167 MASSACHUSETTS, 322.]

A MORTGAGE OF CHATTELS MUST BE RECORDED or the property must be delivered to, and retained by, the mortgagee.

A PLEDGEE'S TITLE MUST FAIL UNLESS the pledged property is delivered to, and retained by, him.

MORTGAGE OR PLEDGE OF CHATTELS, CHANGE OF POSSESSION NECESSARY TO.—If a dealer in goods makes bills of sale of them to secure indebtedness existing, and to exist, to the receiver of such bills, and the latter takes formal possession, and constitutes the bookkeeper of the pledgor his agent to retain such possession, and when additional goods are purchased, receives bills of sale therefor from time to time, but such goods are not separated from the others, and the pledgor continues in business, selling from the goods as before and retaining the proceeds thereof, there is no such apparent change of possession as will support his pledge; and if the pledgor is declared insolvent in proceedings for that purpose, his assignee in insolvency is entitled to the possession of the goods so attempted to be pledged.

Replevin for a lot of goods. The trial judge directed the jury to return a verdict for the defendant, but reported the case for the determination of the supreme court.

R. M. Morse and J. Diff, for the plaintiffs.

S. L. Whipple and W. R. Sears, for the defendants.

³²² ALLEN, J. The question in this case is whether there was any evidence for the jury that the plaintiffs took and retained possession so as to give them a valid title to the goods replevied.

If they were mortgagees, their title would not be valid unless the mortgaged property was delivered to and retained by them, no record of the mortgages having been made: Stats. 1883, c. 73, sec. 2. If, however, they were pledgees, their title would also fail ³²³ unless the property was delivered to and retained by them. So that it makes no difference in the determination of the case whether they were mortgagees or pledgees: *Blanchard v. Cooke*, 144 Mass. 207, 225.

The facts upon which the decision must depend are not now in dispute. Those which were proved, or which the plaintiffs' evidence tended to prove, may be summed up as follows:

One Houdlette was a dealer in iron, carrying a stock of goods in his store in Boston. In 1889, he borrowed money of the plaintiffs, which has never been repaid, and which the plaintiffs sought to secure in the following manner: Houdlette executed to the plaintiffs a general collateral agreement, so called, setting forth that all the merchandise transferred or to be thereafter transferred by him to them should be held only as security for his present or future indebtedness to them. He also from time to time, usually about once a month, executed to them a bill of sale of goods in his store. In some instances, but not always, upon receiving the bills of sale, they executed and delivered to him a special instrument of defeasance. These bills of sale were intended to cover all of the stock of goods in store from time to time, and did so cover it, except so far as new goods may have come in between the dates of two transactions, or as goods may have been released on orders, as hereinafter stated. Soon after the date of each bill of sale, the plaintiffs took possession by going to Houdlette's store, where statements were made by or in behalf of Houdlette that possession of the goods was given, and on behalf of the plaintiffs, that possession was taken, by touching some of them, by appointing Houdlette's bookkeeper as agent of the plaintiffs to take and hold possession of the goods for them, and by his acceptance of such agency. From time to time, as new bills of sale were received, the plaintiffs gave written orders to the bookkeeper to deliver to Houdlette portions of the goods included in former bills of sale. These orders were usually for round amounts, as called for by Houdlette's bookkeeper, being about the same in amount as the amounts of the new bills of sale; the amount being fixed by what the bookkeeper thought would be sufficient to cover the deliveries by Houdlette for the next month. The quantities in these orders were expressed in gross, as, for example, seventy-five thousand ³²⁴ pounds sheet plate iron and steel, fifty thousand pounds angle iron, two hundred kegs rivets.

It was not intended to make sales of goods in excess of the amounts covered by these orders; but Houdlette made sales from all the goods in store, without regard to whether they had or had not been released by the plaintiffs, and this was permitted by the bookkeeper. Whenever the bookkeeper thought the amount of an order had been fully drawn, he would get a new one. No setting apart or separation of the goods covered by these orders was made; and new goods as they came in were mingled with the old, and there was nothing to distinguish them. Sales were made from the general stock of goods on hand, without discrimination; and the proceeds of the sales went to Houdlette. The bookkeeper was paid by Houdlette, and the plaintiffs did not pay or agree to pay him anything. Since the plaintiffs did not take possession on the day of the date of each bill of sale, there were usually some goods in the store which had come in between the date of the bill of sale and the day of taking possession, and which, therefore, were not covered by the bills of sale. No attempt was made to keep such goods separate. The above methods were pursued for nearly four years, at the end of which time Houdlette went into insolvency, and his assignees took possession of the goods.

If it be assumed that there was from time to time a sufficient taking of possession by the plaintiffs at the outset, the facts effectually negative the plaintiffs' view that there was any such retention of possession by them as to meet the requirements of the law. The obvious purpose of the statutory provision as to unrecorded mortgages, and of the rule of law as to the retention of possession by pledgees, is to prevent mortgagors or pledgors, by means of their possession of the property, from misleading people into the belief that they are its real owners. Accordingly the rule is general that, if mortgagors whose mortgages are unrecorded and pledgors are allowed to remain in possession of the mortgaged or pledged property, the mortgagees or pledgees will lose their lien. Possession or control of the property may be given to a mortgagor or pledgor for certain special purposes, without producing this effect; e. g., to make sale thereof for the sole benefit of the mortgagee or pledgee, or to keep the property specifically for him for a time as his bailee or agent. There are ³²⁵ numerous cases in which the question has arisen and been determined whether, under certain particular facts, the lien of a mortgagee or pledgee has been lost by reason of permitting the mortgagor or pledgor to be in possession of the property: Kellogg v. Tompson, 142 Mass. 76; Moore v. Wyman, 146 Mass. 60; Thacher v. Moore, 134 Mass. 156; Thompson v. Dolliver, 132 Mass. 103; Thayer v. Dwight,

104 Mass. 254; Wright v. Tetlow, 99 Mass. 397; Carpenter v. Snelling, 97 Mass. 452; Walker v. Staples, 5 Allen, 34; Way v. Davidson, 12 Gray, 465; 74 Am. Dec. 604; Casey v. Cavaroc, 96 U. S. 467; Bank of Leavenworth v. Hunt, 11 Wall. 391; Steele v. Benham, 84 N. Y. 634; Button v. Rathbone, 126 N. Y. 187; Doyle v. Stevens, 4 Mich. 86; First Nat. Bank v. Summers, 75 Mich. 107; Menzies v. Dodd, 19 Wis. 343; Hage v. Campbell, 78 Wis. 572; 23 Am. St. Rep. 422; Swiggett v. Dodson, 38 Kan. 702; Brunswick v. McClay, 7 Neb. 137; Pickard v. Marriage, L. R. 1 Ex. 364; Northwestern Bank v. Poynter (1895), App. Cas. 56. No one of these cases presents facts exactly like those now before us. But the rule to be deduced from them, which is applicable to the present case, appears to be clear. The plaintiffs appointed Houdlette's bookkeeper as their agent, so that there was no apparent change of possession. The goods which were at any time covered by the bills of sale were not set apart, and kept separate and free from intermixture with other goods not covered by the bills of sale. Whenever new goods were bought by Houdlette, they were added to the general stock on hand. Whenever the plaintiffs gave orders for the delivery or release of goods to Houdlette in order to enable him to make current sales, no separation was made of the goods embraced in such orders. The arrangement was made with the obvious purpose, or at any rate with the effect, of enabling Houdlette to carry on his business in the usual manner and without exciting suspicion; and there never was a day, so far as appears, when he might not have sold any particular piece or parcel of goods in his store without violating his understanding with the plaintiffs. From month to month, the plaintiffs signed orders for the release of goods in gross amounts from their lien, and of such quantities as would probably be sufficient to supply Houdlette's customers, and new orders of the same kind were signed as often as was necessary. There was no attempt to ³²⁶ keep distinct and separate any specific portions of the stock of goods, as those which were subject to the plaintiff's lien. This was the habitual and universal method adopted by the plaintiffs or by their agent.

This course of business is inconsistent with the view that the plaintiffs retained possession of any specific part of the goods. There was at best a confusion and intermixture of mortgaged with unmortgaged, or of pledged with unpledged goods, so that the two classes were indistinguishable, and this was done by the permission or through the neglect of the plaintiffs or of their agent. The plaintiffs no longer retained the sole possession of the mortgaged goods. They either lost the possession entirely, or

were merely tenants in common with Houdlette: *Ryder v. Hathaway*, 21 Pick. 298; *Forbes v. Fitchburg R. R. Co.*, 133 Mass. 154, 160; 2 Kent's Commentaries, 365, note, and cases cited; Story on Bailments, sec. 40; *Willard v. Rice*, 11 Met. 493; 45 Am. Dec. 226; *Adams v. Wildes*, 107 Mass. 123; *Stearns v. Herrick*, 132 Mass. 114; *The Idaho*, 93 U. S. 575.

Upon the undisputed facts, the plaintiffs failed to retain such possession as the law requires in order to maintain their lien. To hold otherwise would enable parties to practice the very frauds which the statute as to unrecorded mortgages of personal property, and the rule of law as to the duty of pledgees to retain possession of the pledged property, seek to prevent.

The title of the defendants as assignees in insolvency of Houdlette must accordingly prevail: *Bingham v. Jordan*, 1 Allen, 373; 79 Am. Dec. 748; *Low v. Welch*, 139 Mass. 33; *Blanchard v. Cooke*, 144 Mass. 207, 218, 226; *Casey v. Cavaroc*, 96 U. S. 467.

Judgment on the verdict for the defendants.

PLEDGE—PLEDGEES' LIEN DEPENDENT UPON POSSESSION.—The pawnee, by giving up possession of the pawn, though for a special purpose, loses his lien, and cannot recover the pawn from an innocent purchaser of the pawnor: *Bodenhammer v. Newsum*, 5 Jones, 107; 69 Am. Dec. 775. At law, the lien incident to a pledge depends upon possession: *Coleman v. Shelton*, 2 McCord Eq. 126; 16 Am. Dec. 639. See, also, *Cooley v. Minnesota etc. Ry. Co.*, 53 Minn. 327; 39 Am. St. Rep. 609, and note.

CHATTEL MORTGAGES—NECESSITY OF DELIVERY OR REGISTRATION.—Delivery of chattels, either actual or constructive, is essential to the validity of a chattel mortgage as against third parties. Registration dispenses with delivery: *Golden v. Cockril*, 1 Kan. 259; 81 Am. Dec. 510, and note; also, *Call v. Gray*, 37 N. H. 428; 75 Am. Dec. 141, and note. See *Brown v. J. H. Campbell Co.*, 44 Kan. 267; 21 Am. St. Rep. 274, and note.

CHATTEL MORTGAGES—EFFECT OF A PROVISION ALLOWING MORTGAGEE TO SELL.—As to this question, there is an irreconcilable conflict among the decisions. It is thoroughly discussed in the extended note to *Peabody v. Landon*, 15 Am. St. Rep. 912-917. Some of the late cases on the subject are: *Birmingham Dry Goods Co. v. Roden*, 110 Ala. 511; 55 Am. St. Rep. 35, and note; *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851; *Eckman v. Munnerlyn*, 82 Fla. 367; 37 Am. St. Rep. 109.

COOK v. COLEMAN.

[167 MASSACHUSETTS, 414.]

GARNISHMENT—ERRORS IN THE INDORSEMENT OF THE WRIT.—If garnishment is duly served on the president of a bank, after which part of the funds belonging to the defendant is permitted to be drawn out on checks, the bank cannot relieve itself from liability by proving that the president relied upon the manner in which the writ was indorsed on the back. Such indorsement constitutes no part of the writ, and the neglect of the president to examine the writ itself must be treated as the neglect of the bank.

Trustee process against the Hancock National Bank to reach a deposit belonging, when the process was served, to the defendant. The trial judge held the bank liable.

T. Savage, for the plaintiff.

W. R. Bigelow, for the trustee

415 MORTON, J. The writ was duly served upon the Hancock National Bank, through its president, who also, as we infer, had charge of its business. In the body of the writ the defendants were described as copartners under the name of the Boston Building Material Company. There was then on deposit in the bank to the credit of the defendants under that name the sum of one hundred and five dollars and sixty-three cents. This was attached by the writ. Afterward, a part of it was paid out on checks drawn by the defendants. The excuse given for this, is, that the president did not examine the body of the writ, but relied on the manner in which it was entitled on the back, from which there appeared to be but one defendant. But he was not justified in relying on what appeared on the back of the writ. That constituted no part of the writ itself. He should have examined the body of the writ, in order to determine the parties against whom it ran. His neglect to do so was that of the bank; and the payments which were made by it through its officers or servants subsequent to the attachment were made by it in its own wrong.

Order of the superior court affirmed.

ATTACHMENT—ERRORS, IRREGULARITIES AND DEFECTS WHICH WILL AVOID.—As to what irregularities and defects in proceedings for attachment will avoid it, see the extended note to *Fridenberg v. Pierson*, 79 Am. Dec. 164-174.

AM. ST. REP., VOL. LVII.—39

LEE v. BUTLER.

[157 MASSACHUSETTS, 426.]

STATUTE OF FRAUDS—MEMORANDUM.—Several papers signed at the same time by the party sought to be charged may be considered and used together to complete the memorandum required by the statute of frauds.

STATUTE OF FRAUDS.—PAROL EVIDENCE MAY BE INTRODUCED TO SHOW THE SITUATION OF THE PARTIES and the circumstances attending the transaction for the purpose of applying the contract to a subject matter and establishing the connection of the different writings connecting the memoranda with one another.

STATUTE OF FRAUDS.—LETTERS WRITTEN YEARS after a contract is entered into may be received to establish its terms.

ALTERATION IN WRITINGS, WHEN DOES NOT AVOID THEM, THOUGH MATERIAL.—An alteration in a written contract after its execution, though in a respect material to it, made in good faith, to correct it and to more nearly conform it to the agreement of the parties, and where such alteration could not possibly prejudice the other party, does not avoid the contract.

GUARANTY NOT DESTROYED BY TAKING AND FORECLOSING OTHER SECURITIES.—If a party making a loan to a corporation receives as collateral security part of its bonds and the guaranty of a third person making himself responsible for the payment of the debt, the foreclosure of the mortgage given to secure such bonds does not release the guarantor. The creditor's interest in the real estate subject to such foreclosure stands as before as mere security for his debt, and does not affect his right to proceed against his guarantor.

Claim in probate against the estate of John Swann, deceased, on contract of warranty. The trial judge reported the matter to the supreme court for its judgment.

F. M. Wood and W. F. Hawkins, for the claimant.

C. E. Burke and P. H. Butler, for the respondent.

427 KNOWLTON, J. The claim is founded on a contract of guaranty, the principal memorandum of which is in these words:

“5 Fredericks Place, Old Jewry, E. C.
London, 18 March, 1873.
6,000

“Dear Lee: If your principal, ~~£8,000~~ & interest at 10 per cent is not paid as stipulated, I hereby make myself responsible for its payment.

“W. B. Lee, Esqre.

Yours sincerely,

JOHN SWANN.”

This paper was inclosed in a letter as follows:

“5 Fredericks Place, Old Jewry, E. C.
London, 18 March, 1873.

“Dear Lee: The security offered for the temporary loan to the

Phoenix Company consists of the bonds of the company to the amount of £100,000. As the price paid by the company for the property involved is \$1,000,000, this speaks for itself. I propose to go to New York myself, and I shall, of course, decline to hand over the money unless satisfied that the bonds are right and sound. If the whole issue of bonds are delivered to the lender, he becomes first mortgagee upon a freehold property worth fifty times the amount of the advance. I am willing to ^{and} make myself responsible for the payment of principal and interest as you request it. It is not my rule, and I should strongly object to do it, if I thought there was a shadow of a risk. I am, however, quite satisfied to make myself so responsible, as I should not only be able to sell bonds at once to the amount of your advance, but should have the whole property of the company to fall back on. I am personally acquainted with the land and know its value.

Yours sincerely,

“W. B. Lee.

JOHN SWANN.

“P. S. I enclose mem. to the effect above mentioned.”

It appears by the testimony that when these papers were sent to the claimant, he and the defendant's intestate were negotiating in regard to the making of a loan by the claimant to the Phoenix Iron and Coal Company, to be secured by bonds of the corporation, and upon which he was to be paid interest at the rate of ten per cent, and also a bonus of twenty per cent of the principal; and that a loan of £4,500 was soon after made, for which a receipt was given in these words:

“London, 30th April, '73.

“Received of W. B. Lee, Esq., the sum of four thousand & five hundred pounds (£4,500) for investment according to arrangement.

“£4,500.00.

JOHN SWANN. [Stamp.]”

There is no doubt under the authorities that the letter and receipt, as well as the paper containing the promise, may be used to complete the memorandum in writing required by the statute of frauds to make such a contract binding: *Owen v. Thomas*, 3 Mylne & K. 353; *Jackson v. Lowe*, 1 Bing. 9; *Barkworth v. Young*, 26 L. J. Ch., N. S., 153; *Bailey v. Sweeting*, 9 Com. B., N. S., 843; *Wilkinson v. Evans*, 35 L. J. Com. P., N. S., 224; *Oliver v. Hunting*, L. R. 44 Ch. Div. 205, and cases cited; *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Colbourn v. Dawson*, 20 L. J. Com. P., N. S., 154. It is also well settled that parol evidence may be introduced to show the situation of the parties and the circumstances attendant upon the transaction

for the purpose of applying the contract to the subject matter, and of showing the connection of different writings constituting the memorandum with one another: ⁴²⁹ New England etc. Co. v. Standard Worsted Co., 165 Mass. 328, 332; 52 Am. St. Rep. 516; Sullivan v. Arcand, 165 Mass. 364; Freeland v. Ritz, 154 Mass. 257; 26 Am. St. Rep. 244; Shortrede v. Cheek, 1 Ad. & E. 57; Bateman v. Phillips, 15 East, 272; Macdonald v. Longbottom, 1 El. & E. 987.

Applying these doctrines to the facts of the case, we have a contract of guaranty properly proved by a memorandum in writing sufficient in every detail, unless it be in regard to the meaning of the words "as stipulated," and in regard to the question whether the principal includes or excludes the bonus of twenty per cent in addition to the amount furnished by the claimant. There is very strong ground for the plaintiff's contention that the parol evidence of the contract between the claimant and the Phoenix Iron and Coal Company, in regard to the loan then contemplated and subsequently made, is competent to establish the meaning of these particulars of the memorandum of guaranty. But even if that were not so, we find a memorandum signed by Swann seven years later, in the form of a letter written in reply to the claimant's letter of April 16, 1880, which amounts to an acknowledgment that the stipulation was to pay the interest half-yearly, and the principal in September, 1875, and that the principal included the bonus as well as the money actually advanced. These particulars were plainly stated in the letter of the claimant. In Swann's letter in reply, he said: "I accept your proposal without hesitation. I can only say that I am not insensible to the tone and spirit of your letter." This must be taken as an admission that the contract was as stated. Under the authorities cited above, these letters, although written long afterward, may be used to establish the terms of the contract; and we are confirmed in our construction of them by the fact found in the report, that Swann "recognized his obligation to the claimant under the guaranty during the last years of his life, and never denied it."

The next question is, whether the claimant has forfeited his right to recover by making an alteration in the writing. The ⁴³⁰ figures 8,000, which he changed to 6,000, were material as a part of the description of the "principal," whose payment was guaranteed. The subject matter of the promise is the principal and interest at ten per cent, which the Phoenix Company promised to pay to the claimant in consideration of his loan. The figures which were inserted by way of description were not essential

to the validity of the contract. They were wrong, and they could not be helpful to either party in applying the writing to the subject matter of the contract. But being intended as a part of the description, they were not absolutely immaterial. If they had been correct, they would have been relied upon as an important part of the memorandum. Whatever their approximation to accuracy, they might be considered in connection with the other evidence in determining the meaning and application of the memorandum. We cannot treat this as a case of an absolutely immaterial alteration, although the legal effect of the memorandum, in its application to the facts proved, is the same in its original as in its altered form. Both before and after the alteration, this part of the description of the subject of the promise was erroneous, and while six thousand pounds was more nearly correct than eight thousand pounds as a statement of the amount of the principal, the difference is not probably of much practical importance. But treating it as not absolutely immaterial, we think that such an alteration, made in good faith, with a view to correct an error in a memorandum of this kind, does not deprive the party of his right to rely upon the memorandum to prove the original contract.

It is a general rule of law that a material alteration of an executory contract in writing, made by the promisee after its delivery, deprives him of his right to enforce it: *Boston v. Benson*, 12 Cush. 61; *Fay v. Smith*, 1 Allen, 477; 79 Am. Dec. 752; *Wade v. Withington*, 1 Allen, 561; *Commonwealth v. Emigrant etc. Sav. Bank*, 98 Mass. 12; 93 Am. Dec. 126; *Draper v. Wood*, 112 Mass. 315; 17 Am. Rep. 92; *Osgood v. Stevenson*, 143 Mass. 399. Two reasons are given for the rule: 1. That the identity of the contract is destroyed by the alteration; and 2. That no man shall be permitted, on grounds of ⁴⁸¹ public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected. But the rule is not applied in this commonwealth to a writing of this kind, where the alteration is made in good faith to correct an error, under circumstances showing an implied authority from the other party to make the correction. The principle underlying this exception to the general rule seems to be, that where no one's rights are injuriously affected, and where it appears that the alteration was made with a view to carry out the intention of the party who signed the paper, the change ought not to render the contract invalid: *Smith v. Dunham*, 8 Pick. 246; *Adams v. Frye*, 3 Met. 103. See, also, *Bluck v. Gompertz*, 7 Ex. 862; *Byron v. Thompson*, 11 Ad. & E. 31; *Waugh v. Bussell*, 5 Taunt. 707; *Brutt v.*

Picard, Ryan & M. 37; Cruchley v. Clarence, 2 Maule & S. 90; Wake v. Harrop, 6 Hurl. & N. 78; Hervey v. Harvey, 15 Me. 357; Horst v. Wagner, 43 Iowa, 373; 22 Am. Rep. 255. In Adams v. Frye, 3 Met. 103, where the alteration was by procuring one who knew the signature of the obligor in a bond to affix his own signature thereto as an attesting witness, although he was not present when the bond was signed, the alteration was treated as not absolutely immaterial, inasmuch as the attestation changed the method of proving the instrument, and it was held that the circumstances of the alteration were prima facie evidence of a fraudulent intent on the part of the obligee, but that the inference of fraud might be rebutted by proof, and that if the change was made without a fraudulent purpose it would not invalidate the contract. The change in the writing before us is not more important than that in the bond in Adams v. Frye, 3 Met. 103. The paper is not a formal contract, but it was intended as a mere memorandum. The figures originally inserted in it were not necessary to give it effect, and were in contradiction of the other evidence. The contract actually existing between the parties was not changed by the change in the figures. The memorandum, with the other competent evidence, proved the same contract after the change as before it. The writing, as a piece of evidence, was changed in a part of the description of the subject matter, but it was only one of several papers necessary to constitute the memorandum required by the statute of frauds. Applying to this case the rule applied in Adams v. Frye, 3 Met. 103, it is a question of ⁴³² fact whether the change was made in good faith or not. Bad faith is not to be presumed, and we do not find in this case, as was found in Adams v. Frye, 3 Met. 103, such circumstances as show prima facie a fraudulent intent on the part of the claimant. There was a manifest error in the statement of the amount of the loan. The testimony is, that the change was made with a view to correct the mistake, and that in some way a mistake was made in making the correction. The report discloses no such improbability in this testimony as to deprive it of credibility, and no such facts of any kind as to overcome the presumption of honesty, on which the claimant has a right to rely: Ely v. Ely, 6 Gray, 439.

The principal referred to in the memorandum is the four thousand five hundred pounds advanced, with the nine hundred pounds bonus, making five thousand four hundred pounds in all on which interest was to be paid, according to the agreement. This appears by the language of the report, and by the letters marked B, D, and E, which are annexed.

It is contended that the foreclosure proceedings in Georgia have deprived the claimant of his right under the guaranty, and *Lockhart v. Hardy*, 9 Beav. 349, and *Kinnaird v. Trollope*, L. R. 39 Ch. Div. 636, are relied on by the administrator. But the facts of the present case call for the application of a different rule. The plaintiff advanced money upon a contract to repay him the money with a bonus of twenty per cent, making five thousand four hundred pounds in all, with interest at ten per cent. For the performance of this contract he took collateral security in the form of bonds secured by mortgage to the amount of twenty thousand ⁴⁸³ pounds. These bonds were part of an issue of one hundred thousand pounds secured by the same mortgage. He also took a contract of guaranty from Swann. In pursuance of the power of sale contained in the mortgage, the form of his collateral security was changed by a foreclosure for the benefit of all the bondholders. This foreclosure was conducted by Swann, himself, who was one of the mortgagees, as trustee. It was understood by him that all he did was without prejudice to the claimant's rights under the contract of guaranty. But without reference to his understanding, a mere change in the form of the collateral security, under a power which went with the security, as part of it, has no effect upon the debt secured by the collateral. The claimant still holds the corporation's contract for the payment of five thousand four hundred pounds and interest, and the trustees have availed themselves of their right to dispose of the real estate in Georgia as a security going with the bonds. The bonds were never evidence of the principal debt from the corporation to the claimant, but were held by him subject to a right of redemption on the payment of five thousand four hundred pounds and interest. The claimant's interest in the real estate since the foreclosure is held subject to the same right. The debt which Swann guaranteed was not the mortgage debt, nor any part of it, and it still remains unpaid. The continued holding by the claimant of the security, whether in its original form or its changed form, does not affect his right to proceed against the defendant on the guaranty: *Lincoln v. Bassett*, 23 Pick. 154; *Taylor v. Cheever*, 6 Gray, 146; *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 710; *Tucker v. McDonald*, 105 Mass. 423. If the respondent pays the principal debt, he will be subrogated to the rights of the claimant to the collateral security.

Judgment for the claimant for the larger sum.

STATUTE OF FRAUDS—LETTERS AS MEMORANDUM—SUFFICIENCY OF.—A memorandum sufficient to satisfy the statute of frauds must be such that when produced in evidence it will inform

the court or jury of the essential facts set forth in the pleadings: *Note to Easton v. Montgomery*, 25 Am. St. Rep. 132. The memorandum may be constituted by correspondence between the parties upon the subject of the contract: *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456; *Hickey v. Dole*, 66 N. H. 336; 49 Am. St. Rep. 614, and note; *Singleton v. Hill*, 91 Wis. 51; 51 Am. St. Rep. 868, and note.

CONTRACTS—PAROL EVIDENCE TO VARY WRITTEN CONTRACTS—SITUATION OF PARTIES AND ATTENDANT CIRCUMSTANCES.—Evidence of the surrounding circumstances under which a contract was made, or of the prior verbal negotiations of the parties, is never admissible except for the purpose of clearing away ambiguities patent upon the face of the written contract: *Note to Appeal of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 894. See, also, *Schmittler v. Simon*, 114 N. Y. 176; 11 Am. St. Rep. 621; *Redfield v. Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889, and note. Conversations and negotiations preliminary to a written agreement, although merged in it, may still be admissible, not to explain its terms, but to throw light upon the question of its execution, or other questions connected therewith: *Wilbur v. Stoepel*, 82 Mich. 341; 21 Am. St. Rep. 568.

ALTERATION OF INSTRUMENTS—WHEN WILL AVOID.—An alteration will not avoid an instrument, though material and made without the knowledge or consent of one of the parties, if it is merely the correction of a mistake, to conform the writing to the intention of all the parties, and is made in a manner clearly negating the idea of any fraud or of a design to obtain an advantage thereby: *Foote v. Hambrick*, 70 Miss. 157; 35 Am. St. Rep. 631, and note. See, also, note to *Burrows v. Klunk*, 14 Am. St. Rep. 376; *Wolferman v. Bell*, 6 Wash. 84; 36 Am. St. Rep. 126, note.

GUARANTY—WHAT WILL DISCHARGE GUARANTOR.—A guarantor is discharged by an extension of the time for payment of the debt, whose payment he guarantees, unless he subsequently ratifies the extension: *Bishop v. Eaton*, 161 Mass. 496; 42 Am. St. Rep. 437; or by any change or alteration in a contract to which the guaranty was applicable: *Page v. Krekey*, 137 N. Y. 807; 33 Am. St. Rep. 731; or by unreasonable delay in foreclosure of a mortgage guaranteed, whereby the mortgaged premises are burned: *McMurray v. Noyes*, 72 N. Y. 523; 28 Am. Rep. 180. See, also, note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 814.

COMMONWEALTH v. FLYNN.

[167 MASSACHUSETTS, 460.]

LARCENY.—If a person sells another a ticket for twenty-five cents on the representation that he will furnish photographs therefor, and on being offered a dollar bill, says he will go and get it changed, and departs with it, and never returns, and, on being confronted with the other person, says he has never seen her, and gives different names to the arresting officer, and says he will have to suffer for some one else, he may be convicted of larceny of the bill, if the jury are of the opinion that he received it as agent of the other person for the purpose of getting it changed and retaining the twenty-five cents for himself, but with the intent of appropriating the whole of the bill to his own use.

LARCENY.—IF ONE OBTAINS POSSESSION OF PROPERTY BY FRAUD, it has the same effect as obtaining possession by a trespass, and the fact that the possession was obtained by the

former rather than by the latter method does not show that he was not guilty of larceny, if he obtained the possession with intent to appropriate the property to his own use.

CRIMINAL LAW—EVIDENCE.—If one arrested under a charge of larceny says to the arresting officer that he is not guilty, but that he will have to suffer for some one else, such statement is admissible in evidence against him.

Prosecution on a charge of larceny. The defendant sold Margaret Driscoll a ticket purporting to entitle her to a dozen photographs for a dollar and a half, twenty-five cents being paid in advance. He then stated to her that for another twenty-five cents he would furnish her a half dozen more of the pictures. She stated that she had a dollar bill, but had no change. He took the bill and put it in his pocket, saying he was going for the change. He then gave her two tickets, and left, but he never returned to her. A week or more afterward she saw him, but he denied ever having seen her. The ticket purported to be for photographs at the Revere Studio in Boston, but she never visited that studio nor applied to have any pictures taken. The police officer was permitted to testify, against the defendant's objection, that when the arrest was made, the defendant, on being asked whether he was guilty, replied, "No," and said he had to suffer for some one else, and gave several names instead of his true name. The court instructed the jury as follows: "The jury must be satisfied beyond a reasonable doubt that the defendant was the person who had the transaction with the witness Driscoll; and if they are not so satisfied, they must return a verdict of not guilty; and if they are so satisfied, they must determine whether the taking of the dollar bill was larceny. Ordinarily, larceny is the unlawful taking of property; but where the taking is by fraud and deceit, that is an unlawful taking. You have to consider in this place just what took place; you have the testimony of Margaret Driscoll as to what took place. The matter of this complaint does not rest upon the first twenty-five cents. Whether the first twenty-five cents was obtained to get off with it or not has nothing to with this case. She said that the defendant said to her that if she would pay twenty-five cents more that he would finish six pictures for her. She said she told him she did not have any more change; and then did he say to her that he would change a bill, and after he got the bill into his possession did he put it in his pocket, and did he then say that he had another man on the road, that he did not have the change, and that he would go out and get it changed? More than that, was that talk about changing the bill merely for the purpose of getting the bill into his

possession and going off with it? If so, then that was larceny. If, on the other hand, he intended to give her the change in good faith, and then went off and made up his mind not to return, that was not larceny. Did he get it into his possession for the purpose of making off with it, or did he get it to change it and afterward decide not to do so? What did he say—that he would give her the change, meaning that then and there he would give her the change? When he got the bill into his possession, was his conduct such as to indicate that he did not intend to return with the change? What was the intent with which he got it into his possession? If the whole scheme was to get the money from her by fraud and deception, for the purpose of depriving her of it, it was larceny. Before you can return a verdict of guilty, you should be satisfied that he got the bill by deception, with intent to convert it to his own use. The following instructions were asked for by the defendant, and refused: “1. There is not sufficient evidence to warrant the jury in finding the defendant guilty. 2. If the defendant fraudulently obtained possession of the piece of paper described in the complaint as the property of Margaret Driscoll, intending at the time he received it to convert it to his own use, Margaret Driscoll intending to part with her title to the piece of paper, but expecting to receive seventy-five cents in change from the defendant, he cannot be convicted of larceny upon this complaint. 3. If Margaret Driscoll purchased of the defendant a ticket for photographs and paid him twenty-five cents therefor, and the defendant thereupon offered to finish off several extra photographs for Driscoll for twenty-five cents more, and Driscoll accepted the defendant’s offer, and delivered to him in payment a dollar bill, expecting to receive back seventy-five cents in change, and the defendant fraudulently converted said seventy-five cents to his own use, he cannot be convicted of larceny of the dollar bill. 4. If Margaret Driscoll made an agreement with the defendant, and paid him pursuant thereto twenty-five cents, but in the form of a dollar bill from which he was to deduct his twenty-five cents, returning to Driscoll the change, the defendant owned an interest in said dollar bill, and cannot be convicted of larceny thereof.” Verdict of guilty.

C. W. Rowley, for the defendant.

J. D. McLaughlin, second assistant district attorney, for the commonwealth.

463 MORTON, J. The defendant was identified by the witness Driscoll as the man who obtained the bill from her, and, in

addition to the representations by which he induced her to part with it, there was evidence that he went away with it and never returned, and that when he was arrested, about ten days later, he denied that he had ever seen her before, gave different names to the officer who arrested him, and said that he had to suffer for some one else. It was competent for the jury to find on this testimony that the title to the bill did not pass to him, and that he obtained possession of it by fraud, with the present intent to convert it to his own use, and did so. This would constitute larceny: *Commonwealth v. Rubin*, 165 Mass. 453; *Commonwealth v. Lannan*, 153 Mass. 287; 25 Am. St. Rep. 629; *Commonwealth v. Barry*, 124 Mass. 325. The first of the rulings asked for by the defendant was therefore rightly refused.

The remaining instructions which were requested by the defendant present questions of more difficulty.

⁴⁶⁴ If the circumstances disclosed by the evidence were such as fairly to justify the inference that a relation of trust and confidence arose between the witness Driscoll and the defendant, so that he became her debtor for seventy-five cents, and she gave him credit therefor, then, the title to the bill having passed to him, he could not be convicted of larceny, though he had obtained possession of it by fraud: *Commonwealth v. Barry*, 124 Mass. 325. But if he was only her hand or agent to get the bill changed, with the right to retain twenty-five cents out of it when he had done so, returning the rest to her, and he obtained possession of the bill by fraud, with the intent at the time to appropriate the whole to his own use, and did so, then the title to the bill remained in her, and he was guilty of larceny: *Commonwealth v. Barry*, 124 Mass. 325; *Commonwealth v. Lannan*, 153 Mass. 287; 25 Am. St. Rep. 629; *Commonwealth v. O'Malley*, 97 Mass. 584; *Justices v. People*, 90 N. Y. 12; 43 Am. Rep. 135; *Murphy v. People*, 104 Ill. 528; 2 Bishop's Criminal Law, sec. 808.

Obtaining possession by fraud in such a case is regarded as having the same effect as obtaining possession by trespass: *Commonwealth v. Rubin*, 165 Mass. 453-455. We think that there was no evidence, or, if there was, that it was so slight as to be no more than a scintilla, that fairly would have warranted the jury in finding that the transaction was of the former, and not of the latter, character. The undisputed testimony was, that the defendant received the bill for the purpose of getting it changed, and that he was expected to do so immediately; and though the witness Driscoll did not expect the bill to be returned to her, but only to receive the seventy-five cents, that does not show,

and has no tendency to show, that she had parted with the title to the defendant. But the bill remained her property till he had delivered it to another person, and had received the change: *Commonwealth v. Lannan*, 153 Mass. 287; 25 Am. St. Rep. 629. Nor, for the same reason, was there any evidence which fairly would have warranted the jury in finding that the bill was delivered to the defendant in payment of the twenty-five cents which the witness Driscoll had agreed to pay him, meaning thereby that the property in the bill had passed to him. It was expected that he would receive his pay out of the dollar; but that is very different from saying that the bill, or any part of it, became his, and that the ⁴⁶⁵ effect of the transaction was to convert the witness Driscoll from his debtor into his creditor.

In the view of the case which we have taken, the instructions which we are now considering were each based in some particular on a hypothesis which the evidence did not warrant, and were, therefore, rightly refused. Those which were given were correct.

The statements which were made by the defendant to the officer are not shown to have been made under such circumstances as to render them incompetent: *Commonwealth v. Myers*, 160 Mass. 530.

Exceptions overruled.

LARCENY—INTENTION TO APPROPRIATE—OBTAINING POSSESSION BY FRAUD.—If possession of property is lawfully obtained, a subsequent appropriation of it is not larceny, unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands: *Smith v. Commonwealth*, 96 Ky. 85; 49 Am. St. Rep. 287, and note; also, *Commonwealth v. Williamson*, 96 Ky. 1; 49 Am. St. Rep. 285, and note. One who obtains the goods or money of another by some fraudulent trick or artifice and carries them away, is guilty of larceny: *Beasley v. State*, 138 Ind. 552; 46 Am. St. Rep. 418, and note; *State v. Woodruff*, 47 Kan. 151; 27 Am. St. Rep. 285, and note; also, *Commonwealth v. Lannon*, 153 Mass. 287; 25 Am. St. Rep. 629.

EVIDENCE—CRIMINAL CASES—DECLARATIONS OF ACCUSED BEFORE ARREST.—Statements made to an arresting officer before an arrest by a person accused of crime are admissible in evidence against him: *Brewer v. State*, 32 Tex. Cr. Rep. 74; 40 Am. St. Rep. 760. See extended note to *Nolen v. State*, 46 Am. Rep. 258-260.

DOLB BROS. CO. v. COSMOPOLITAN PRESERVING CO.

[157 MASSACHUSETTS, 481.]

PRINCIPAL AND SURETY.—If the principal did not execute the contract purporting to be executed by him, his sureties thereon are not liable. They are presumed to rely on the right of the creditor to proceed against the principal and upon their own right to recover from the principal, if they are compelled to pay for his benefit.

PRINCIPAL AND SURETY—OBLIGATIONS SIGNED BY AN AGENT WITHOUT AUTHORITY.—If sureties sign an obligation purporting to be executed for their principal by an agent, they are not bound thereby if the agent acted without authority, unless they had knowledge of his want of authority. It is not sufficient that they had reasonable cause to know of the absence of such authority.

Action upon a contract alleged to have been executed by the Cosmopolitan Preserving Company as principal and the other defendants as sureties. The contract purported to be executed on the part of the company by an agent, but it was shown that he acted without authority. The trial judge held that the sureties were, nevertheless, bound, and they alleged exceptions.

C. F. Allen and H. H. Newton, for the defendant sureties.

H. J. Boardman and P. G. Bolster, for the plaintiff.

⁴⁸¹ KNOWLTON, J. The defendants Lathrop and Wentworth are sued as sureties upon a bond to dissolve an attachment.

⁴⁸² The instrument purports to be a bond of the Cosmopolitan Preserving Company as principal, and Lathrop and Wentworth as sureties, and to be signed and sealed by the principal by the hand of an agent. In fact, the agent had no authority to sign for the corporation, and the question is, whether the sureties can be held on the bond.

It is well settled that, upon the face of the paper and the facts stated above, without more, they do not appear to be liable. Such an instrument is supposed to be signed by the sureties as a contract binding upon the principal as well as upon themselves. They may be presumed to rely upon the right of the obligee to proceed against the principal, and upon their own right to recover from him under the instrument if they are compelled to pay for his benefit: *Bean v. Parker*, 17 Mass. 591, 604; *Herrick v. Johnson*, 11 Met. 26; *Russell v. Annable*, 109 Mass. 72; 12 Am. Rep. 665; *Mattoon v. Barnes*, 112 Mass. 463, 466; *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460. The instrument as delivered was not what it purported to be, and not what the sureties, if they judged from the instrument alone, must have

supposed it to be. Without further proof, they cannot be held upon it.

The remaining question is, whether, upon the findings of the judge, the case is taken out of the general rule above stated. It is found that they knew, or had reasonable cause to know, that the agent had no authority to execute the bond in the name of the corporation. This finding was enough to justify the judge in refusing to rule, as matter of law, that the defendants were not liable. If they knew that the bond was improperly executed, when from the circumstances it would naturally be inferred that the plaintiff was relying upon it as properly signed, and binding upon both the principal and sureties, they ought to be estopped from setting up the invalidity of their promise. The judge went further, and ruled, as matter of law, upon the facts found that they were liable. He did not find that they had any knowledge of the agent's want of authority, but only that they had reasonable cause to know it. If, in fact, they had no knowledge or belief of it, they are not culpable in their dealings with the plaintiff. They owed the plaintiff no duty to investigate in regard to the validity of the signing for the principal, and it was certainly as much the plaintiff's duty as theirs to ascertain the facts. ⁴⁸³ Whatever might be their duty to the defendant corporation as directors, there was no negligence as between them and the plaintiff in their failure to discover facts in regard to the agent's want of authority, even if they had reasonable cause to know them. Their ignorance does not work an estoppel against them, nor in any way affect their right to have the ordinary rules of law applied when the plaintiff seeks to hold them on an instrument that was not signed by the principal.

They were not taking action, the validity and effect of which it was their duty to ascertain, so far as it depended upon what had previously been done by others. If it appeared that they were, the principle which is sometimes applied in cases of alleged ratification by a principal of acts done in his behalf might be invoked, and it would be held that, if they were taking action which ought to be founded on knowledge, their willful shutting of their eyes to facts, and deliberate determination to proceed without regard to facts, would be equivalent to knowledge: *Combs v. Scott*, 12 Allen, 493; *Kelley v. Newburyport etc. R. R. Co.*, 141 Mass. 496, 499; *Murray v. C. N. Nelson Lumber Co.*, 143 Mass. 250; *Wood v. Bullard*, 151 Mass. 324, 328; *Phosphate of Lime Co. v. Green*, L. R. 7 Com. P. 43. It does not appear that they willfully or deliberately ignored the facts. They may have been merely ignorant or obtuse.

Exceptions sustained.

SURETYSHIP—PRINCIPAL AND SURETY—DISCHARGE OF SURETY.—The sureties to a bond are not holden if the instrument is not executed by the person whose name is stated as the principal therein: *Russell v. Annable*, 109 Mass. 72; 12 Am. Rep. 665. See note to *Scott v. Fisher*, 28 Am. St. Rep. 691. As to the liability of a surety when the name of a principal or another surety is forged, see note to *Lombard v. Mayberry*, 8 Am. St. Rep. 246; also, note to *Bank v. Buchanan*, 10 Am. St. Rep. 619. A surety is not bound by any official bond, conditioned to be, but not, signed by the principal: *Bunn v. Jetmore*, 70 Mo. 228; 35 Am. Rep. 425. It is of the essence of the contract that there be a subsisting valid obligation of a principal debtor: *Russell v. Fallor*, 1 Ohio St. 827; 59 Am. Dec. 681.

GLIDDEN v. CHAMBERLIN.

[187 MASSACHUSETTS, 486.]

NEGOTIABLE INSTRUMENTS.—THE SIGNATURE OF MAKERS need not be proved in suits against indorsers. The indorsement of a note admits the signature of the apparent makers, and such signatures need not, therefore, be proved in an action against the indorsers.

CORPORATIONS—EXISTENCE OF NEED NOT BE PROVED IN SUITS AGAINST INDORSERS.—An indorser of a note purporting to be made by a corporation admits the corporate existence of the apparent maker, and therefore, in an action upon the note, cannot require the corporate capacity to be proved.

USURY, CONFLICT OF LAWS.—A contract between the seller and purchaser of a note is governed by the laws of the state where its sale or transfer is made, and cannot be affected by the laws against usury in the state where the note was executed.

NEGOTIABLE INSTRUMENTS—DISHONOR, WAIVER OF NOTICE OF.—An indorser's liability may be established by proving an unqualified promise to pay or an unqualified admission of liability made after the failure to give due notice to him of the dishonor, if he had knowledge of all the material facts. His knowledge of the failure to give him notice in due time of the presentment and dishonor may be inferred from the fact that he admitted he received no notice, together with the fact that the proper time for notice to have reached him had expired when he made the new promise or otherwise acknowledged his liability.

NEGOTIABLE INSTRUMENTS.—AN INDORSER'S PROMISE TO PAY A NOTE MADE AFTER THE FAILURE TO NOTIFY HIM of presentment and dishonor is binding on him if he knew that no notice had been given, though he did not know the legal effect of such omission.

NEGOTIABLE INSTRUMENTS — FAILURE TO KEEP AGREEMENT TO PROSECUTE MAKER.—If, after the maturity of a note, the indorsers agree to pay two per cent per month interest on such note, and a part of the consideration of the agreement was the promise of the holder to go to another state and undertake to enforce the note against the maker and prior indorser, the failure of the holder to do as agreed does not release the indorsers from their agreement, but they are entitled to have deducted from the amount due from them thereon any damage resulting to them by reason of the holder's failure to comply with his agreement.

NEGOTIABLE INSTRUMENTS—AGREEMENT TO LOOK TO MAKERS ONLY.—The fact that prior to the purchase of a note the purchaser had it in his possession several days and agreed to look up the responsibility of the makers, and, having done so, said they were good and that he would take the note, constitutes no defense against a subsequent agreement on the part of the indorsers to pay the note and also additional interest thereon.

INTEREST, ADDITIONAL FOR FORBEARANCE TO SUE. If the indorsers of a note bearing interest at the rate of six per cent per annum agree with the holder after maturity to pay interest at the rate of two per cent per month so long as the note remains unpaid, the agreement is valid and enforceable.

NEGOTIABLE INSTRUMENT — EVIDENCE TO SHOW WAIVER BY INDORSER.—If it is sought to show that the indorsers of a note have waived notice to them of presentment and dishonor, the evidence must be clear and explicit. Circumstances and conversations equivocal in character and not amounting to a distinct promise, or a clear admission of liability, are not sufficient.

NEGOTIABLE INSTRUMENTS.—THE WAIVER OF NOTICE OF PRESENTMENT AND DISHONOR is not established by an agreement made by the indorser after such notice ought to have been given to the effect that he would pay interest at the rate of two per cent on the note while it remained unpaid.

Action against George B. Chamberlin and Samuel W. Spofford. The complaint contained two counts, one of which was upon a promissory note dated February 16, 1893, signed "Enterprise Mining & Transportation Co., Robt. J. Boys, Treas.," and indorsed by the payee and defendants. The second count was upon an instrument dated July 8, 1893, signed by the defendants and agreeing to pay plaintiff, at such time as he may demand it, interest at the rate of two per cent per month on and after June 16, 1893, on the note hereinbefore described, so long as such note or any part thereof shall remain unpaid, and further agreeing to pay plaintiff any expense which he might sustain when attempting to collect the note from the maker or first indorser, including attorneys' fees and traveling expenses. The answer denied the genuineness of the signature to the note and the incorporation of the corporation by which it purported to have been executed. On the maturity of the note, a demand was made for its payment in New York, where it was payable. The signature of the defendants as indorsers of the note was admitted. The note was received in evidence against the objections of the defendants, but neither the signature of the maker nor its corporate capacity had been proved. There was testimony to the effect that within ten days after the note became due the attorney of the plaintiff saw the defendant Spofford and demanded payment of the note, that Spofford requested the attorney to see Chamberlin, that the attorney replied that he had already seen Chamberlin, who requested him to see Spofford, that after the note became due, the

attorney communicated with both the defendants, that the defendant Chamberlin said he could not raise the money at that time, but that he would do what he could, and wanted to know why the plaintiff did not prosecute the makers and first indorsers. To this the plaintiff's attorney responded that they did not propose to go to New York to get the money, that Chamberlin requested him to wait before bringing suit and said they would pay a fair rate of interest; that subsequently plaintiff informed Chamberlin that he should be given a little time, provided he would pay two per cent a month interest, and an agreement was subsequently drawn and signed by both the defendants by which they stipulated to pay interest at the rate of two per cent per month on the note while it remained unpaid. The testimony also showed that the defendant Spofford, on being advised of the nonpayment of the note, said he would pay it the next day or day after. The note was for the sum of two thousand five hundred dollars, and was bought of the defendant Spofford in March, 1893, for the sum of two thousand three hundred and thirty-three dollars and thirty-three cents, and was indorsed to the plaintiff in the state of Massachusetts, where he and the defendants then resided. The defendants offered in evidence the statutes of New York upon the subject of interest to show that by those statutes no interest greater than six per cent could be charged or received on any note or contract. These statutes were excluded from evidence, and the defendant excepted. The judge instructed the jury as follows: "What liability did these defendants incur as indorsers of this note at the time it was negotiated and transferred to the plaintiff? Their liability, I have no doubt you know very well, was not to pay this note at all events; it was not the liability of a maker who promises absolutely to pay a sum to the person who is the legal holder of a note, but it was a conditional liability; it was a promise on their part to pay the note to the plaintiff, provided when the note became due payment was demanded at the bank where it was made payable, and payment was there refused, and these defendants were seasonably notified of the demand made upon the maker, and the maker's refusal to pay. One of the main defenses, and, so far as the first count is concerned, substantially the only defense you will need to consider, is that while it appears in the case from the notarial certificate, which is not controverted, that the demand was seasonably and properly made in New York, at the bank where the note was payable, for the payment of the note, yet that no proper notice, such as the law required, was ever given to these defendants, or

either of them, and therefore that the action cannot be maintained against them. The burden is upon the plaintiff to satisfy you that such notice was given to the defendants, or that the defendants, by their acts and their conduct, waived the giving of such notice. There is no evidence in the case from which you would be justified in finding that the notice which the law required was given to either of these defendants. The right of the plaintiff, then, so far as the first count is concerned, depends upon whether these defendants have so conducted themselves that the law will not permit them to interpose the failure to give notice to them as a defense in this suit. So far as the defendant Spofford is concerned, I instruct you, as matter of law, that there is evidence in the case which, if believed by you, will justify you in finding that Spofford waived the right to notice. You will recollect that there is evidence tending to show that Spofford, some considerable time after the maturity of the note, in conversation with the plaintiff or the plaintiff's attorney, promised unqualifiedly to pay the note. On the other hand, of course, you will take into consideration the testimony of Spofford that he made no promise to pay. You must say what the truth is, the burden being upon the plaintiff to show that such a promise was made. If the plaintiff has failed to satisfy you that such promise was made, then the plaintiff is not entitled to a verdict upon the first count against Spofford. Suppose you find that Spofford did make that promise, then if he made that promise with knowledge that no notice such as the law required had been given him of the nonpayment of the note, the plaintiff is entitled to a verdict as against Spofford; you will be justified in finding that Spofford did have knowledge that no such notice had been given to him in view of the fact, which you may well assume to be true, that he had received no such notice." The judge also refused to give instructions numbers 1 to 8 presented by the defendants, which instructions were as follows: "1. There is no evidence of protest as against the defendants, or that they received legal notice of the dishonor of this note; 2. In order that the plaintiff may recover against the defendants as indorsers, the plaintiff must show that they were legally notified of its dishonor or nonpayment by the maker; 3. The evidence of the notarial certificate, and the facts therein recited, are not sufficient evidence to entitle the plaintiff to recover against these defendants; 4. In order that the plaintiff may recover as against the defendants, the plaintiff must show dishonor and notice of nonpayment to these indorsers by the next mail; 5. In order to show a waiver

of protest and notice, the plaintiff must show that the defendants knew that they were released for want of notice, and that, knowing that, they promised to pay the note; 6. In order to show a waiver of protest and notice, the plaintiff must show that the defendants knew that they were released for want of notice, and that, knowing that, they, for a valuable consideration, promised to pay the note; 7. If the plaintiff charged, reserved, and took more than six dollars upon the one hundred dollars for one year, upon the note in suit, the note is void, and the plaintiff cannot recover against the defendants; 8. The note in suit being a note dated in New York, and payable in the city of New York, is to be governed by the laws of New York." The court also instructed the jury that if the plaintiff had promised to go to New York to endeavor to collect the note by suit against the maker and first indorser, and failed to do so, such failure would not avoid the contract to pay two per cent a month interest, or that plaintiff could recover the amount due on such contract after deducting therefrom any damages which the jury might find that the defendant had sustained by reason of the failure of the plaintiff to comply with his agreement. The judge also instructed the jury that the evidence was not sufficient to warrant a verdict against the defendant Chamberlin upon the promissory note. The jury gave a verdict for the plaintiff as against the defendant Spofford for the principal and interest of the note and against both defendants for interest thereon at the rate of two per cent per month from June 16, 1893, to the trial. The plaintiff and the defendant Spofford each alleged exceptions.

E. B. Hale, for the plaintiff.

C. F. Eldredge, for Spofford.

G. P. Wardner, for Chamberlin.

⁴⁹⁴ ALLEN, J. We will first consider the exceptions taken by the defendant Spofford.

1. The note was rightly admitted in evidence. The defendant's indorsement admits the signature and capacity of every prior party: *Prescott Bank v. Caverly*, 7 Gray, 217; 66 Am. Dec. 473; *Byles on Bills*, 13th ed., 155; *Daniel on Negotiable Instruments*, 4th ed., sec. 669 a, 675, 676. This includes the existence and capacity of a firm: *Dalrymple v. Hillenbrand*, 62 N. Y. 5; 20 Am. Rep. 438; and, by the same reasoning, the existence and capacity of a corporation.

2. The evidence offered as to the law of New York respecting usury was rightly excluded. The contract between the selling

indorsers and the plaintiff was a Massachusetts contract, and is governed by the laws of this commonwealth: *Williams v. Wade*, 1 Met. 82; *Slacum v. Pomery*, 6 Cranch, 221; *Lee v. Selleck*, 33 N. Y. 615; *Greathead v. Walton*, 40 Conn. 226; *Daniel on Negotiable Instruments*, 4th ed., sec. 899.

3. The presiding justice instructed the jury that there was no evidence from which they would be justified in finding that the notice of dishonor which the law requires was given to either of the defendants. The question remains as to the alleged waiver of such notice by a subsequent unqualified promise to pay the note, with knowledge that no notice such as the law requires of the nonpayment of the note had been given to him. There is no doubt that an indorser's liability may be established by proof of an unqualified promise to pay, or other unqualified admission of liability, made after a failure to give due notice to ⁴⁰⁵ him of the dishonor, if he had knowledge of all material facts: *Hobbs v. Straine*, 149 Mass. 212; *Parks v. Smith*, 155 Mass. 26. The defendant Spofford now argues that his alleged promise was before he knew that no notice had been sent to him. It seems probable that this view was not presented at the trial, and that it is not now open. But, however this may be, the evidence would well warrant a finding that he then had this knowledge. He testified that he had received no notice; and from the other evidence the jury might find that the proper time for the notice to come, if it had been duly sent, had passed, especially as he made no suggestion to the contrary at the trial.

The fifth and sixth requests for instructions were properly omitted to be given in terms, because it was not necessary for the plaintiff to show that the defendant knew that he was released from liability for want of due notice of the dishonor; it was enough if he knew the fact that no notice had been sent to him; without knowing the legal effect of such omission: *Third Nat. Bank v. Ashworth*, 105 Mass. 503; *Matthews v. Allen*, 16 Gray, 594; 77 Am. Dec. 430; *Givens v. Merchants' Nat. Bank*, 85 Ill. 442, 444; *Daniel on Negotiable Instruments*, 4th ed., sec. 1148. The rule is the same in case of a new promise by an infant after becoming of age: *Morse v. Wheeler*, 4 Allen, 570.

4. In respect to the special agreement declared on in the plaintiff's second count, direct evidence was introduced without objection tending to prove that the plaintiff had agreed, as a part consideration for it, to go to New York and undertake to bring suit against the maker and the first indorsers, and use his best efforts to collect the note; and the court instructed the jury that, if the plaintiff so agreed, and failed to do so, such failure

would not be an avoidance of the contract, and that the plaintiff could recover the amount claimed in said count up to the time of the trial, after deducting therefrom any damages which the jury might find the defendants had sustained by reason of such failure. But the defendant excepted to the exclusion of evidence that, at the time the note was purchased of the defendant by the plaintiff, he held the note in his possession for several days, and agreed to look up the responsibility of the makers, and did so, and said that they were all right and perfectly good, and he would take the note. This evidence was properly excluded. ~~496~~ The note was bought by the plaintiff in March, 1893, and the agreement declared on was dated July 8, 1893. The evidence offered had no legitimate tendency to prove that at the latter date the plaintiff agreed to do the things asserted.

5. The defendant contends that the court erred in allowing the plaintiff to recover on the second count to the time of the trial. No such point was taken at the trial. But the ruling was right: *Union Inst. for Savings v. Boston*, 129 Mass. 82; 37 Am. Rep. 305; *Bowers v. Hammond*, 139 Mass. 360; *Lamprey v. Mason*, 148 Mass. 281; *Schmidt v. People's Nat. Bank*, 153 Mass. 550.

We come now to the exception taken by the plaintiff in respect to the liability of the defendant Chamberlin. The only question saved is, whether the plaintiff had any evidence for the jury to show that Chamberlin had received notice of the dishonor of the note, or that he had waived notice thereof.

The notarial certificate did not show any notice to either of the defendants, and there was no evidence of such notice to Chamberlin, except from his subsequent conversations with the plaintiff's attorney, and from the fact of his entering into the subsequent agreement which is declared on in the second count. These conversations included no direct admission by Chamberlin that he had received such notice, and no direct acknowledgment of liability or promise to pay. Instead of calling somebody to testify that such a notice was sent or given to Chamberlin, the plaintiff wished to ask the jury to infer this fact from the conversations and the fact of the subsequent agreement, or else to find a waiver of such notice.

A distinction is sometimes taken between evidence which will warrant an inference that due notice of dishonor was in fact given, and evidence of a waiver of the omission to give such notice. This distinction was adverted to in *Andrews v. Boyd*, 3 Met. 434, where the evidence was held sufficient to show a waiver, if not to warrant a finding of actual notice. The deci-

sions which go farthest in admitting circumstances to go to the jury as evidence of actual notice have been criticised in 1 Parsons on Notes and Bills, 616, and Daniel on Negotiable Instruments, 4th ed., sec. 1160. If circumstantial evidence alone is relied on, it may often be easier to establish a waiver than the fact of actual notice, but the general considerations which weigh in determining the sufficiency of such evidence are much alike in both cases.

⁴⁹⁷ In this commonwealth, where one is under no existing liability upon a contract, either because the contract was made during infancy, or by reason of the statute of limitations, or of a discharge in insolvency, or because his name has been forged or signed without authority, or for want of demand or notice of dishonor to an indorser of a bill or note, and it is sought to establish a liability by proof of ratification, new promise, adoption, or admission of liability, the rule has been held with some strictness that the proof must be clear and distinct: See, as to cases of infancy, Proctor v. Sears, 4 Allen, 95; Tobey v. Wood, 123 Mass. 88; 25 Am. Rep. 47; as to cases under the statute of limitations: Weston v. Hodgkins, 136 Mass. 326; Krebs v. Olmstead, 137 Mass. 504; Custy v. Donlan, 159 Mass. 245; 38 Am. St. Rep. 419; Boynton v. Moulton, 159 Mass. 248; as to cases of discharge in insolvency: Bigelow v. Norris, 139 Mass. 12; Kenney v. Brown, 139 Mass. 345; as to cases of forgery or unauthorized signature: Greenfield Bank v. Crafts, 2 Allen, 269; 4 Allen, 447; Traders' Nat. Bank v. Rogers, 167 Mass. 315; ante, p. 458; and as to cases of indorsers: Creamer v. Perry, 17 Pick. 332; 28 Am. Dec. 297; Parks v. Smith, 155 Mass. 26. An unqualified admission of liability, or a direct promise to pay, which imports such admission, is evidence of the most satisfactory kind. Evidence of circumstances or of conversations which are equivocal in their character, and which do not import a clear admission of liability, or amount to a distinct promise to pay, and which are consistent with the view that the indorser was merely seeking to avoid or postpone a suit against himself, are not satisfactory evidence either to prove actual notice or to re-establish the indorser's liability after it has ceased for want of demand or notice.

We lay no stress on the defendant's contention that he was ignorant of the fact that a demand had been made. If no demand had been made, that fact would be material, because it would release the indorsers from liability. But a fact which would not release them from liability is immaterial, and if the indorsers in this case assumed that a demand was made, they were not harmed by that assumption. We also think the evi-

dence was sufficient to warrant a finding that Chamberlin knew that no notice had been given to him, because he knew that he had received none.

⁴⁹⁸ But the plaintiff's evidence fails to show an admission of liability by Chamberlin, or a new promise, with such distinctness as the law requires. His words and acts were at most equivocal, and were consistent with another hypothesis than that of an admission of liability. In *Creamer v. Perry*, 17 Pick. 332, 28 Am. Dec. 297, there was evidence that the indorser said, "The note will be paid." The court said, "This is quite as consistent with the hypothesis, that it was a mere assertion of his expectation, that it would be paid by the promisor, as of a promise on his own part to pay it." Accordingly it was held that the plaintiff was not entitled to go to the jury: See, also, *Haskell v. Boardman*, 8 Allen, 38. Where the evidence is equally consistent with some other hypothesis than that which the plaintiff is bound to establish, his case fails: *Smith v. First Nat. Bank*, 99 Mass. 605; 97 Am. Dec. 59. This doctrine is often applied in accident cases: See, also, *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27, and *Smith v. Kelley*, 13 Met. 309, where it was held that there was nothing for the jury to show ratification by an infant after he came of age. In the present case, it is quite plain that the defendant disliked to be sued, and perhaps was afraid that he might be held bound to pay the note; but upon the evidence the jury would not have been warranted in finding that he assumed the duty of paying it, or waived the notice of dishonor. All that he said or did was equally consistent with another hypothesis: See, also, *Hussey v. Freeman*, 10 Mass. 84; *Daniel on Negotiable Instruments*, 4th ed., sec. 1163, where other instances of equivocal words being held insufficient to show waiver are cited.

The subsequent written agreement has no greater effect. The promise which it contained was limited to interest.

Exceptions overruled.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—EFFECT AS TO PRIOR SIGNATURES.—By placing his own name on a draft as indorser one admits the legal ability and signature of every antecedent party: *Prescott Bank v. Caverly*, 7 Gray. 217; 66 Am. Dec. 473, and note. Also, see *Rhodes v. Jenkins*, 18 Colo. 49; 36 Am. St. Rep. 263, and note.

CORPORATIONS—SUITS BY AND AGAINST—PROOF OF CORPORATE EXISTENCE.—The existence of a corporation is established prima facie by evidence tending to show that it transacted business as such: *People v. Formosa*, 131 N. Y. 478; 27 Am. St. Rep. 612, and note. For a complete discussion of the question as to when, in suits by or against a corporation, it is necessary to plead its corporate existence, see notes to *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 375, *Miller v. Pine Min. Co.*, 35 Am. St. Rep. 291, and *Schloss v. Montgomery Trade Co.*, 18 Am. St. Rep. 54.

USURY—CONFLICT OF LAWS.—The laws of the place where a contract is made control in any question of usury which may arise: See extended note to *Morris v. Hockaday*, 55 Am. Rep. 609-618. A note dated in one state, executed and delivered by a resident of that state in another state, reserving a rate of interest legal in the former, but illegal in the latter, state, may be enforced in the former state, if it is shown that the parties intended that the law of that state should govern the contract: *Bigelow v. Burnham*, 90 Iowa, 300; 48 Am. St. Rep. 442, and note. See, also, *Meroney v. Atlanta Building etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841, and note.

NEGOTIABLE INSTRUMENTS—WAIVER OF NOTICE OF PRESENTMENT AND DISHONOR—WHAT CONSTITUTES.—Such conduct on the part of an indorser toward a holder as is calculated to put a person of reasonable prudence off his guard, or to induce him to omit demand, protest, or notice of dishonor, will dispense with the necessity of taking these steps: *Boyd v. Bank of Toledo*, 32 Ohio St. 526; 30 Am. Rep. 624. Waiver of demand and notice need not be direct and positive, but may be implied from usage or from any understanding between the parties showing satisfactorily that waiver was intended: *Fuller v. McDonald*, 8 Greenl. 213; 23 Am. Dec. 499, and note. An indorser whose liability has not been fixed by notice, and who, with knowledge thereof, subsequently either acknowledges his liability or promises to pay the note, is bound by such recognition: *Bogart v. McClung*, 11 Heisk. 105; 27 Am. Rep. 737. See, also, *Whitaker v. Morrison*, 1 Fla. 26; 44 Am. Dec. 627, and note. See note to *Trimble v. Thorne*, 8 Am. Dec. 304.

NEGOTIABLE INSTRUMENTS—WAIVER OF NOTICE OF PRESENTMENT AND DISHONOR—EVIDENCE.—The indorsee cannot show as against the indorser of negotiable paper, that at the time of indorsement it was verbally agreed that presentment for payment, notice thereof and of nonpayment, need not be made or given: *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742, and note; also, *Piscataqua etc. Bank v. Carter*, 20 N. H. 246; 51 Am. Dec. 217, and note. Contra, *Sanborn v. Southard*, 25 Me. 409; 43 Am. Dec. 288, and note; also, *Annaville Nat. Bank v. Kettering*, 106 Pa. St. 531; 51 Am. Rep. 536, and cases cited in note.

CARNIG v. CARR.

[167 MASSACHUSETTS, 544.]

A CONTRACT FOR PERMANENT EMPLOYMENT SHOULD BE CONSTRUED AS MEANING that where the employer had work which the employé could do and desired to do, and was able to do satisfactorily, his employment should be continued. Such a contract is, therefore, capable of enforcement, and is not defective for want of mutuality.

STATUTE OF FRAUDS—CONTRACT FOR PERMANENT EMPLOYMENT.—If a person carrying on the business of an enameLER agrees to abandon such business and enter the services of another who, on his part, agrees to furnish the former permanent employment at stipulated wages, such contract is not within the statute of frauds, because it can be completely performed within a year.

RESTRAINT OF TRADE.—A CONTRACT TO ABANDON ONE'S BUSINESS AND ENTER THE PERMANENT EMPLOYMENT OF ANOTHER in the same line of business is not in restraint of trade, nor against public policy.

Action of tort. The complaint alleged that the plaintiff, in November, 1893, was in business as an enameler in Boston, and that he and the defendant then entered into a contract by which it was agreed that plaintiff should give up his business and sell his stock in trade to the defendant, who, on his part, agreed to employ the plaintiff permanently at a salary of eighteen dollars per week as an enameler and engraver, that the plaintiff thereupon entered into the employment of the defendant and continued the faithful discharge of his duties until about May 1, 1894, when he was discharged without cause by the defendant, who refused to thereafter employ him. At the trial the defendant requested the court to charge the jury that the action could not be maintained on the complaint. This request was refused, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

E. G. McInnes, for the defendant.

S. L. Whipple and W. R. Sears, for the plaintiff.

546 MORTON, J. There was evidence tending to show that the defendant agreed that, if the plaintiff would give up his business, which was that of an enameler, and enter his service in the same occupation, he would furnish him with permanent employment at stipulated wages; that the plaintiff gave up his business, and entered the defendant's employment and continued therein several months, receiving wages at the rate agreed, when the defendant suspended his employment, and finally ceased altogether to employ him, though he had work of the kind which the plaintiff was to do.

The defendant contends that the contract is too indefinite to be capable of enforcement; that it is within the statute of frauds; that the plaintiff's agreement to give up his business was unlawful, and therefore the contract is void for want of consideration; and that the action cannot be maintained on the declaration.

547 To ascertain what the parties intended by "permanent employment," it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood. For it fairly may be assumed that the parties used and understood them in that sense: *Schuykill Navigation Co. v. Moore*, 2 Whart. 477, 491. Looking at the matter in that way, we think that the words would be commonly understood as meaning that,

so long as the defendant was engaged in enameling and had work which the plaintiff could do and desired to do, and so long as the plaintiff was able to do his work satisfactorily, the defendant would employ him, and that in that sense the employment would be permanent; that is, the plaintiff would be under no necessity of looking for work elsewhere, but could rely on the arrangement thus made. So construed, the contract would be capable of enforcement, and there would be no want of mutuality because the plaintiff might not have bound himself to continue in the defendant's employment. The construction contended for by the defendant, namely, that it was for him to say whether he needed the plaintiff's services or not, would put the plaintiff entirely at the defendant's mercy, and, in view of the fact that the plaintiff was to give up his business to enter the defendant's employment, would be such an agreement as he could not reasonably have been expected to make: See *Russell v. Allerton*, 108 N. Y. 288. On the other hand, it would be equally unreasonable to hold that the defendant could have intended to bind himself to employ the plaintiff so long as they both lived, regardless of his continuing in the enameling business, or of the plaintiff rendering satisfactory service. The plaintiff does not indeed contend for such a construction. If it is difficult, as the defendant insists that it is, to lay down a rule for estimating the damages arising from the breach of such a contract as we have construed this to be, the difficulty is no greater than exists in many other cases, and does not present an insuperable objection to recovery.

The construction which we have given to the contract disposes of the defense of the statute of frauds. It has been repeatedly held that, if an agreement whose performance would ⁵⁴⁸ otherwise extend beyond a year may be completely performed within a year on the happening of some contingency, it is not within the statute of frauds: *Peters v. Westborough*, 19 Pick. 364; 31 Am. Dec. 142; *Lyon v. King*, 11 Met. 411; 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray, 168; 71 Am. Dec. 696; *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80; *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *Bartlett v. Mystic River Co.*, 151 Mass. 433; *McGregor v. McGregor*, 21 Q. B. Div. 424. In this case, to say nothing of other contingencies, the contract would have been completely performed if the defendant had ceased to carry on business within a year.

The contract did not impose an unlimited restraint upon the plaintiff, but at most only restrained him from engaging in business so long as he continued in the employment of the defend-

ant. There was nothing unlawful or against public policy in such a contract: *Morse etc. Machine Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513.

The defendant did not demur to the declaration, and, although his answer raised certain objections to it, he seems to have been content to go to trial on it as it stood. He does not claim that he was misled by it as to the real nature of the plaintiff's demand, and we do not think that the declaration was so fatally defective as to require the court to instruct the jury that at the stage of the case at which the request was presented the action could not be maintained: *Moor v. Boswell*, 5 Mass. 306; *Haverhill Loan etc. Assn. v. Cronin*, 4 Allen, 141.

Whether the contract was waived or annulled was properly submitted by the court to the jury, and decided by them adversely to the defendant. It was a question of fact for them to decide.

Exceptions overruled.

CONTRACTS — STATUTE OF FRAUDS — AGREEMENTS WHICH MAY BE PERFORMED IN ONE YEAR.—The fact that the agreement may not be and was not executed to be performed within a year does not bring it within the statute of frauds, if it is one which admits of a valid execution within that time: *Warren etc. Mfg. Co. v. Holbrook*, 118 N. Y. 586; 16 Am. St. Rep. 788, and note. See, also, note to *Dant v. Head*, 29 Am. St. Rep. 373, and *Hall v. Solomon*, 61 Conn. 476; 29 Am. St. Rep. 218.

CONTRACTS IN RESTRAINT OF TRADE—WHEN VOID.—Although agreements in general restraint of trade are void as against public policy and as creating monopolies, yet an agreement in partial restraint of trade will be upheld when the restriction does not go beyond some particular locality, is founded upon sufficient consideration, and is limited as to time, place, and person: *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297, and note. See extended note to *Callahan v. Donnolly*, 13 Am. Rep. 173-176; *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. FALLON.

[152 NEW YORK, 12.]

LOTTERIES—PREMIUMS FOR HORSE-RACING.—An association which holds a meeting for the racing of horses, offering prizes or premiums to be contested for, of a definite sum, without regard to the entry fees received, and payable out of the general funds of the association, is not guilty of a violation of that part of the Penal Code forbidding lotteries and the sale of lottery tickets.

BOOKMAKING AND POOLSELLING.—The holding of a meeting for the racing of horses in the ordinary manner does not render the association holding it guilty either of bookmaking or of poolselling.

GAMBLING, WHAT IS NOT.—The offering and paying premiums or prizes by an association to the owner of horses contesting at racing held by such association is not gambling, where the fees paid to such association are put into its general fund, and become, for the time being, a part of its assets, subject only to the obligation of the association to pay out of its funds the sums which it has offered as premiums or prizes. Horseracing, under such circumstances, differs from that in which a stake is contributed by the participants alone.

SPECIAL LAWS.—If a statute prohibits the racing for stakes except as allowed by special laws, a statute authorizing the organization of a racing association, and permitting it to offer prizes or purses to the owner of horses competing therein, is a special law, and justifies the association in doing the acts permitted by the last-named statute.

John D. Lindsay and Benjamin Steinhardt, for the appellant.

Elihu Root, Joseph Auerbach, and John M. Bowers, for the respondent.

16 MARTIN, J. The relator was arrested upon three distinct criminal charges. One was for a violation of chapter 8 of the Penal Code, forbidding lotteries and the sale of lottery tickets,

another for violating section 351 of the Penal Code, which relates to poolselling, bookmaking and bets and wagers, and the third for an offense under section 352 of the same act, relating to racing of animals for stakes. When arraigned before the magistrate, he waived an examination and was committed to the city prison. He subsequently sued out a writ of habeas corpus, upon the return of which a certiorari was granted, and, upon the hearing before the oyer and terminer, he was discharged.

The facts, so far as material, may be briefly stated. The relator was an officer of the Westchester Racing Association, which was organized under chapter 570 of the laws of 1895. He, together with other officers of the association, announced and advertised the intention of the association to hold a meeting for races on its grounds, and offered purses or premiums to be competed for at a time named. Owners of horses were permitted to enter them for the races by paying an entrance fee, which became the property of the association, was paid into its general treasury and became a part of its general assets. ¹⁷ The premiums or stakes offered by the association were for a definite sum, without regard to the amount of entrance fees received, and were payable out of its general funds. The races were advertised, managed, and held under the direction of the association and its officers, conducted in the usual way, and governed by the rules generally adopted by racing associations.

The first contention of the appellant is, that the races thus held were in direct violation of chapter 8 of the Penal Code, which forbids lotteries and the sale of lottery tickets. That statute defines a lottery as a scheme for the distribution of property by chance, among persons who pay or agree to pay a valuable consideration for the chance. It is obvious from the language of this statute, and the circumstances existing at the time of its passage, that it was not intended to include within its provisions every transaction which involved any degree of chance or uncertainty, but its plain purpose was to prohibit and punish certain well-known offenses which had existed and been regarded as crimes before the enactment of that law. The offenses thus sought to be suppressed have long been known and understood, and are clearly distinguishable from the racing of animals for stakes or prizes. There is certainly a great difference between a contest as to the speed of animals for prizes or premiums contributed by others and a mere lottery, where the controlling, and practically the only element, is that of mere chance alone. A race or other contest is by no means a lottery simply because its

result is uncertain, or because it may be affected by things unforeseen and accidental. When this statute against lotteries was passed, the legislature not only defined the meaning of the term, which cannot be fairly said to include a test of speed or endurance of horses for prizes or premiums, but it at the same time passed a statute relating to the racing of horses, which shows that such a contest was not intended to be included among the offenses which should be punishable under the statute against lotteries. What constitutes a lottery was considered in *Reilly v. Gray*, 77 Hun, 402. The opinion in that ¹⁸ case and the authorities there collated show quite satisfactorily that acts like those performed by the relator do not and were not intended to constitute an offense under the statute relating to that subject. We are of the opinion that the courts below properly held that the relator was guilty of no offense under the statute relating to lotteries.

After a careful examination of the record, brief, argument, and authorities cited by the learned counsel for the appellant, we fail to find any facts or to discover any principle of law that would justify us in holding that the relator was guilty of either book-making or poolselling. Nor do we find that there was any evidence even tending to show that he was guilty of either of those crimes.

Another question we are asked to determine is, whether the races held by the association, of which the relator and his associates were officers, constituted gambling within the provisions of the constitution of this state. The appellant contends that they did, and, consequently, even if authorized by statute, the statute was violative of the provisions of the constitution, which forbids lotteries or the sale of lottery tickets, poolselling, book-making, and every other kind of gambling, and, therefore, affords no protection or justification to the relator. Chapter 570 of the laws of 1895 authorized associations organized under the provisions of that act to hold and conduct meetings for running or trotting races for purses, premiums, prizes, or stakes, to be contributed by the corporation or owners of horses engaged in the races, or others who were not participants therein, but forbade any other person than the owners of contesting horses from having any pecuniary interest in such prizes or premiums contested for, or from being entitled to receive any portion thereof after the race was finished, and further provided that the whole of such prize should be awarded according to the conditions of the race. The validity of that statute is challenged, and the appellant insists that it is void for the reason that it authorized a

species of gambling which was in terms forbidden by the constitution of the state. As it was conceded in this case that the moneys contributed by ¹⁹ the horse owners participating in the races were paid into the general treasury of the association, and became, for the time being, a part of its general assets, subject only to the obligation of the association to pay out of its funds the amount of three thousand five hundred dollars to the owners of the first, second, and third horses in the races, the inquiry arises whether the offering or paying of premiums or prizes contributed in that manner constitutes gambling, within the meaning of the constitutional provision referred to. There is a plain and obvious distinction between a race for a prize or premium contributed in that manner, and a race where the stake is contributed by the participants alone, and the successful contestant is to have the fund thus created. The latter is a race for a mere bet or wager, while the former is for a prize offered by one not a party to the contest. In *Harris v. White*, 81 N. Y. 532, Judge Folger fully discussed and quite clearly pointed out the distinction between a race for a prize or premium, and a bet or wager. The conclusion reached in that case was that a race for a prize or premium offered by such an association, under circumstances similar to those existing in this case, was not within the condemnation of the law relating to gambling, or illegal gaming. If the doctrine contended for by the appellant is sustained, it would seem to follow that the farmer, the mechanic, or the stock-breeder who attends his town, county, or state fair, and exhibits the products of his farm, his shop, or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them. ²⁰ The decision of this court in *Harris v. White*, 81 N. Y. 532, renders any further discussion of the question unnecessary. We are of the opinion that the offering of premiums or prizes to be awarded to the successful horses in a race is not in any such sense a contract or undertaking in the nature

of a bet or wager as to constitute gambling within the spirit and intent of the constitutional provision under consideration.

Nor can it be held that the relator was guilty of a crime under the provisions of section 352 of the Penal Code. That section prohibits racing for a stake, bet, or reward, except as allowed by special law. That chapter 570 is a special law within the meaning of that section, we have no doubt. It is manifest that such racing was not intended to be entirely prohibited by this statute, as it plainly indicates that the legislature contemplated the existence or passage of special laws pertaining to races for stakes or rewards.

We think the determination of the courts below was correct, and that the order of the appellate division should be affirmed.

All concur.

Order affirmed.

LOTTERIES, WHAT PROHIBITED AS: *Branham v. Stallings*, 52 Am. St. Rep. 218, and note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 48.

CURRAN v. GALEN.

[152 NEW YORK, 33.]

AGREEMENT TO COERCE WORKMEN INTO BECOMING MEMBERS OF AN ASSOCIATION.—An agreement between an association of brewers and an assembly of workmen that all employes of the former shall be members of the latter, and that no employe shall work more than four weeks without becoming such member, is against public policy and the interests of society, and cannot justify an action of members of such assembly in procuring the discharge of a workman because of his failure to become a member thereof.

Action against the defendants to recover damages claimed to have resulted to the plaintiff from their confederating and conspiring together and injuring him by preventing his continuing in employment. He was an engineer by trade, and as such was employed by the Miller Brewing Company. The defendants were officers and members of an organization known as the Brewery Workingmen's Local Assembly, 1796, Knights of Labor. The defendants had procured the discharge of the plaintiff from his employment. They pleaded as their excuse for doing so that they were members of the local assembly above named, and that an agreement had been entered into between such assembly and the Brewers' Association of the city in which plaintiff had been employed to the effect that all employes of the Brewers' Associa-

tion should be or become members of the Workmen's Local Assembly, and that no employé should work for a longer period than four weeks without becoming such member. After it was learned that the plaintiff was in the employment of the Brewers' Association, he was requested to become a member of the local assembly, and declining to do so for the period of four weeks and upward, the defendants, in pursuance of the agreement above named, procured his discharge. To an answer setting up this agreement and that the acts of the defendants were done under it, the plaintiff interposed a demurrer, which was sustained by the trial court and also upon appeal to the general term.

W. A. Sutherland and D. C. Feely, for the appellants.

A. G. Warren, for the respondent.

³⁶ Per CURIAM. In the decision of the question before us, we have to consider whether the agreement upon which the defendants rely in defense of this action, and to justify their part in the dismissal of the plaintiff from his employment, was one which the law will regard with favor and uphold, when compliance with its requirements is made a test of the individual's right to be employed. If such an agreement is lawful, then it must be conceded that the defendants are entitled to set it up as a defense to the action; forasmuch as they allege that what they did was in accordance with its terms.

In the general consideration of the subject, it must be premised that the organization, or the co-operation, of workingmen is not against any public policy. Indeed, it must be regarded as having the sanction of law, when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate: Pen. Code, sec. 170. It is proper and praiseworthy, and, perhaps, falls within that general view of human society ³⁷ which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend, or to accomplish, injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and, if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under

the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice Barrett in *People ex rel. Gill v. Smith*, 5 N. Y. Crim. Rep. 513, "impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate."

Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation under conditions equal as to all, and to enjoy the fruits of his labor without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the state. The sympathies, or the fellow-feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to ^{as} oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed toward the repression of individual freedom, upon what principle shall it be justified? In *Regina v. Rowlands*, 17 Ad. & E., N. S., 671, the question involved was of the right by combination to prevent certain workingmen from working for their employers, and thereby to compel the latter to make an alteration in the mode of conducting their business. The court of queen's bench, upon a motion for a new trial for misdirection of the jury by Mr. Justice Erle below, approved of his charge, and we quote from his remarks. He instructed the jury that "a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are

conceded; but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property, and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

The organization of the local assembly in question by the workingmen in the breweries of the city of Rochester may have been perfectly lawful in its general purposes and methods, and may, otherwise, wield its power and influence usefully and justly, for all that appears. It is not for us to say, nor do we intend to intimate, to the contrary; but so far as a purpose appears from the defense set up to the complaint that no employé of a brewing company shall be allowed to work for a longer period than four weeks without becoming a member ⁸⁹ of the Workingmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association shall be availed of to compel the discharge of the independent employé, it is, in effect, a threat to keep persons from working at the particular trade and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into, on the part of the Ale Brewers' Association, with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention cannot aid the defense, nor legalize a plan of compelling workingmen, not in affiliation with the organization, to join it, at the peril of being deprived of their employment and of the means of making a livelihood.

In our judgment, the defense pleaded was insufficient, in law, upon the face thereof, and, therefore, the demurrer thereto was properly sustained.

The judgment appealed from should be affirmed, with costs.

All concur, except Haight, J., not sitting.

Judgment affirmed.

LABOR UNIONS—ACTS OF, WHEN UNLAWFUL.—A labor union procuring the discharge of a person from his employment because he is a nonunion man acts wrongfully, and is liable for the consequent injury to him: *Lucke v. Clothing etc. Assembly*, 77 Md. 293; 39 Am. St. Rep. 421, and note.

COSGRIFF v. FOSS.

[152 NEW YORK, 104.]

COTENANTS—IMPROVEMENTS, RIGHT TO COMPENSATION FOR.—At the common law, a tenant in common who made permanent improvements, as distinguished from ordinary repairs, could not recover from his cotenants any part of his expenditures made for that purpose, unless they were made at the request or with the consent, express or implied, of the latter.

COTENANTS—IMPROVEMENTS, COMPENSATION FOR IN PARTITION, WHEN WILL NOT BE DIRECTED.—A tenant in common who is also the lessee of his cotenant will not, when the property cannot be partitioned otherwise than by its sale, be allowed compensation from the proceeds of such sale for improvements placed upon the property during the course of his tenancy, which enhance its value and were made with the knowledge, but without the consent, of his cotenants, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on his business then prosecuted by him upon the premises, and increasing the income therefrom, which was not shared with his cotenants.

Suit for partition. The premises were valuable only as a stone quarry. In 1889, a lease of the undivided nine-sixteenths of the premises was made to one Dewey, who was given by the lease the right to remove any machinery or buildings placed on the property. In less than six months after leasing the property the tenant purchased the interest of his landlord. Dewey, while in possession as lessee, improved the premises for quarrying purposes by building foundations of masonry, erecting buildings, enlarging the working place for the quarry, and by making other useful and substantial changes and additions thereto, for all of which he asked to be compensated out of the sale of the property. The special term decreed that the property be sold and he paid a sum allowed for his improvements. The general term on appeal modified the decree by striking out the allowance for improvements, and the defendant Dewey appealed.

Clarence Lexow, for the appellant.

Irving Brown, for the respondents.

108 VANN. J. The question presented by this appeal is, whether a tenant in common, who is also a lessee of his cotenant, can be allowed in partition for improvements made upon the property in the course of his tenancy, which enhanced its value, and were made with the knowledge, but without the consent, of the cotenant, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on a business then prosecuted by him upon the premises,

the increased income from which was not shared with the cotenant.

At common law, a tenant in common, who has made permanent improvements, as distinguished from ordinary repairs, upon the common property, cannot recover from his cotenant any part of his expenditures for that purpose, unless they were made at the request or with the consent, express or implied, of the latter: *Mumford v. Brown*, 6 Cow. 475; 16 Am. Dec. 440; *Jackson v. Bradt*, 2 Caines, 303; *Taylor v. Baldwin*, 10 Barb. 582, 590, 626; *Putnam v. Ritchie*, 6 Paige, 390, 405; *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec. 353; *Gregg v. Patterson*, 9 Watts & S. 197, 209; *Story's Equity Jurisprudence*, sec. 1235; *Knapp on Partition*, 10. In some states, this is the rule, even when the expenditure was necessary to keep the property from going to ruin, while in others repairs essential to preservation may be made at the expense of the cotenants, in proportion to their respective shares, without their consent, especially if such consent is unreasonably withheld after due request. It is strictly limited ¹⁰⁹ to repairs, however, and does not extend to improvements not essential to protect the property, but designed to enhance its value: *Loring v. Bacon*, 4 Mass. 575; *Beaty v. Bordwell*, 91 Pa. St. 438; *Stackable v. Stackpole*, 65 Mich. 515; *Wiggin v. Wiggin*, 43 N. H. 561; *Alexander v. Ellison*, 79 Ky. 148; *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293.

The rule of courts of equity upon the subject is more liberal and extends to improvements in special cases, as, in an action of partition, for instance, the court acts upon the principle that the party who asks for equitable relief will be required to do what is equitable himself. The rule, however, is carefully limited to those cases where special circumstances give rise to strong equitable rights: *Putnam v. Ritchie*, 6 Paige, 390; *Ford v. Knapp*, 102 N. Y. 135; 55 Am. Rep. 782.

Some authorities sanction repairs that are absolutely necessary to preserve houses and mills already erected and in being, but refuse to extend the rule to other kinds of property: *Dech's Appeal*, 57 Pa. St. 467, 472; *Anderson v. Greble*, 1 Ashm. 136, 139. Chancellor Kent says: "One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary repairs to a house or mill belonging to them, though the rule is limited to those parts of the common property and does not apply to fences inclosing wood or arable land": 4 Kent's Commentaries, 370. Other cases permit improvements to be set off against rents and profits, but not charged against the body of the estate unless made with the knowledge and consent of the

other owners: *Pickering v. Pickering*, 63 N. H. 468; *Luck v. Luck*, 113 Pa. St. 256; *Jones v. Jones*, 23 Ark. 212. Where one tenant in common, who was in possession supposing himself to be the legal owner of the entire premises, erected valuable buildings thereon, he was held entitled to an equitable partition so as to give him the benefit of his improvements: *Town v. Needham*, 3 Paige, 546; 24 Am. Dec. 246. So in an action for partition, where actual division is possible, the cotenant who has made substantial improvements upon one parcel is usually allotted the part that he has enhanced in value, or so much thereof as represents his share ¹¹⁰ in the whole tract: *Freeman on Cotenancy and Partition*, sec. 509; 17 Am. & Eng. Ency of Law, 758. But when the property is so situated that actual partition is out of the question, even courts of equity, in this state, do not require contribution for improvements, as distinguished from repairs, except in the case of mills, houses, and the like, under circumstances of special necessity. The erection of a new and independent building, the improvement of farming lands by fencing or drainage, the opening of mines or quarries, or the making of changes that are in no sense designed to protect or preserve the property, but simply to improve it and increase its value, do not warrant the court in requiring a cotenant who has not consented to contribute to the expense. This is just, as an extension of the rule from repairs to general improvements, in the nature of new erections, might enable one cotenant to "improve" the other out of his share in the property. The case of *Green v. Putnam*, 1 Barb. 500, is sometimes cited as an authority sanctioning an allowance for the erection of a new building without consent. In that case, however, the plaintiff had been consulted and had consented to the construction of a smaller building, but objected when it was ascertained that a larger one was in process of erection. The allowance made was "limited to the sum necessary for erecting the smaller building, and no relief was granted for the amount expended without the plaintiff's consent." The leading cases in this state are *Scott v. Guernsey*, 48 N. Y. 106, which is relied upon by the respondents, and *Ford v. Knapp*, 103 N. Y. 135, 55 Am. Rep. 782, which is relied upon by the appellant. In the former case, two remaindermen, without the consent of the others, but with the consent of the life tenant, erected buildings upon the premises, under an agreement with the life tenant that they might put up the buildings and receive the rents. One building erected in 1833 increased the value of the land by seven hundred and fifty dollars, and another erected in 1841, by two hundred dollars. In 1854, when the life tenant

died, the rents received had largely exceeded the value of the buildings and the interest on the investment. It was held that the remaindermen who thus improved the property ¹¹¹ were not entitled to any compensation therefor, and, upon partition, could not exact reimbursement from, or claim a lien upon, the shares of their cotenants. The court said: "There was no consent, mistake, or other equitable ground in this case for relieving the party who made his investment with full knowledge of the facts, voluntarily, and without any inducement offered by other cotenants. Had the appellants offered to share their rents, upon being paid a due proportion of the value of the improvements after the termination of the life estate, it might have afforded a better ground to claim compensation. The appellants are not within the reason of any of the adjudged cases, where relief has been granted in partition for money expended in improvements by one of several tenants in common."

In *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep, 782, "the defendants were tenants in common with one Whittaker of a mill property badly run down, and out of repair." Whittaker's interest was sold upon execution to the defendants, "but subsequent judgment creditors redeemed and acquired the title of the debtor." "During the fifteen months between the sale and redemption, the defendants expended a large amount upon" a grist-mill on the premises. Some of the machinery, adapted to and once used for merchant milling, was out of date and not worth repairing, while that necessary for custom work was still in use, but "dilapidated and inefficient." The dam was repaired, a new waterwheel made, and the machinery so changed as to do good custom work, which was classed by the referee who decided the case as repairs, "while the addition to the buildings and the introduction of new machinery and appliances for a merchant mill he classed as improvements. These repairs and improvements largely increased the market value of the property. Before they were made, a generous estimate of that value did not exceed eight thousand dollars, while on the sale in partition it brought about double that amount." The supreme court refused "any allowance either for repairs or improvements."

This court, referring to *Scott v. Guernsey*, 48 N. Y. 106, said: "Here were reasons enough for denying any equity to the improving ¹¹² tenant, and the case stands solidly upon its facts and is not open to criticism. But it does not deny the duty of a court of equity in a proper case to give its relief upon condition of an allowance for improvements, and does not undertake to specify all the cases in which such equity shall be recognized.

Nor shall we undertake any such dangerous or impossible effort. The authorities leave us at liberty to consider whether upon the facts and circumstances of this particular case, the improving tenant ought to be protected, and furnish us the power to grant the protection if it may justly be demanded." After alluding to some of the facts of the case then in hand, the court continued: "The defendants acted in the presence of a peculiar and unusual emergency; they acted in entire good faith; the repairs were necessary and not merely a venture or speculation, and the improvements were in the line of restoration and not of new and strange enterprise. What they did was natural and normal to the use and character of the property, and such as joint owners of equal ability might be expected to join in making. They offer to share in the increased income thus secured, and in every respect appear to have acted fairly." The court sent the case back for a division of the proceeds of the sale according to the principles stated in the opinion, and for an accounting of the income and profits which the defendants offered to make.

We do not regard the two cases thus reviewed as in conflict. In the one special equities existed, while in the other they did not, and judgment went accordingly. In the earlier case, those who made the improvement did it as a business venture, and they had received back from it not only principal and interest, but also a large profit, which they did not offer to share with their cotenants. In the later case, those who made the improvements did not make them as a business venture, but to save the property and prevent the "business and custom" of the mill from drifting "into other hands." What they did was "in the line of restoration," not of independent construction, and when they had done it and had doubled the value of the property, they offered to share the increased ¹¹³ profits with their cotenants. The improvements were made upon a mill and mill dam, which, owing to their peculiar nature, seem always to have appealed strongly to courts of equity for aid through contribution toward repairs and reasonable improvements, so as to keep pace with the times, accommodate the public, and prevent loss of custom.

In the case before us, we find no such equitable strength in the claim of the appellant. He sustained the double relation to his cotenants of tenant by lease and tenant in common. Under the former relation he was entitled to no repairs, but was bound by a covenant in the lease to make such as would keep the premises in their normal condition, except depreciation by use and damages by the elements. The improvements were made mainly for the purpose of extending his business and increasing his sales,

in which his cotenants had no interest. He had the right, by express contract, to remove all his structures during the term of his lease. The nature of the property did not permit decay, and there was no controlling necessity for making the changes and additions. If they had not been made the premises would not have depreciated in value. Some of the work was done after this action was commenced and a part even after the trial was in progress. It does not appear that the appellant offered any share of the profits to his cotenants, or to what extent the value of the premises was increased, or, unless inferentially, that they would sell for any more on account of the improvements. His erections were in the nature of new and independent construction to enable him to quarry more rock and sell it, and thus, pro tanto, he consumed the property. They were not "in the line of restoration," but of a business venture.

We know of no well-considered case in this state that would authorize an allowance for improvements under these circumstances. It would be a dangerous extension of the rule governing the subject, which is always applied with caution, to permit one cotenant to run the other in debt, against his will, for unnecessary improvements. Equity requires contribution ¹¹⁴ from tenants in common only to prevent injustice, and, unless the rule is kept well in hand, it is liable to cause more injustice than it prevents.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

LIABILITY OF TENANTS IN COMMON FOR IMPROVEMENTS MADE ON THE COMMON PROPERTY.—A tenant in common cannot charge either the lands or his cotenants for improvements of the common property: *Thurston v. Dickinson*, 2 Rich. Eq. 317; 46 Am. Dec. 56; *Ward v. Ward*, 40 W. Va. 611; 52 Am. St. Rep. 911, and extended note, 924-941.

COTENANTS—IMPROVEMENTS, COMPENSATION FOR ON PARTITION.—Where property cannot be divided otherwise than by sale, and improvements made by one of the cotenants have enhanced its value, he cannot be awarded the costs thereof, but should be given the actual enhancement in value therefrom existing at the time of the sale, though the improvements were not made at the request of the cotenants: *Ward v. Ward*, 40 W. Va. 611; 52 Am. St. Rep. 911, and extended note, 924-941.

CURTIS v. MOORE.

[152 NEW YORK, 139.]

ASSIGNMENT OF MORTGAGE, NONRECORD OF.—If the holder of a note and mortgage borrows money thereon, delivering them to his creditor as collateral security, no record of such assignment or pledge is necessary, except as against a subsequent bona fide purchaser of the mortgage, and if the mortgagor subsequently conveys the mortgaged premises to his mortgagee, who sells them to a third person, the latter believing that the interests of the mortgagor and mortgagee have merged, he nevertheless acquires his mortgage subject to such mortgage and such unrecorded assignment thereof.

A PURCHASER OF PREMISES AGAINST WHICH THERE IS AN UNSATISFIED MORTGAGE OF RECORD cannot be a bona fide purchaser thereof as against a person holding an unrecorded assignment of such mortgage, where he had not made any inquiry respecting it, nor required it or the note which it was given to secure to be produced, though the person of whom he purchased had a conveyance both from the mortgagor and the mortgagee.

MORTGAGE—MERGER.—There can be no merger of a mortgage with the legal estate upon a conveyance by the mortgagee to the mortgagor if the former has previously assigned his mortgage, though the assignment is not of record.

MORTGAGE.—THE ASSIGNEE OF A RECORDED MORTGAGE cannot be affected by a secret agreement between the mortgagor and the mortgagee that the former shall hold the property in trust for the latter.

Benjamin Yates, for the appellants.

Robert L. Harrison, for the respondent.

100 VANN, J. On the 19th of October, 1885, Edward S. Curtis conveyed an undivided one-sixth interest in certain premises situate in the city of New York to John B. Armstrong by a deed dated that day and duly recorded October 26, 1885. At the same time, the said Armstrong executed a purchase money mortgage to Edward S. Curtis to secure a note for two thousand dollars, given by the former to the order of the latter, of even date with the mortgage, and payable two years thereafter with interest at six per cent. This mortgage was duly recorded November 24, 1885. March 29, 1886, said Edward S. Curtis borrowed the sum of five hundred dollars of the plaintiff, and delivered to him the said note and mortgage and gave him an instrument of which the following is a copy:

“\$500.

Chicago, Ill., Mar. 29, 1886.

“One day after date, for value received, I promise to pay to the order of De Witt H. Curtis the sum of five hundred dollars, at Chicago, with interest at the rate of 8 per cent per annum after date, having deposited with said D. H. Curtis, as collateral security, a certain real estate mortgage for the sum of two thou-

and dollars, bearing date of 19th October, ¹⁶¹ 1885, given to E. S. Curtis by J. B. Armstrong & Desiree D., his wife, which I hereby give the said D. H. Curtis, agent or assignee, authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of said securities depreciating in value in the opinion of said D. H. Curtis, at public or private sale, at the discretion of said D. H. Curtis or his assignee, without advertising the same, or demanding payment, or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said mortgage, including attorney's fees, and in case the proceeds of the sale of the said mortgage shall not cover the principal, interest and expenses, I promise to pay the deficiency forthwith after such sale.

"EDWARD S. CURTIS."

On May 20, 1886, Edward S. Curtis borrowed from the plaintiff five hundred dollars, on the same security as collateral, and, on August 25th in the same year, he borrowed five hundred dollars more, each time giving him an instrument similar in form to that of March 29, 1886, but none of them were acknowledged or recorded. February 7, 1887, said Armstrong conveyed the premises covered by the mortgage to Edward S. Curtis by deed duly recorded on the 5th of March, following. On the 23d of February, 1891, Edward S. Curtis, for a valuable consideration, conveyed the premises to the defendant J. Charles Moore, by deed duly recorded on the 11th of April thereafter.

This action was brought to foreclose said mortgage, and the defendant Moore alleges in defense that he is a bona fide purchaser of the premises in question without notice, and that the conveyance from Armstrong to Edward S. Curtis effected a merger of the mortgage. Upon the trial it did not appear that Mr. Moore purchased the premises either with or without actual knowledge of the outstanding mortgage and note given by Mr. Armstrong and transferred to the plaintiff. He is presumed, however, to have had notice of such facts, as an examination of the record would have disclosed.

¹⁶² Under the circumstances above stated, the plaintiff became the owner of the mortgage for the purpose for which it was delivered or pledged to him, as "a good assignment of a mortgage is made by delivery only": *Frver v. Rockefeller*, 63 N. Y. 268-276; *Runyan v. Mersereau*, 11 Johns. 534; 6 Am. Dec. 393; *Green v. Hart*, 1 Johns. 586. If the omission of the plaintiff

to record the evidence of the transfer of the mortgage to him inured to the benefit of the defendant under the recording act, we may assume that the latter became a bona fide purchaser, without notice, otherwise not. In *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532, the question was directly passed upon by this court and decided adversely to the contention of the defendant. It was held in that case that the assignee of a recorded mortgage upon real estate, which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage, has a valid lien as against a purchaser from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee, as well as the conveyance from the mortgagee to the purchaser, were recorded before the assignment was placed upon record. The court said: "The question is then presented, whether Calvin Huntington can be protected in his title as against the mortgage by reason of the omission to have the assignment thereof recorded. It is conceded that he is to be charged with constructive notice of the existence of the mortgage, and of the continuance of its lien, by its record in the proper office. By that he was informed not only of the date of the mortgage, the amount secured thereby, and of all its particulars, but that it was open and uncanceled of record, and therefore apparently an outstanding lien and encumbrance on the premises of which he was taking title. Having that information, he knew or was at least chargeable in law with the further notice, that it was such lien and encumbrance in the hands of any person to whom it had been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged or any other person than a subsequent purchaser in good faith of the ¹⁶³ mortgage itself or the bond or debt secured thereby; but, on the contrary, that a vendee of the premises took it subject to the lien of the mortgage irrespective of the ownership thereof. That knowledge and notice made it his duty in the exercise of proper diligence to inquire whether Minott Mitchell, his vendor, was still the owner and holder of the mortgage, and his omission to make that inquiry deprives him of the protection of a bona fide purchaser": Citing *Brown v. Blydenburgh*, 7 N. Y. 141; 57 Am. Dec. 506; *Kellogg v. Smith*, 26 N. Y. 18; *Gillig v. Maass*, 28 N. Y. 191; *Campbell v. Vedder*, 3 Keyes, 174. The same principle was laid down in an earlier case, where the court said: "The failure to record an assignment of the prior mortgage could not blot out the record of the mortgage itself. If Van Vranken was the purchaser, in good faith, of the prior mortgage,

and an assignment thereof, previously made, had not been recorded, he would hold the mortgage. But, if he only became the purchaser of the premises by absolute deed, or otherwise, the record of a prior mortgage is sufficient notice thereof to him, no matter how often assigned, or whether the assignment be recorded or not. The only alteration made by the recording act of 1830 is, that an assignment must now be recorded as against a subsequent bona fide purchaser of the mortgage assigned. A 'subsequent purchaser in good faith,' in the recording act, as to this case, means a purchaser of the mortgage assigned, not a purchaser of the premises. A subsequent purchaser of the premises is bound by a prior recorded mortgage, no matter who holds it": *Campbell v. Vedder*, 1 Abb. Ct. of App. Dec. 295, 302; 3 Keyes, 174.

It is obvious that these cases are analogous to the case before us. Mr. Moore was not a bona fide purchaser within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time. In dealing with the property on the assumption that Edward S. Curtis still owned the mortgage, he acted at his peril and assumed the risk that ¹⁸⁴ Curtis might have transferred the mortgage to someone else. He was put upon his inquiry, and it was not enough for him to examine the record and see that no assignment of the mortgage appeared thereon, but he should have required a satisfaction piece in due form or the delivery of the mortgage and note.

The case of *Bacon v. Van Schoonhoven*, 87 N. Y. 446, is not in conflict with the cases cited above. In that case, the mortgagee advanced money in reliance upon a satisfaction piece executed by the mortgagee in a former mortgage, which had been duly recorded and in fact had been assigned, but the assignment was not recorded. The court held that the satisfaction piece was a conveyance within the meaning of the recording act, and that whoever advanced money to be secured by a bond and mortgage upon the faith of such an instrument was a bona fide purchaser within the provisions of the act. This was the question before the court, and all that was decided that bears upon the subject now before us, although language somewhat broader in its application was used in the opinion. Although both *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532, and *Campbell v. Vedder*, 3 Keyes, 174, were cited by counsel upon the argument, neither is referred to in the opinion, and it is clear that the court

did not intend to overrule them. If Edward S. Curtis had given a satisfaction piece of the mortgage standing on the record in his name, the case relied upon by the defendant would be applicable. He did not do this, however, but accepted title with constructive notice of an uncanceled mortgage, recorded and outstanding, without making inquiry or requiring the production of the mortgage itself, or the note that it was given to secure. Under these circumstances, he cannot be held a bona fide purchaser as against the mortgage assigned to the plaintiff, because it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only as against a subsequent purchaser of the mortgage itself: *Purdy v. Huntington*, 42 N. Y. 334; 1 Am. Rep. 532; *Campbell v. Vedder*, 3 Keyes, 174; *Miller v. Lindsey*, 19 Hun, 207.

¹⁰⁵ There was no merger because the ownership of the mortgage, with the debt secured thereby, and the title to the land, did not meet in the same person. When the fee came back to Edward S. Curtis he had no title to the mortgage, for he had assigned it some months before. There can be no merger, at law, without a union of titles in the same person; nor, in equity, unless, also, there is an intention on the part of those concerned in the transaction that it should operate as a merger. In this case both the union and the intention were wanting: *Purdy v. Huntington*, 42 N. Y. 334; 1 Am. Rep. 532; *Smith v. Roberts*, 91 N. Y. 470; *Sheldon v. Edwards*, 35 N. Y. 279, 284; *Bascom v. Smith*, 34 N. Y. 320.

The defendant offered to show an agreement between said Armstrong and Edward S. Curtis, bearing the same date as the mortgage, which recited the conveyance of the property by Curtis to Armstrong, and provided for its reconveyance by Armstrong to Curtis. It contained a stipulation that Armstrong "has no beneficial interest in the above-described property, but holds it subject to a trust." This agreement was immaterial, and was properly excluded on that account. The plaintiff knew nothing of it, and was not a party to it. Armstrong's title came from Curtis, and the plaintiff could not be affected by a secret agreement between them that the former should hold the premises in trust for the latter, when, according to the record, he held it in fee at the time the mortgage was executed, and the mortgage contained the recital that it was given to secure the payment of a part of the purchase money. Moreover, the plaintiff has the interest of both the trustee and the cestui que trust, for the one executed while the other assigned the mortgage.

After examining all of the exceptions, we think the judgment was right and that it should be affirmed, with costs.

All concur.

Judgment affirmed.

MORTGAGES—ASSIGNMENT OF—EFFECT OF NONRECORDING AS AGAINST SUBSEQUENT BONA FIDE PURCHASERS.—

The assignment of a real estate mortgage is a proper instrument for record. If a real estate mortgage, given to secure a non-negotiable note, is assigned to a purchaser of the note, who fails to record the assignment, and the mortgagee, disregarding the assignment, forecloses the mortgage, and sells the premises, and a subsequent grantee of the mortgagor redeems them within the statutory time without notice of the assignment, but in good faith, relying upon the record and the right of the mortgagee to so foreclose, the redemptioner takes title free from the lien of the mortgage; and one who, under the same conditions, furnished money to make such redemption, secured by another mortgage on the same premises, takes his mortgage free of the first mortgage lien: *Merrill v. Luce*, 6 S. Dak. 354; 55 Am. St. Rep. 844, and note; also, *Merrill v. Hurley*, 6 S. Dak. 592; 55 Am. St. Rep. 859, and note. See *Murphy v. Barnard*, 162 Mass. 72; 44 Am. St. Rep. 340, and note. Under certain circumstances, the nonproduction by the vendor of the mortgage and the note secured by it will put the purchaser or encumbrancer upon inquiry as to whether or not they have been assigned: *Vann v. Marbury*, 100 Ala. 438; 46 Am. St. Rep. 70; also, *Williams v. Keyes*, 90 Mich. 290; 30 Am. St. Rep. 438, and note.

ESTATES—MERGER—WHEN IT WILL TAKE PLACE.—It is essential, in order that there should be a merger, when a greater and a less estate meet in the same person, that there be no intermediate estate: *James v. Morey*, 2 Cow. 246; 14 Am. Dec. 475, and note; also, note to *Hunt v. Hunt*, 25 Am. Dec. 410; *Boss v. Morgan*, 130 Ind. 305; 80 Am. St. Rep. 237, and note.

MORTGAGES—ASSIGNMENT—ASSIGNEE AS AFFECTED BY SECRET TRUSTS BETWEEN MORTGAGOR AND MORTGAGEE. The assignee of a mortgage bona fide and without notice takes it discharged of any secret trust with which it may be bound in the hands of the mortgagee: Note to *Mott v. Clark*, 49 Am. Dec. 572; also, *Williams v. Keyes*, 90 Mich. 290; 80 Am. St. Rep. 438, and note.

FARLEY v. MAYOR OF NEW YORK CITY.

[152 NEW YORK, 222.]

MUNICIPAL CORPORATIONS—KNOWLEDGE OF POLICEMEN, WHEN CHARGEABLE WITH.—What a policeman knows respecting the condition of a street the municipality is chargeable with knowing after the lapse of a reasonable time to enable him to communicate his knowledge to his superiors.

A MUNICIPAL CORPORATION IS ANSWERABLE for injuries received by the driver of a hosecart from collision with a truck without negligence on his part, such truck having been left for several months standing on a public street at night, at the place where the injury was inflicted, to the knowledge of the policemen on the beat, who had never made any report of the fact.

FIRE DEPARTMENT, RATE OF SPEED.—A statute purporting to regulate the speed of horses in the public streets is not applicable to drivers of hosecarts and engines connected with the fire department when going to a fire.

MUNICIPAL CORPORATIONS—FIREMEN, RISKS NOT ASSUMED BY.—Though the driver of a hosecart connected with the fire department assumes the risks usual to his employment of a dangerous character, he does not assume the risks of the insecurity of streets resulting from the culpable negligence of the municipality.

Charles Steckler, for the appellant.

Francis M. Scott and William H. Rand, Jr., for the respondent.

225 ANDREWS, C. J. We think the case should have been submitted to the jury. The evidence would have authorized a finding that for several months preceding the accident the truck against which the hosecart collided had been, to the knowledge of the policeman on duty, left during the night-time standing in the roadway on Broome street next to the curb, at or near the place where it was at the time of the collision, and that no report had been made by the policemen of the fact, nor any measures taken by the public authorities by notice to the owner or by proceedings to enforce the penalty given by the ordinance to remedy the nuisance. The truck was an obstruction to the street, and both at common law and by the ordinance the using of the street for the storage of the truck was an illegal act: *Cohen v. Mayor etc.*, 113 N. Y. 535; 10 Am. St. Rep. 506; Ordinance of city of New York, art. 4, sec. 33. It is, moreover, made the duty of the commissioner of public works, by section **226** 324 of the consolidation act (Laws 1882, c. 410), to remove or cause to be removed all unharnessed trucks found in a public street in the night-time, unless there by permission of the mayor. The storing of the truck in the street was the act of the owner, without authority from the city, and the rule applies that, in order to charge a municipality for an injury happening to a third person using a street therein, from an unlawful obstruction placed therein by a stranger without authority, it must appear that it had notice, express or implied, of the existence of the obstruction before the accident, and that a reasonable time had elapsed subsequent to the notice and before the injury during which it could have abated the nuisance. Until it had received such notice, and an opportunity had been afforded, in the exercise of reasonable diligence, for the city to have acted, there would be no breach on its part of the duty resting upon municipal corporations to use all reasonable care to keep the streets in a safe condition for travel. It is undoubtedly true, as a general rule, that a munici-

pality is not called upon to anticipate infractions by third persons of the law or ordinances relating to its streets, enacted to secure their safety and an unobstructed right of passage. But in this case the custom of the owner of the truck to leave it in the street at this point during the night-time had existed for several months before, and up to the time of, the accident, and was known to the patrolmen on the beat. It was not the case of an isolated trespass, which a public officer might reasonably suppose would not be repeated, but a continuous invasion of the public-right, habitually indulged in and known to the public officials. They had just reason to believe that the practice would be continued unless the city authorities interfered to stop it, and what the policemen knew the city is chargeable with knowing after the lapse of a reasonable time to enable information to be communicated by them to their superiors. This is not like the case of *Breil v. Buffalo*, 144 N. Y. 165, where the only possible fault charged against the city was that it failed to remove or guard a pile of earth left in the street on a single night by the ²²⁷ owner of adjacent property engaged in filling in his lot, of which the city had no actual notice and no constructive notice, unless the fact that the lotowner was engaged in filling in his lot, with earth deposited in the street in the daytime, and which on each day, except in the one instance, was removed during the daytime, made the city liable for an injury caused by the obstruction. If the pile of earth had been suffered to remain in the street for weeks, and the city had remained inactive, a different question would have been presented.

The question of the contributory negligence of the plaintiff was one also for the jury. It is manifest that section 1932 of the consolidation act can have no application to the speed at which engines or hosecarts connected with the fire department shall be driven when going to a fire. This section is not in the chapter regulating the fire department. By another section the vehicles of the fire department are given the "right of way" at any fire over all other vehicles except those carrying the United States mail: Consolidation Act, sec. 444. The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires. The conduct of the plaintiff was for the con-

consideration of the jury. He took the usual risks of an employment of a dangerous character, but he did not assume the risks of the insecurity of streets resulting from the culpable negligence of the city. He was bound in driving to exercise the care which a prudent person would ordinarily exercise under similar circumstances. It was for the jury to say whether he was alert on this occasion, watchful to avoid obstructions which might be in his path, and whether there was any omission on his part of reasonable circumspection and diligence which contributed to the accident.

²²⁸ Having reached the conclusion that the case was improperly withheld from the jury on the facts, both as to the negligence of the defendant and the contributory negligence of the plaintiff, the judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

MUNICIPAL CORPORATIONS—NOTICE OR KNOWLEDGE OF OFFICER OR AGENT—WHEN CHARGEABLE TO CITY—POLICEMAN.—The rule that notice to the agent of a party, whose duty it is as agent to act upon such notice, or to communicate it to his principal in the proper discharge of his trust as agent is legal notice to his principal, applies as well to the agents of corporations, both municipal and private, as to those of private persons: *Burditt v. Porter*, 63 Vt. 296; 25 Am. St. Rep. 763, and note. So, notice to a street overseer of a defect in the streets is notice to the city: *Bradford v. Mayor*, 92 Ala. 349; 25 Am. St. Rep. 60, and note; also, *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731. But see *O'Rourke v. Sioux Falls*, 4 S. Dak. 47, 46 Am. St. Rep. 760, where it is held that the police officers of a city are not its officers or agents, citing a number of cases.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIABILITY FOR INJURIES RESULTING FROM NOTICE.—It is the positive duty of a municipal corporation to keep its streets in reasonably safe condition, and for a breach of this duty an action lies in favor of the person injured by such breach: *Lorence v. Ellensburg*, 13 Wash. 341; 52 Am. St. Rep. 42, and note; *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847, and note. Before a municipal corporation can be held liable for injuries resulting from defective streets, it must have had notice of the defect, or the defect must have existed such a length of time as to apprise its officers if they were diligent in performing their duties: *Turner v. Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453.

MASTER AND SERVANT—ASSUMPTION OF RISKS BY SERVANT.—A person, when he enters the service of another, assumes only such risks and dangers as are usually incident thereto: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633, and note; but he does not assume the risks of dangers which are known to, and can be avoided by, the exercise of reasonable care on the part of his employer: *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and note.

ANDERSON v. BLOOD.

[152 NEW YORK, 285.]

NOTICE TO PURCHASER OF LAND, WHAT IS.—If a purchaser of land has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered as a bona fide purchaser.

PURCHASER BONA FIDE.—A purchaser for a valuable consideration is entitled to be protected in his title, and, in the absence of actual notice of fraud, it is necessary that the facts and circumstances relied upon to charge him with knowledge of a fraud should be of a character equivalent to notice.

PURCHASER, WHAT NOT SUFFICIENT TO CHARGE HIM WITH NOTICE OF A FRAUD.—Where the premises have been sold at public auction by an executor and trustee of an estate, are at the time under an advantageous lease to a tenant, and a third person is subsequently negotiating for their purchase, the fact that the trustee and lessee are friends and associates in business, that the amount bid at such auction sale has never been collected, and the ten per cent required to be paid at the sale has been paid by a check given by such tenant, but never presented for payment, that he is willing to surrender his lease, and that the premises are, in the opinion of the purchaser, worth several thousand dollars more than has been bid for them, is not sufficient to charge him with notice that the sale was made for the benefit of the executor or trustee, and in fraud of the rights of persons interested in the estate.

Action by the plaintiff as substituted trustee under the last will and testament of R. M. Hernandez to have a conveyance of certain property decreed fraudulent and set aside. The defendant, John R. M. Hernz, then acting as trustee under the will of Hernandez, exposed the property for sale at public auction in November, 1887. The bidder at such sale immediately advertised the property for sale, and the advertisement attracted the attention of one Blood, who was a brother in law of the defendant Mrs. Isabell Blood. Negotiations were then entered into, resulting in a contract on January 6, 1888, between Melhado and Blood for the sale of the premises at forty thousand dollars. Melhado negotiated a loan of thirty thousand dollars upon the property, and it was a part of the contract of sale that Mrs. Blood acquire the property subject to the mortgage to be given to secure this loan. The money was to be loaned by one Moller. Mrs. Blood paid on account of the purchase price the sum of three thousand two hundred and fifty dollars. Prior to the execution of the contract of sale to her, she was ignorant about the title of the property and the relations of Hernz and Melhado thereto. The sale of the property had been made subject to the lease to Melhado, which had more than two years to run. This was re-

garded as a very advantageous lease to him, but he nevertheless agreed to cancel it, if Mrs. Blood would not otherwise purchase the property. After the title had been examined, a mortgage was executed by Melhado to Moller, and Mrs. Blood paid six thousand seven hundred and fifty dollars, and assumed the payment of the mortgage debt. Mrs. Blood afterward conveyed the premises to her daughter, Miss Fogg, subject to the mortgage which was assumed by the grantee. Mrs. Blood had no communication with any of the parties to the transaction, and was not aware that the executor and trustee had any interest in the sale which had been made at auction. This executor, prior to that sale, had been charged personally with a deficiency of two thousand seven hundred dollars, and he was subsequently removed as executor and trustee, and the plaintiff appointed in his place. Mrs. Blood, on purchasing the property for forty thousand dollars, thought she was getting a good bargain. The relations between Melhado and Hernz were of an intimate character, and had been such for several years. They occupied offices adjoining each other, and were in more or less close business relations. The ten per cent required to be paid by the purchaser at the auction sale was, in fact, not paid. A check was, however, given by Melhado to the auctioneer, but it was not presented for payment, nor was any money paid upon the trustee's sale except upon the proceeds of the mortgage and all money paid for the property by Mrs. Blood. The trial court entered judgment in favor of the plaintiff. On appeal to the supreme court, the judgment was reversed, and a new trial ordered, after which a further appeal was taken to the court of appeals.

Alfred G. Reeves and Francis Wellman, for the appellant.

John F. Parsons, for the respondents.

²⁰¹ GRAY, J. The position taken by the appellant is: 1. That the transactions between Hernz, Melhado, and Waddell, and the consequent conveyance from Hernz, as executor and trustee, to Melhado, constituted a fraud upon the estate in Hernz's hands; and 2. That Mrs. Blood was not a bona fide purchaser, ²⁰² without notice of the fraud. I think it would be difficult to deny some degree of justification to the conclusion reached by the trial judge, that the transaction as conducted between Hernz, Waddell, and Melhado, whereby the real estate in question was acquired and reconveyed at a profit to the latter, amounted to a fraud upon the beneficiaries of the trust. The evidence was of a character to justify an inference that there was a

guilty combination, or a collusion, between these parties to benefit one, if not more, of them at the expense of the trust estate. It is true that the sale at auction is unimpeached and that it is not proved that Hernz shared in the profit; but there is room for strong inferences adverse to him. Considering the fact of a sale by the trustee, subject to the somewhat depressing influence of a lease at a low rental, with most of the term unexpired; that the property was bid in by Melhado, whose wife was the lessee; that Melhado and Hernz had been intimate friends and business associates; that instead of requiring Melhado to complete his purchase at the time fixed by the terms of the auction sale, Hernz allowed the matter to be postponed until Melhado could find a purchaser at a profit and a party willing to loan thirty thousand dollars upon the property, and that no money was required to be paid upon the sale at auction, nor until the requisite amount was obtained through the deposit by Mrs. Blood upon her subsequent purchase, these and other facts bearing upon the relations subsisting between Hernz and Melhado and Hernz's assistance in procuring for Melhado a resale at an advanced price, might well be deemed to constitute such badges of fraud as would vitiate the transaction, if it stood there, at the instance of the beneficiaries of the trust, or their representative, the plaintiff. But, in the view which I take of Mrs. Blood's relation to the matter, it becomes unnecessary to pass upon the question of the validity of the transaction as between Hernz and Melhado. I think we must agree with the prevailing opinion at the general term, that Mrs. Blood was not only a purchaser for value, but in good faith, and that the evidence does not warrant the conclusion that she either ²⁹³ had actual notice of any fraudulent motive on the part of Hernz to defraud the estate, or any knowledge of facts or circumstances equivalent to such notice. The rule, as it was early laid down in the case of *Williamson v. Brown*, 15 N. Y. 354, has not been departed from in any subsequent case, of which I am aware. That was, that where a purchaser of land has knowledge of any facts sufficient to put him upon inquiry as to the existence of some right, or some title, in conflict with that he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a bona fide purchaser. Many subsequent cases in this court have rested upon the rule in *Williamson v. Brown*, 15 N. Y. 354. But all are to the point that a purchaser for a valuable consideration is entitled to be protected in his title, and, in the absence of actual notice of fraud, it is necessary that the

facts and circumstances relied upon to charge him with knowledge of the fraud should be of a character equivalent to notice. If the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person, and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed: See *Le Neve v. Le Neve*, 3 Atk. 646; 2 *White and Tudor's Lead. Cas. Eq.* 146; *Williamson v. Brown*, 15 N. Y. 354; *Stearns v. Gage*, 79 N. Y. 102; *Parker v. Conner*, 93 N. Y. 118; 45 *Am. Rep.* 178; *Bush v. Roberts*, 111 N. Y. 278; 7 *Am. St. Rep.* 741; *Jacobs v. Morrison*, 136 N. Y. 101. I will assume in the present case, for the purpose of the discussion, that the beneficiaries of this estate might be regarded as having such equitable interests in the property as to impose a stricter duty of vigilance in the case of an intending purchaser than would be required where the parties interested were the general creditors of the grantor, and with that assumption, which perhaps is barely justified in this case, I still am unable to perceive in what way Mrs. Blood was chargeable with the neglect of any duty of inquiry resting upon her by reason of the circumstances. Her relations ²⁹⁴ commenced with Hernz, and his alleged confederates in the transaction, at the time of the execution of the contract of sale to her by Melhado. Intermediate that time and the closing of the title, she was in fact represented only by the lawyer whom she had employed to look after her interest, Mr. Lobenthal, and by Mr. Wandell, the lawyer for the mortgagee, Moller, whose examination of the title she had agreed to pay for and was willing to rely upon. So far as her brother in law, Blood, was concerned, it does not appear that he had any knowledge of facts which would excite a suspicion as to the motives of Hernz; but, even if he had, his agency in the matter practically ceased with the termination of the negotiations for the purchase of the property through the real estate agent, Sloan. When Mrs. Blood appeared again upon the scene, it was at the time of the closing of her purchase, when, undoubtedly, she came into personal communication with Hernz and Melhado. At that time, of course, several facts must be deemed to have come under her observation; such as the fact that Melhado was willing to cancel the lease of the property, subject to which it had been sold at auction; the fact that he availed himself of the payments by her of the purchase moneys, in order to complete his own purchase from the trustee, and the fact that Melhado was making a profit of seven thousand five hundred dollars in the transaction, to the knowl-

edge of the trustee. But there was nothing in these facts which, in reason, should have excited her suspicions as to the good faith of these parties with whom she was dealing, and have suggested some inquiry into their relations and dealings. It was not unnatural that Melhado, being the lessee of the premises, should have attended and have bid them in upon the auction sale, and, if the purchase was so advantageous in price as to enable him to make a quick profit upon a resale, that, upon its face, simply exhibited keenness in business and would hardly have justified Mrs. Blood in suspecting the transaction and the good faith of the actors in it. That he was willing to cancel the lease upon the premises was a natural act on his part, in order to gain the profit upon a resale. ²⁹⁵ She was entitled to take the matter as it then appeared to her, in the absence of any definite information upon which she could act. She was not called upon to exercise that same cool and reflective judgment which, perhaps, when turning over all the facts in her mind deliberately, might have given rise to some doubts as to their significance and their bearing upon those interested in the result of the trustee's sale. It did not appear then, nor does the evidence show, that the profit which Melhado made upon his resale to her was any gain to Hernz personally; and if the evidence does not reveal that fact, how can we assume that investigation would have been useful? The question is, not whether Mrs. Blood could have discovered the existence of any fraud by an inquiry; but it is whether, acting as an ordinarily prudent person would have done, she was called upon, under the circumstances, to make inquiry. Were the circumstances such as to necessitate the making of some inquiry, at the peril of being charged with the knowledge of some then unperceived fact? However strong the circumstances may have seemed to militate against the good faith of Hernz and Melhado in the transaction, I do not think they would have warranted Mrs. Blood in then declaring that some collusion existed to defraud the beneficiaries of the trust estate.

But it is argued, on behalf of the appellant, that Mrs. Blood was chargeable with knowledge gained by her attorneys, Wandell and Lobenthal. Wandell's agency for Mrs. Blood did not extend beyond the examination of the title which she was to acquire, and while notice of any facts coming to him in relation to the title, and affecting it with liens or equities, would have been constructive notice to her, it does not appear that there were any such. Hernz sold under the power of sale in the will, and there is no complaint that it was insufficient for that purpose, or that it was inadequately executed. Both he and Lobenthal were aware of

the advantageous purchase made by Melhado of the trust property; but, in view of the authorized and fairly conducted public sale, what was there to suggest collusion with respect to the resale? So far as the evidence ²⁹⁸ shows, an inquiry could not have resulted in the discovery of anything upon which to rest an objection to the title. They might have regarded the trustee as having acted improvidently; but that is not enough. Wandell could hardly be assumed to have had any doubt with respect to the validity of Melhado's title, when he was passing it upon the large loan made by Mr. Moller, his client. He was a lawyer of standing and of respectability, recommended to Mrs. Blood as being competent upon such questions, and it does not appear in the evidence that he gained any knowledge of facts other than what the records would give to him, or than what came under his observation upon the closing of the title. It does not appear that he knew any more than she did about the relations of Hernz and Melhado, and, moreover, his duty toward her ended with his report, at the time of the closing of the title, that he approved of it. So far as Mr. Lobenthal is concerned, I find nothing in the evidence which charges him with any knowledge of an intent on the part of Hernz to defraud the estate, or of any collusion between Melhado and Hernz, or of any other facts than were apparent upon the face of the matter. He did not know Hernz. He had only seen him once or twice, and his testimony does not tend to show any knowledge in him of any facts which, being chargeable to his client, imperiled her title for failure of further inquiry. A careful consideration of the record fails to find any support for the contention of the appellant that Mrs. Blood was not a bona fide purchaser.

The conclusion reached renders it unnecessary to consider the questions relating to the defendant Mrs. Koss; to whom, as her daughter, and for love and affection, Mrs. Blood subsequently conveyed the premises.

The order of the general term should be affirmed, and, under the stipulation of the appellant, final judgment should be ordered in favor of the respondents, with costs.

All concur, except Bartlett, Martin, and Vann, JJ., dissenting.

Order affirmed and judgment accordingly.

NOTICE—WHAT IS SUFFICIENT TO PURCHASER OF REAL PROPERTY.—A purchaser of property is bound to act as an ordinarily careful man would under the circumstances, and, if he acts in contravention to the dictates of reasonable prudence, and refuses to inquire when the propriety of inquiry is naturally suggested by the circumstances known to him, he is chargeable with notice of the

facts which such an inquiry would have disclosed: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729, and note; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 40 Am. St. Rep. 299, and note; also, *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373, and note.

VENDOR AND PURCHASER—BONA FIDE PURCHASERS, WHO MAY CLAIM PROTECTION AS—BURDEN OF PROOF.—The great weight of authority holds that one claiming title to land by a deed to him purporting to be made for a valuable consideration, is presumed to be a purchaser in good faith without notice, and while the fact of notice may be inferred from circumstances, as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be strong enough to fix upon him the imputation of mala fides: Extended note to *Anthony v. Wheeler*, 17 Am. St. Rep. 288, 290. See, also, *Warnock v. Harlow*, 98 Cal. 298; 31 Am. St. Rep. 209.

MYGATT v. COE.

[152 NEW YORK, 457.]

COVENANTS OF WARRANTY, WHEN DO NOT PASS WITH THE LAND.—If a husband joins with his wife in a conveyance of her separate estate, and covenants that she has good right to convey the premises, and the deed also contains the usual covenants of warranty and for quiet enjoyment, such covenants, as against the wife, pass with the land, because she has possession of it, and delivers such possession to her grantee, but as the husband had no possession in his own right, and therefore delivered none to the grantee, his covenant is personal, and does not run with the land, and a subsequent grantee cannot recover against the husband thereon, unless he can prove its assignment to him.

HUSBAND AND WIFE—HUSBAND'S POSSESSION OF, OR INTEREST IN, HIS WIFE'S LANDS.—Though a husband lives with his wife and family on her lands, and pays taxes thereon, and keeps them in repair, this does not impair her title to the possession, nor give him the possession of the property or any right to the possession thereof.

HUSBAND AND WIFE, EFFECT OF HIS COVENANTS IN JOINING IN A CONVEYANCE OF HER LANDS.—If a husband joining in a conveyance with his wife of her separate property covenants that she has a good title, and the deed also contains covenants of general warranty, such covenants on the part of the husband are personal, and do not pass to a subsequent grantee of the land.

HUSBAND AND WIFE—EVIDENCE OF HIS RIGHT TO THE POSSESSION OF HER LAND.—The fact that a husband negotiates for the sale of his wife's land, executes a written contract of sale in his own name, delivers the deed to the purchaser, receives a check for a part of the purchase price payable to his order, and takes the bond and mortgage to his wife for the balance of the purchase price, does not show that she had surrendered possession of such land to him, or conveyed to him any interest therein sufficient to carry with the land, as against him, any covenant contained in a conveyance thereof in which he joined with her.

THE COVENANT OF A STRANGER TO THE TITLE, it appearing from the deed that he did not claim the property which he purports to convey, is personal to the covenantee, and incapable of transmission by his mere conveyance of the land.

Edward M. Grout and Almet F. Jenks, for the appellants.

W. S. Cogswell and Joseph H. Choate, for the respondent.

⁴⁵⁹ O'BRIEN, J. The question of law in this case has been so fully discussed in this court and in the courts below on former appeals that very little is left to be said that would be pertinent now.

⁴⁶⁰ A married woman, who had purchased and paid for a piece of real estate, which was conveyed to her for her sole and separate use, free and clear from any control of her husband, lived in the house for several years with her husband, and, on April 12, 1867, supposing that she had a good title, sold the same to one Nancy Fisher, executing a conveyance thereof containing the usual covenants of warranty and quiet enjoyment. In this deed her husband joined, for what purpose does not expressly appear. It was, no doubt, a very common occurrence at the time in cases of deeds by married women of their separate real estate. Subsequent events disclosed the fact that the grantors in this deed had no title, and a remote grantee was evicted, under paramount title, on November 30, 1878. The plaintiffs' title and right to maintain this action are derived solely from a mortgage from Mrs. Fisher, which was foreclosed by judgment entered June 5, 1879, and they received the sheriff's deed August 14, 1879. The plaintiffs were never in the actual possession of the land, and were never in fact actually evicted, but they rely upon the eviction of one of Mrs. Fisher's grantees, subject to the mortgage.

The covenant of the husband was, that his wife, at the time of the grant, was lawfully seised in her own right of the estate granted; that she had good right to convey the premises, full power and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, with the usual covenants of warranty and quiet enjoyment. This covenant upon its face was personal, having been made by the husband, who was in law a stranger to the title, with no interest in the land conveyed. It may have been good as an indemnity to the immediate grantee of his wife, who, as covenantee, held and owned it. But in order to make it available to the plaintiffs, who are remote grantees, it must be shown that it was assigned or passed to them. Since it is not claimed that it was ever assigned to them in fact, they must show that it became annexed to the land and passed to them with the land through the various conveyances from the original covenantee, Mrs. Fisher. That is the question that has always stood in ⁴⁶¹ the way of plaintiff's recovery in this case:

Mygatt v. Coe, 147 N. Y. 456; 142 N. Y. 78; 124 N. Y. 212. There must be some privity of estate or contract between the covenantor and the party who asserts a right to recover damages for breach of the covenants, and it has been held in this case that possession in the grantor is a sufficient title or estate to carry the covenants down through the line of conveyances to a remote grantee. This doctrine was asserted by Judge Finch when the case was here on a former appeal: **Mygatt v. Coe**, 142 N. Y. 78. The authority cited by him to sustain that proposition illustrates what he evidently meant by the rule. It was the case of **Beddoe v. Wadsworth**, 21 Wend. 120. That was an action upon a covenant in a deed like the one now under consideration. The grantor and covenantor had no title when he made the conveyance, and it was claimed that since he never had any interest in the land, that the covenant never became annexed to the land, but was broken at the moment the conveyance was made, and it did not pass to the plaintiff, who was a remote grantee. There was a demurrer to the declaration and the case turned upon facts admitted by the demurrer. The declaration alleged that the grantor had put the grantee into possession of the lands described in the deed, and this fact was admitted by the demurrer. It was held that the delivery of possession of the lands by the grantor to the grantee vested in the latter such an estate as carried the covenants with it, that they thus became annexed to the land and a part of it, and passed with it to successive grantees.

This principle is plainly applicable to Mrs. Coe. When she conveyed to Mrs. Fisher she had no title whatever, but she delivered possession to her grantee, and this was sufficient to attach her covenant to the land, and so it passed with the land to remote grantees. It was her act and her deed that conferred possession and secured enjoyment of the premises to her grantee. She had no other estate, right, or title to the property through which her covenant could be annexed to the land or pass with it. There is no difficulty in holding that the covenant of the wife was annexed to the land by the ⁴⁰² delivery of the possession to her grantee. But the plaintiffs' case requires us to go still further and hold that her husband was also in possession and delivered such possession to her grantee as attached his covenants to the land and passed them to remote grantees. The basis of this proposition is, that the husband had either the sole possession or a divided possession. Since a married woman may hold real estate in her own right, and may convey the same in like manner as if she were unmarried, there must attach to her title and accompany it all the usual incidents and marks of ownership. She

holds possession of her lands as completely as if she were a feme sole, and delivers such possession to a purchaser by the same act or instrument as would have been effectual for that purpose before her marriage. If the real estate be a dwellinghouse in which she resides, the presence of her husband there as the head of the family, cannot in the least detract from her full possession and ownership. Her title and possession are consistent with all the rights and duties that arise out of the marital relations. The husband is the head of the family, and being bound to provide a house for them to live in, the fact that he occupies a house owned by his wife and pays the taxes on it and keeps it in repair cannot in the least impair her title to or possession of the property. The wife, by allowing her husband in such cases to pay the taxes, make repairs, and perform such duties of care and management as are incidental to the occupation of the property, and usually grow out of the marital relations, does not surrender her possession or in any way impair her title. Such acts of the husband can no more affect the possession or title of his wife, with respect to her separate real estate, than would like acts done by him in regard to the property of a stranger. Any other rule would tend to make the title and possession of a married woman to her separate real estate less secure than that of her husband or a stranger to his property.

These considerations suggest the difficulty which the plaintiffs must meet in this case in establishing such a possession in the husband when he joined in his wife's deed as would ⁴⁶³ make his covenant run with the land. We have not been able to find any authority, and we have been referred to none, to sustain the proposition that the husband can become possessed of an interest or estate in his wife's land sufficient to carry his covenants in the wife's deed with the land to remote grantees as a result of such acts on his part with respect to the property as appear in this case.

Of course, it is possible for the wife to surrender the possession or convey the title to her husband, but such a change should be manifested by some unequivocal act on her part, plainly indicating her intention to vest some interest in the husband. When this case was here on the last appeal we decided two propositions: 1. That the evidence in the record did not sustain the finding that the husband was in such possession at the time he joined in the deed of his wife as would carry his covenant to a remote grantee; 2. That the recital in the deed of the receipt of the consideration by the grantors was not conclusive in any inquiry as to the actual possession of the property at the time of the grant,

but it could be shown by evidence dehors the deed whether it was the husband or the wife that received the consideration.

It remains to consider how far the evidence produced on the last trial has changed the situation. The case comes to us now as it did then with a finding by the trial court that the husband was in possession of the real estate at the time of the grant. The additional evidence consists: 1. Of proof that the husband negotiated the sale; 2. That he executed a written contract of sale in his own name; 3. That he delivered the deed to Mrs. Fisher, received a check to his order for part of the purchase money, and took back the bond and mortgage to his wife for the balance.

The question is, Do these acts on the part of the husband prove that his wife had surrendered to him the possession, or conveyed to him any interest in the land sufficient to carry his covenant down through the line of conveyances to the plaintiffs? We think not. They are all such acts of care, management, and agency by the husband, with respect to his wife's ⁴⁸⁴ property, as naturally and necessarily proceed from the relation of husband and wife. They do not show that the original title or possession of the wife had been changed. They are such acts, and such only, as a man of business would be expected to perform with respect to the sale and conveyance of his wife's real estate. If the wife cannot avail herself of the advice and business ability of her husband concerning the care and management of her property, without, at the same time, furnishing evidence against her own title and possession, then she must employ strangers to act for her, since she cannot always act for herself. The law does not impose any such unreasonable restriction upon her right to hold and convey property. There is no question here of fraud against the rights of creditors. In all such cases, where there is reason to suspect that the title of the wife is nominal or in trust for the benefit of the husband, such acts as are disclosed by the record in this case with respect to the property, when connected with other facts and circumstances, become quite significant, and, doubtless, tend to prove that the husband may have some secret interest in the property. But here there is no controversy about the fact that the wife purchased and paid for this property and took the title in her own name and in her own right. The only question is, whether the acts of the husband, done with the consent of the wife, are evidence sufficient to establish the fact that she subsequently, in some manner, transferred some legal interest or estate in the property to her husband so as to attach his covenant to the land and render

it capable of transfer with the land itself; and this result must be accomplished, if at all, against the husband's express disclaimer, as a witness, of any interest whatever in the property.

It was ascertained and adjudged years after the conveyance that neither he nor his wife had in fact any title to or interest in the land conveyed, but, at the time, all the parties to the transaction supposed that the wife had good title. She had, however, when she conveyed, the power to put her grantee into possession, and her deed did give such possession. Her ⁴⁸⁵ relations to the property and her actual dominion over it were such that her covenants became annexed to the land and passed with the possession from one to another, but her husband had no such dominion over it and held no such legal relations to it, though he joined in the conveyance.

The possession was all that the wife ever really had to convey, and it is quite difficult to conceive how this could be so divided with her husband as to make the covenants of both effectual as obligations running with the land. The written contract of sale, which the husband executed in his own name, bound him to convey with covenants, but when the deed was executed it disclosed the fact upon its face that the wife was seised of the premises in fee simple, which, of course, excluded the possibility of any interest in the husband, and his covenants denoted, not that he had any interest or title whatever, but that his wife had an indefeasible estate of inheritance in fee simple. There is nothing upon the face of the deed that indicates that the husband professed to have any interest whatever in the land, but the contrary inference is deduced from the form of the covenant. In view of the positive testimony of the husband that he had no legal interest in the land, and of what appears upon the face of the deed itself, the circumstance that the check for the cash portion of the purchase money was made payable to the order of the husband is not very significant.

At most these acts on the part of the husband raise only a presumption which is overthrown by the deed, the testimony of the husband, and the other general facts in the case which are not disputed.

There may be some hardship to the plaintiffs in this case, but we are dealing with a doctrine of the common law, applicable to covenants in conveyances of real estate, which we do not feel at liberty to disregard. The reasons in which it originated may not now have the force that they formerly had; but it is somewhat significant that the very able counsel, who have been engaged for years in the prosecution of this case, have not been able to dis-

cover any authority holding that a ⁴⁶⁶ husband can be made liable for damages upon such a covenant in the deed of his wife conveying her own property under such circumstances as appear in this record. That fact alone is an argument against the right to maintain the action which cannot be ignored, since, in the nature of things, transactions of like character must have been and are of frequent occurrence. The rule that the covenant of a stranger to the title is personal to the covenantee and incapable of transmission by a mere conveyance of the land must, in the absence of special facts and circumstances, apply to a husband who becomes a party to a deed by his wife conveying her own land. The plaintiffs have attempted to take this case out of the operation of the general rule by showing that there was some estate in the husband sufficient to carry the covenants to the land, but we think that this claim has no substantial basis of fact upon which to rest. We do not think that the facts in the case justify the inference that any right or interest which the wife had was divided with her husband, or that he ever had the power to deliver any possession of the property to another, or that he ever, in fact, assumed to do so. The husband's signature to the deed gave the grantee no right to the possession that she would not have had without it. It added nothing to the force or effect of the conveyance, while that of the wife secured to her grantee all the right and title that she ever had, which was simply the actual possession. The husband had no more possession as against his wife than one of the children would have had, who had done or performed like acts with respect to the property, under the same circumstances.

The conception of possession in the husband in such cases may be traced largely to that instinct of the mind which so readily attributes to the husband, by reason of his headship of the family, the possession and dominion of the family home. That conclusion, however, will be dissipated by an application to the question of the legal principles that grow out of the right of the wife to hold and convey real property. The actual possession of the property is one of the incidents that flow from this right, and it must be in the wife in most if not ⁴⁶⁷ in all cases where she has the legal title, and, when possession is once delivered to her, it is not lost or impaired by permitting her husband to exercise acts of care, management, or agency with respect to the property.

The nature of the husband's covenant cannot be affected by the fact that at common law he had an interest in the real property of his wife. The common-law rights of the husband in the wife's realty have been abolished, and did not exist when the cov-

enant in question was made, and so we are not concerned with the question as to the legal character of the covenant when the relations of husband and wife were governed by the rules of the common law. I have not referred to the cases and authorities that mark the distinction between covenants in deeds that are personal to the covenantee and those that run with the land. These cases have been very fully examined and explained on the former appeals in this case. The controversy has reached a stage where both parties are in the attitude of admitting that the nature of the covenant, whether personal or one running with the land, must depend entirely upon the fact of possession in the husband, and the transmission by him of possession to the grantee under the deed.

We are of the opinion that the plaintiffs failed to establish this primary fact, and that the judgment of the court below should, therefore, be affirmed, with costs.

BARTLETT, J., dissenting. I vote for reversal upon the following grounds, viz.: 1. For the purposes of this appeal, the defendant, George S. Coe, must be deemed to have been in possession of the premises at the time he joined in the deed with his wife, for the reason that the order of the appellate division does not show that the reversal was on questions of fact; 2. If the question of fact is before us, the record shows that the trial judge was warranted in finding George S. Coe in possession. The facts tending to show possession are much stronger now than on a former appeal, when Judge Finch, writing for ⁴⁶⁸ this court, stated that it was not possible to say that Coe was a stranger to the title and transferred no estate to which his covenant of warranty could attach: *Mygatt v. Coe*, 142 N. Y. 86; 3. The plaintiffs are entitled to maintain this action by virtue of the title they acquired on the foreclosure sale of their mortgage from Nancy Fisher.

By the sheriff's deed the plaintiffs took the entire estate of the mortgagor as it existed at the time the mortgage was executed, unaffected by her subsequent acts, and Coe's covenant ran to the plaintiffs as well as to the grantee of the mortgagor, in proportion to their respective rights, and was divisible accordingly: *Mygatt v. Coe*, 142 N. Y. 89; *Rector etc. v. Mack*, 93 N. Y. 492; 45 Am. Rep. 260.

Andrews, C. J., Gray and Vann, JJ., concur with O'Brien, J., for affirmance.

Haight and Martin, JJ., concur with Bartlett, J., for reversal.

Judgment affirmed.

DEEDS—HUSBAND AND WIFE—COVENANTS REAL AND PERSONAL—WHEN RUN WITH THE LAND.—The fundamental distinction between real and personal covenants is that the former run with the land, inuring to the benefit of, or becoming binding upon, subsequent grantees, while the latter do not run with the land, and are binding only upon the covenantor and his personal representatives and in favor of the covenantee: Extended note to *Morse v. Garner*, 47 Am. Dec. 569. If the grantor be not seised when he makes the conveyance, his covenant of warranty is merely personal, and does not attach and run. He must have capacity to convey the land itself to which the covenant is incident: Note to *Morse v. Garner*, 47 Am. Dec. 569. As to the effect of covenants of warranty in deeds of married women, see extended note to *Nash v. Spofford*, 43 Am. Dec. 426-428; *Hill v. West*, 8 Ohio, 222; 31 Am. Dec. 442; also, *Dean v. Shelley*, 57 Pa. St. 426; 98 Am. Dec. 235.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—EFFECT OF HUSBAND'S POSSESSION AND CONTROL OVER.—The possession by a husband and wife of the wife's land is referable to her title, and the marital relation. His occupancy of it results from, and accords with, his relation to the owner, and it is not in any sense adverse to hers, nor, as between them will the mere continuance of such occupancy for any space of time operate in equity, or by force of any statute, as an extinguishment or bar to the assertion of her title: Note to *Miller v. Barker*, 45 Am. St. Rep. 683. The fact that a husband has the management of his wife's separate personal property as if it belonged to him, and not to the wife, will not affect her title to it, so far as the creditors of the husband are concerned: *Second Nat. Bank v. Merrill*, 81 Wis. 151; 29 Am. St. Rep. 877, and note. See, also, *Wells v. Batts*, 112 N. C. 283; 34 Am. St. Rep. 506, and note.

MOFFETT v. ELMENDORF.

[152 NEW YORK, 475.]

DEVISES, WHEN NOT TO A CLASS AND THEREFORE SUBJECT TO LAPSE.—A devise to the testator's aunt, naming her, and to his cousins, naming seven persons, each to take an equal share, is not a devise to a class, though all the cousins are the children of such aunt. Therefore, upon the death of any of such cousins, his or her devise lapses and goes into the residue.

WILLS—CONSTRUCTION OF PROVISIONS IN FAVOR OF A TESTATOR'S WIFE.—Provisions in a will in favor of the wife of a testator should be liberally construed in her favor, and the revocation of a devise to her will not be presumed in the absence of express words of a clear, unequivocal implication.

WILLS—LAPSED DEVISE, WHEN VESTS IN THE WIFE AS RESIDUARY DEVISEE.—If a will purports to give to the wife of the testator all his real estate except therein otherwise given, and in a succeeding clause gives to certain persons therein designated certain real property to hold share and share alike, and some of the devisees die before the testator, and the devise as to their share lapses, such shares vest in the wife as residuary devisee, although the will in a subsequent clause declares that all the residue of the testator's estate, if any there be, is devised to his heirs at law at the time of his decease. This last clause can become operative only in the event of the death of the wife before that of the testator, and her consequent inability to take under the residuary devise to her.

Action for the partition of certain lands which in his lifetime belonged to Samuel Bowne Duryea. He died testate, leaving a wife but no descendants. He had two brothers of the half blood, children of his father, and three cousins, who were his only heirs of the whole blood of his mother. He left a will, the first, second, sixth, eighth, and tenth clauses of which were as follows: "First, I give to my beloved wife, Kate Duryea, all my personal property and estate not herein otherwise bequeathed, unless in the contingency of my surviving her, or of her and my decease on the same day, or by occasion of the same wreck or casualty proving fatal to both, and in that case I bequeath said personal estate to my next of kin. The provisions of this will, in favor of my wife, are made by me and are to be accepted by her in lieu of all claims of dower in my real estate or any portion thereof. Second. All my real estate, except the portions thereof hereinafter otherwise given or disposed of, I give in like manner to my said wife, if I leave no issue, but if I leave any children living or afterborn, or the descendants of any deceased child, I give the real property in this clause devised to my wife and such issue in equal shares, that is, each child, the representative of each deceased child, as a class, and my wife, are severally and respectively to take equal shares therein." "Sixth. I give and devise to my aunt Catherine Elwell and my cousins Mary S. Elmendorf, John D. Elwell, Joseph S. Elwell, Cornelius A. Elwell, Annie A. Elwell, James H. Elwell, and Sarah E. Elwell (each to take an equal share therein), my lots on the southerly line of Sixtieth street, between First avenue and Avenue A, in the city of New York; also my lots on the southerly line of Sixty-first street, between First avenue and Avenue A in the city of New York; also my lots and premises now or hereafter known as No. 276 Mott street, in the city of New York, and also my house and lot now or heretofore known as 143 Mercer street, in the city of New York." "Eighth. I give to my issue (if any me surviving, or, if I leave no such issue), then to the Brooklyn Children's Aid Society of the city of Brooklyn, all my lots situate on Clinton street, Bush street, Leonard street, Grinelle street, Richard street, Sullivan street, Walcott street, and King street, all situate in the Twelfth ward of the city of Brooklyn, as the wards are now numbered." "Tenth. All the residue of my real estate, if any there prove to be, I give and devise to those who may be my heirs at law, at the time of my decease, and in the same proportion in which they would have taken if, as to such residue, I should have died intestate." After the making of the will two of the devisees named in the sixth clause died.

James W. Gerard, Jr., and John M. Bowers, Charles R. Westbrook, Edward W. Ditmars, for the appellants.

James G. Flanders and Francis L. Stetson, for Kate Duryea.

⁴⁸² VANN, J. The plaintiff, who is one of the devisees named in the sixth clause of the will, seeks to partition the lands devised thereby, except such parts thereof as were sold by the testator in his lifetime. Her right to partition is not disputed, and it is conceded that each of the six surviving devisees mentioned in said clause has title to an undivided eighth of the premises in question. The contest arises over the undivided two-eighths devised to Catherine and Cornelius R. Elwell, which are claimed by various parties upon the following grounds: Mrs. Kate Duryea, the widow, claims that the gifts to those decedents lapsed because they died before the testator, and that she takes the estate represented by such devisees as residuary legatee under the second clause of the will.

The defendants Pierrepont and Harmanus Duryea claim that, as brothers of the half blood, they are the sole heirs at law of the testator, and that, the devises having lapsed, they take as residuary devisees under the tenth clause.

The defendants King also claim under the tenth clause, but upon the ground that, as cousins of the whole blood of the mother, they are the heirs at law as to seven-eighths of the estate covered by the devise alleged to have lapsed, because that proportion of the property in question came to the testator by devise, under the wills of maternal ancestors, and that Pierrepont and Harmanus Duryea are not of the blood of those ancestors.

The defendant John D. Elwell claims that the gift in the sixth clause was to the devisees therein named as a class, and that the survivors, of whom he is one, take the whole.

It will be convenient to first consider whether the shares in question passed to the devisees of the sixth clause, as a class, with the right of survivorship, or lapsing, fell into the residuum and passed under one of the residuary clauses. ⁴⁸³ The answer to this question depends on the intention of the testator, which is to be learned from reading the whole will, aided, if there is any ambiguity, by a reference to such extrinsic facts as were known to the testator when he executed it. The mode of the gift is to "my aunt," giving her full name, and to my "cousins," giving the full name of each, and adding "each to take an equal share therein."

Thus, we have a devise to eight persons, each designated by name, with nothing on the face of the will to indicate that they

compose a class, or even that they are members of the same family, although it appears from evidence outside of the will that they constituted the Elwell family, consisting of a mother and her seven children. The words "aunt" and "cousins," as thus used, may properly be regarded as merely descriptive of the persons named for the purpose of identification, and not as indicating a class. There is no reference in any other portion of the will either to the devisees of the sixth clause or to the estate devised therein. There is no double description, both by individual names and as a class, nor a gift to a body of persons, uncertain in number, collectively described. The devise was to eight persons nominatim, in equal shares, with no words necessarily pointing to a class. There is nothing in the rest of the will that bears upon the intention of the testator as to the point under consideration aside from the residuary clauses which prevent partial intestacy, except that it appears when he wished to give to a class, as he did in the second clause, or to provide against a lapse, as he did in the seventh clause, he made his meaning clear beyond a doubt by the use of express terms. The designation of the devisees by giving the full name of each constituted them *personae designatae* as those words are known in the law. There was no perfect devise except to the devisees by name. Omitting the names, the gift would fail for uncertainty, as the testator had more than one aunt and more than seven cousins. "In a gift to a class you look to the description and inquire what individuals answer to it, and those who do answer to it are the legatees described": ⁴⁸⁴ 13 Am. & Eng. Ency. of Law, 61. While the mere fact that part of the persons composing a class are named is not controlling, when all are named, each by his or her name in full, and an equal share is given to each, the presumption is, that they are to take in their individual and not in their collective capacity, although this may be rebutted by other parts of the will showing a different intention, which, as we have seen, does not appear in the will in question: 3 Jarman on Wills, 8; Woerner's American Law of Administration, sec. 434. As was said by Judge Comstock in *Savage v. Burnham*, 17 N. Y. 561, 575: "When a will directs an aggregate fund to be divided amongst individuals by name, share and share alike, the rule seems to be well settled that the interests of those dying before the testator are deemed to have lapsed." The courts invariably attach great importance to the designation of the devisees severally by name, and to a provision that they shall share the gift in fixed and definite proportions. To quote Judge Comstock again: "When an equality or inequality of shares is prescribed

in express words, the language was always held to create" the relation of tenants in common: *Downing v. Marshall*, 23 N. Y. 366, 373; 80 Am. Dec. 290. When it so happens that the devise is to a class, as such, without naming the individuals or providing that each shall take a definite share, as was the case in *Magaw v. Field*, 48 N. Y. 668, where the gift was "to the children of Van Brund Magaw," it is held a gift to a class, and that only the survivors take. Necessarily, where the devisees are described as a class only, their names not being mentioned, and there is nothing to indicate a gift to individuals, the gift is to a class as such, and not to particular persons who may compose a class. If they did not take as a class, they could not take at all. In *Hop-pock v. Tucker*, 59 N. Y. 202, the devise was to three persons by name, and as "the children of my deceased daughter Ann Maria." The court, through Chief Judge Church, said: "It must be conceded that the clause, as it is written, with its double description, free from the influence or control of other portions of the will, would, according to the adjudicated cases, be construed as a ⁴⁸⁵ personal legacy to each child: *Ashling v. Knowles*, 3 Drew. 593; *Viner v. Francis*, 2 Cox Eq. 190; *Denn v. Gaskin*, Cowp. 657; *Bain v. Lescher*, 11 Sim. 397. The law infers this intent from the specification of names, and regards the descriptive portion of the clause as intended for identification." The court concluded, however, wholly from other and quite significant language used in a different part of the will then under consideration, that the devisees took as a class, the intention of the testator to that effect plainly appearing. In *Matter of Wells*, 113 N. Y. 396, 10 Am. St. Rep. 457, the devise was of "one-eighth part to each of five persons named and one-eighth part to the children of three other persons 'to have and to hold the same to them, their heirs and assigns forever.'" Four of the devisees having died before the testator, it was held that the devise to them lapsed. In *Matter of Kimberly*, 150 N. Y. 90, where the gift was "unto my three sisters, Mary, Annie, and Louisa," the court held that it was not to them as joint tenants, nor as a class, but as tenants in common, and, as one of the three died before the testator, that her devise lapsed, although the result was partial intestacy. The court based its conclusion upon the ground that the number of the donees was certain, and the share each was to receive was also certain and in no way dependent for its amount upon the number who might survive.

We find no precedent of this court authorizing the conclusion that the devisees of the sixth clause took as a class. We think that by naming the devisees and giving an equal share to each,

without the use of any word applying strictly to a class, or anything requiring a class to satisfy the scheme of the will, the testator intended to make the beneficiaries of that clause tenants in common, and that they should take distributively and not collectively. The lapsed devises went into the residue, as the common-law rule to the contrary has been done away with by statute, and there is no longer any difference as to the operation of a residuary clause between lapsed devises and lapsed legacies: *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 353; 2 Rev. Stats., sec. 5, p. 57.

⁴⁸⁶ The discussion is now narrowed to the residuary devisees, but it is not easy to determine under what residuary clause the lapsed devises passed. It is clear that the testator did not intend to die intestate as to any portion of his property, either real or personal, for there are three residuary clauses in his will. The first is unimportant, as it relates to personal property only, except as it shows unusual care to provide against every possible contingency that the uncertainty of life might bring, and to protect his estate from partial intestacy, no matter what might happen. Having his wife first in mind, he gave all his personal estate to her, if she should survive him; but if he proved the survivor, or if they both died on the same day or by reason of the same casualty, he gave it to his next of kin.

The second and third residuary clauses, relating exclusively to real estate, appear in the second and tenth paragraphs of the will. By the former, which may be termed the special residuary clause, he continued to favor his wife, for he gave her all his real estate, not otherwise given, unless he should leave descendants, and in that event he gave all to her and to them. He did not, however, by this clause, which disposed of more property than any other paragraph in his will, provide against contingencies involving partial intestacy with the same care that he showed in disposing of his personal property, for he failed to direct where the residuum of his real estate should go in case he survived his wife and died without descendants. There was another contingency left unprovided for, and that was the possibility that his wife might not accept the provisions of his will in lieu of dower, as he had previously required. As his property consisted mainly of real estate, this was of much importance and was not likely to be overlooked in a will drawn with the care and foresight of the one under consideration. By the tenth clause, however, which is a general residuary clause relating to real property, he provided against both of these contingencies and thereby shut out the last possibility of partial intestacy. He evidently regarded

it as a safety clause and adopted it to provide against ⁴⁸⁷ remote contingencies. That he did not expect any residuum for this paragraph to act upon is indicated by his expression, "if any there prove to be," referring to real estate. The gift "to those who may be my heirs at law at the time of my decease" indicates that he thought he was dealing with possibilities rather than probabilities, and thus supports the theory of a safety clause. Apparently, he did not expect that anything would pass by the tenth clause, but inserted it from abundant caution in order to provide for an improbable contingency. The codicil throws little light on the question before us. Although it was executed after the death of at least one of his devisees, and it revoked the contingent devise of a large amount of real estate in the eighth clause, still he did not direct to whom the gifts thus affected should go, except as he had already directed in the residuary clauses of his will. The fact that he made no further disposition of the subject matter simply shows that he was satisfied with the way it would go under the general provisions of his will. As the codicil gave to strangers about one-fourth of the personal property bequeathed by the will to his wife, it is reasonable to believe that he intended to make it up to her by allowing her to take the addition to the real estate not specifically disposed of. Provisions for the benefit of a wife should be construed liberally in her favor. It is clear that he did not intend by the tenth clause to revoke the prior devise to his wife, as that would be hostile to his general purpose, and would render the provisions for her of less value than her rights under the statute: *Stimson v. Vroman*, 99 N. Y. 74, 80; *Thurber v. Chambers*, 66 N. Y. 42, 48. This could be done "only by express words or by clear and undoubted implication": *Freeman v. Coit*, 96 N. Y. 63, 68; *Roseboom v. Roseboom*, 81 N. Y. 356; *Bristow v. Masefield*, 52 L. J. R. Ch. Div. 27. If the lapsed devises had been expressly revoked, it would hardly be contended that they fell into the tenth clause. Why should it be so held under the facts as they exist, since the dominant purpose of the testator was to take care of his wife? His first thought was of her; and his ⁴⁸⁸ intention to take from her and give to remote relatives, whom he could not mention by name, should plainly appear, or the theory be rejected as untenable. It is not enough to simply raise doubts by considering detached parts of the will by themselves, provided the general purpose of the instrument, as a whole, points in the opposite direction. Special reliance is made by those appellants whose claims are now under consideration upon the gift by the second clause of all his real estate, "except the portions thereof

hereinafter otherwise given or disposed of in like manner to my said wife." It is insisted that he thus imported into the second clause and applied to the real estate the contingencies applied in the first clause to personal property. It is improbable, however, that in a will so carefully drawn, such a loose and ambiguous method would have been adopted simply to avoid repeating a few words, and manifestly the gift in the second clause was not made "in like manner" to that in the first, for the conditions and terms of the gift are utterly different, even if the imported words are inserted. The devise "in like manner" refers to the gift to the wife, and may have been used in the sense of "also," to indicate a gift to her in addition to that made by the preceding clause; or, it may have been used to refer to the basis of the gift, in that it was to be accepted in lieu of dower, the same as the bequest of the personal property. So the gift of all but certain excepted portions "otherwise given or disposed of" may refer to gifts effectually made, as distinguished from those which might lapse. By general rule, the will speaks from the death of the testator, and as to the second and tenth clauses, this is necessarily the result, at least in part, independent of the rule, for until that time it could not be known whether he would leave any children or not, or who would be his "heirs at law." Speaking as of that date, lapsed legacies would be ignored the same as if they had not been made. Moreover, a gift of "all other land," or of "all land not hereinbefore devised," is regarded as a devise of the residue, and not as indicating an intention "to exclude lapsed specific gifts": *Cogswell v. Armstrong*, 2 Kay & J. 480 227; *Green v. Dunn*, 20 Beav. 6; *Culsha v. Cheese*, 7 Hare, 236; *Carter v. Haswell*, 26 L. J. Ch. 576; *Burton v. Newbery*, L. R. 1 Ch. Div. 241; *Roberts v. Cooke*, 16 Ves. 451. While the arguments of the learned counsel for the appellants founded on the tenth clause and parts of the second have caused us to hesitate before pronouncing judgment, we think that the general purpose of the will as indicated by the analysis already made should control. The second and tenth clauses are not necessarily inconsistent, for if the former is construed as a special residuary clause, to be operative unless the widow should die first, or should refuse to accept the provisions of the will in lieu of dower, and the latter as a general residuary clause, to be operative in case either of said contingencies should happen, there is no inconsistency, and every part of the will speaks and is given its apparent function. This impresses us as more reasonable and probable, in view of all the facts than to suppose that the testator was trying to provide for lapsed legacies which would render the said clauses inconsistent. Seeking to gather the intention

of the testator from the entire will, as republished in the codicil, and carefully studying his main design, based on the natural import of the words used by him, we think that the nearest approach to his actual purpose that can be made is to adjudge that he intended his "beloved wife, Kate Duryea," should be his sole residuary devisee, unless he should survive her, or she should insist upon her statutory rights.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

WILLS—DEVISES TO A CLASS—LAPSED DEVISES.—It is a general rule of the common law that a legacy lapses or is extinguished by the death of the legatee while the testator is alive. This rule does not apply, however, where a legacy is given to a class of persons in general terms, as tenants in common. In this case, the death of one or more of them before the testator will not cause a lapse of any part of the fund, but the survivors of the class will take the whole: Extended note to Cureton v. Massey, 94 Am. Dec. 157; also, note to Collin v. Collin, 45 Am. Dec. 423. A legacy or devise lapses and becomes void by the rules of the common law, if the legatee or devisee fails to survive the testator: In re Wells, 118 N. Y. 396; 10 Am. St. Rep. 457, and note.

WILLS—LAPSED DEVISES—RIGHTS OF RESIDUARY DEVISEE.—The rule seems to be that property devised or bequeathed to a person who is dead when the will is made, or who dies before the testator, does not pass to such person's heirs. If personalty, it goes to the residuary legatee, and if real estate, it descends to the heirs of the testator: Gore v. Stevens, 1 Dana, 201; 25 Am. Dec. 141; Greene v. Dennis, 6 Conn. 293; 16 Am. Dec. 58. See, also, Donohoo v. Lea, 1 Swan, 119; 55 Am. Dec. 725. But in interpreting wills, the cardinal principle is to arrive at and carry out the intention of the testator if it is lawful: Morrison v. Sessions, 70 Mich. 297; 14 Am. St. Rep. 500; Dickison v. Dickison, 138 Ill. 541; 32 Am. St. Rep. 163. The intention of the testator will govern in the disposition of lapsed devises or legacies: Extended note to Giddings v. Giddings, 48 Am. St. Rep. 197-202. The construction of a general residuary clause in a will must be in subordination to the general purpose of the testator as expressed in the will: Dickison v. Dickison, 138 Ill. 541; 32 Am. St. Rep. 163.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

McCORMICK HARVESTING MACHINE CO. v. TAYLOR.

[5 NORTH DAKOTA, 53.]

NEGOTIABLE INSTRUMENTS—ACTION BY THIRD PERSON AS PAYEE—BREACH OF WARRANTY AS A DEFENSE—AGENCY.—If a vendor of an article warrants its quality, and takes a note for the price payable to a third person, and the article proves worthless, the breach of warranty is a defense to an action on the note by the payee, although the maker may not be able to show that the payee had any knowledge of the warranty, or that he took the note otherwise than in good faith and for value. Hence, if an agent for the sale of machinery sells machinery of his own, and takes in payment therefor a horse which he sells with a warranty, taking in payment therefor a note made payable to his principal, and the latter, being ignorant of the transaction, and supposing that the note was taken in payment for his own machinery receives the note upon a settlement of the agency account, and gives his agent, the vendor, credit for the full amount thereof, the maker of the note may, in an action upon it by the payee, set up a breach of warranty of the horse, and defeat a recovery.

Action by the McCormick Harvesting Machine Company against William Taylor on a promissory note. There was a judgment for the defendant, and the plaintiff appealed.

A. T. Cole, McCumber & Bogart, for the appellant.

W. H. Rowe, for the respondent.

53 BARTHOLOMEW, J. Action on a promissory note given as purchase price for a horse. Defense of warranty of the horse and breach thereof by reason of horse being diseased with glanders. Counterclaim for damages by reason of the communication of the disease to other horses, and infection of stable. At the close of the testimony, the court directed a verdict for defendant. Subsequently, a motion for a new trial was denied, and defendant had judgment for costs. Plaintiff appeals. The case was correctly ruled, and on entirely elementary principles. Assum-

ing all that plaintiff's evidence tended to prove as proven, and the facts are as follows: The firm of Martin & Strane were the agents of plaintiff at Ellendale, in this state, for the sale of machinery. For machinery so sold they accounted to plaintiff either in money or notes. Martin & Strane sold a piece of machinery of their own, not of plaintiff's manufacture, and received in payment therefor a horse. This horse they subsequently sold to defendant with a warranty. ⁵⁴ The note in suit was taken in payment, but, instead of being made payable to Martin & Strane, they had it made payable to plaintiff, and turned it over to plaintiff in their next settlement, plaintiff at the time supposing that it had been taken in payment for its machinery. The horse was entirely worthless, and was killed by order of the proper authorities.

Plaintiff's sole ground for recovery upon the note rests upon the proposition that it is an innocent purchaser for value before maturity, and thus relieved from the defense pleaded. In other words, it claims to be a bona fide indorsee of the note. Section 4487 of the Compiled Laws reads: "An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer." Plaintiff did not acquire the note by indorsement. It was the payee named in the note. "A bona fide holder must be a purchaser in the usual course of business": Randolph on Commercial Paper, sec. 988. Plaintiff was not a purchaser in any such sense. It received the note from its agents as its property in the hands of its said agents. It was named as payee therein, and, when it accepted the note in that form, it was bound to know that it took it subject to any defenses that the maker had against it: See Randolph on Commercial Paper, sec. 1875. The case of Aldrich v. Stockwell, 9 Allen, 45, fully covers this case. We quote the headnote: "If the vendor of an article with warranty of quality takes a promissory note for the price, payable on demand to a third person, and the article proves worthless, the maker of the note may rely upon the breach of warranty in defense to an action upon it by the payee, although he cannot show that the payee had any knowledge of the warranty, or took the note otherwise than in good faith and for value."

The judgment of the district court is affirmed.

All concur.

NEGOTIABLE INSTRUMENTS — DEFENSES — BREACH OF WARRANTY.—The principal case is a very unusual one, and we find no case "on all fours" with it. That a vendee may recoup his damages for breach of warranty of quality in an action by the vendor on a promissory note given by the vendee for the price, see *Getty v. Rountree*, 2 Pinn. 379; 54 Am. Dec. 138; and that, in an action on a non-negotiable promissory note, given for the purchase price of a stallion sold for breeding purposes, an answer setting up a breach of the implied warranty that the horse is reasonably fit for such purposes is sufficient, where the note is subject to equities, see *Merchants' etc. Bank v. Frazee*, 9 Ind. App. 161; 53 Am. St. Rep. 341.

NICHELLS v. NICHELLS.

[5 NORTH DAKOTA, 125.]

• **ATTORNEY'S WITHDRAWAL OF ANSWER—ACT OF BAD FAITH.**—An attorney at law, who has appeared and filed an answer for the defendant in a case, has no authority to withdraw such answer and appearance, merely because his client has failed to pay his fee. Such an act is one of bad faith, and, therefore, beyond the scope of an attorney's authority; and the rule applies to actions for divorce as well as to other actions.

JUDGMENT BY DEFAULT AFTER WITHDRAWAL OF ANSWER, WHEN INVALID.—If the defendant's attorney, in bad faith, and in hostility to his client, withdraws his answer and appearance, without notice to the latter, because his fees have not been paid, and judgment by default is taken against the defendant for want of an answer, the court having notice, from the record, of the act of bad faith, the judgment entered is illegal in its inception and should be set aside on motion of the defendant as a matter of strict legal right, and not as a matter of favor. This rule applies to actions for divorce as well as to other actions.

ATTORNEY'S DUTY, UPON WITHDRAWAL, TO NOTIFY HIS CLIENT.—An attorney at law, engaged to defend a cause, acts in bad faith, where he abandons it without justifiable cause and without giving his client ample notice and a full opportunity to procure other counsel to defend the case in court. Hence, no valid judgment by default can be legally entered, after appearance and answer, when such appearance and answer are withdrawn by the attorney, in bad faith, without first giving notice to the defendant; and a notice that, if his fees are not paid, he will withdraw from the case is not a notice that he will withdraw the answer.

MARRIAGE AND DIVORCE.—JUDGMENTS ENTERED IN DIVORCE CASES ARE OPEN TO ATTACK in the same manner, upon the same grounds, and within the same periods of time as other judgments, although parties divorced have entered into new matrimonial alliances, while the decree is still open to attack on appeal.

JUDGMENT—WHEN WITHDRAWAL OF ANSWER DOES NOT LEAVE DEFENDANT IN DEFAULT.—If an attorney at law enters an appearance and files an answer, his subsequent withdrawal thereof, in bad faith and without notice to his client, because his fees have not been paid, does not leave the defendant in default for want of an answer, for such attempted withdrawal is without authority. The answer still stands, and will continue to stand until it is lawfully withdrawn, or the case is regularly tried.

JUDGMENT—RES JUDICATA, WHAT IS NOT—APPEAL.—A decision that sweeps away the rights of a party without giving him a chance to be heard is not *res judicata*, and does not force him to an appeal as a first step in seeking a remedy.

JUDGMENT—MOTION TO SET ASIDE FOR IRREGULARITIES IN ENTRY.—It is proper practice to attack all the irregularities in the entry of a judgment by a motion to set it aside.

Action for a divorce by Clinton G. Nichells against Minnie B. Nichells. The defendant appealed from an order denying a motion to vacate a decree for the plaintiff.

Ball & Watson and I. J. Ringolsky, for the appellant.

W. E. Purcell and McCumber & Bogart, for the respondent.

¹²⁷ WALLIN, C. J. The record in this action presents a state of facts which, so far as they are important to a decision of the question involved, may be stated as follows: The action is for a divorce from the bonds of matrimony, and was commenced by the personal service of a summons and complaint, which, after an order of publication was obtained, was made upon the defendant ¹²⁸ at Kansas City, Missouri, the place of the defendant's residence, on February 3, 1894. On April 14, 1894, the defendant, by her attorney, Frank Gray, Esq., appeared in the action and served an answer to the complaint. The plaintiff's ground of action, as stated in the complaint, was cruel and inhuman treatment. The marriage between the parties was celebrated at Kansas City in 1883, and two children were born of the marriage, both of whom were living with their mother at Kansas City when the action commenced, and ever since have been in her custody. The answer of the defendant denied the allegations of the complaint and alleged that the plaintiff was not a resident of North Dakota in good faith, but was and is a resident of Kansas City aforesaid; that plaintiff deserted the defendant in September, 1893, leaving the defendant and said children without means of support, and that, after such desertion, plaintiff went to the state of North Dakota with one ———, with whom plaintiff now is and ever since has been living in open adultery, said ——— being a married woman, and not the wife of the plaintiff. On the eleventh day of May, 1894, a document signed by the defendant's said attorney was filed with the clerk of the district court in which the action was pending, which read as follows:

"State of North Dakota, }
"County of Richland. } ss.

"In District Court, Fourth Judicial District.

"CLINTON G. NICHELLS,
Plaintiff,
vs.
"MINNIE B. NICHELLS,
Defendant. }

"To W. E. Purcell, Attorney for the Above-named Plaintiff:

"You are hereby notified that, in the above-entitled action, the undersigned withdraws his appearance for the above-named defendant, Minnie B. Nichells and withdraws the answer by him interposed on behalf of said defendant, for the reason that the undersigned was retained to appear in said action in the month of February, 1894; that he furnished the defendant with a copy of the summons and complaint in said action, and, during said month of February, demanded of the defendant that he be put in communication with her attorneys, if any she had, in the city of Kansas City, Missouri; that he was instructed by the defendant to prepare and serve the said answer in said action, ¹²⁹ and to make a draft on the defendant's representatives for his retainer in said action; that he prepared and served said answer in this action within the time by law prescribed after the service of the summons and complaint herein upon the defendant; that he demanded from the defendant and her representatives in said Kansas City, Missouri, the payment of a reasonable retainer for his appearance in said action on or about the fourteenth day of April, 1894; that defendant and the said representatives have failed, neglected, and refused to pay the undersigned any sum whatever as a retainer or for his fees in said action; that the representative of said defendant in Kansas City, Missouri, has been notified long prior to this date that, unless the retainer of the undersigned was paid, he would have nothing further to do with this action.

"Dated May 8th, 1894.

"FRANK GRAY,

"Defendant's Attorney."

On the same day (May 11, 1894) the trial court made and filed its findings of fact and conclusions of law, and directed a judgment to be entered dissolving the bonds of matrimony existing between the parties, whereupon said judgment was then formally entered in the judgment-book. Preceding said findings of fact

was the following recital made by the trial court: "The above-entitled action having been brought on for trial before the court on this eleventh day of May, 1894, and it appearing to the satisfaction of the court that the summons and complaint herein were personally served upon the defendant at Kansas City, in Jackson county, state of Missouri, on the third day of February, 1894, the same being in lieu of service by publication, which had been theretofore ordered by this court by an order herein filed; and the defendant having appeared by Frank Gray, Esq., her attorney, and having answered herein, and served her answer to the plaintiff's complaint upon the attorneys for the plaintiff on the fourteenth day of April, 1894; and the defendant having on the eighth day of May, 1894, by a stipulation in writing herein filed, withdrawn her appearance and her answer in said action, and being, therefore, on this day, in default—and the court having¹³⁰ proceeded to hear the evidence adduced on the part of the plaintiff in support of the allegations of his complaint, and having duly considered the same, and being fully advised in the premises, now makes and files the following findings of fact." The defendant, through her other attorneys, Messrs. Ball & Watson, of Fargo, North Dakota, made application to said district court in July, 1894, and obtained an order to show cause before said court why said judgment should not be vacated, and the defendant be allowed to interpose a defense to the cause of action alleged in the complaint; said application being based upon a proper affidavit of merits and other affidavits, and a proposed amended answer to the complaint, which embodied, in addition to the defenses stated in the original answer, other defensive matter. After several adjournments, a hearing was had upon the order to show cause, and upon October 31, 1894, the trial court entered its order discharging the order to show cause and denying the application to vacate said judgment, and refusing to allow the defendant to interpose her proposed amended answer. The case is brought to this court for review on appeal from said order.

Without adverting now to any of the facts contained in the numerous affidavits which were presented to the court upon the hearing of the motion below, it will be convenient here to pause and consider whether, upon the conceded facts appearing of record and already narrated, the district court erred in denying defendant's motion to vacate the judgment and allow her to interpose a defense to the merits of the action. In other words, was the judgment entered below upon the defendant's alleged default a valid judgment, regularly and legally entered, or was such judgment illegally and irregularly entered? If the judgment was

illegally entered, it would, of course, be *prima facie* valid, because it is conceded that the court entering the same had jurisdiction of the subject matter and of the parties to the action. But it is likewise true that if the judgment was irregularly entered—i. e., entered as a default judgment when there was no default in law or in fact existing, and while there was an issue of fact joined in the ¹³¹ action upon a complaint and answer—then such judgment would be illegally entered, and hence vulnerable to attack by motion in the court which entered the judgment; and upon such motion, if seasonably made, the moving party would be entitled, as a matter of strict legal right, to have the judgment vacated. In such a case as that suggested, the motion would not be addressed to the discretion of the trial court, nor would it be an appeal to the favor of that court. Upon such a motion, if the judgment was illegally entered, it would be error to refuse to set aside the judgment, and the trial court would be without discretion in the premises. In reviewing such an order as that supposed, this court is never in the attitude of reviewing a matter lying within the discretion of the court below. Applying the elementary principles of law and rules of practice to which we have adverted to the undisputed facts in this record, and above set out, the question is presented whether or not the judgment herein was a valid judgment regularly entered. We think it was not a valid judgment, and that its entry was illegal, and in violation of the most sacred legal rights of a suitor, viz., the right to appear in open court and there confront his adversary, the opportunity to present witnesses in his own behalf, and that right of paramount importance and of priceless value to every suitor in a court of law—the right to be represented in court by faithful counsel, whose fidelity has not been tainted by hostile passion prejudicial to his client, or being swerved by selfish considerations personal to himself and inimical to the suitor whose cause he has undertaken to defend. The attempted withdrawal of the defendant's answer and appearance in this action contemporaneously with the open and avowed desertion of the case by the defendant's counsel (for the reasons spread out upon the record) operated necessarily, and in this case speedily, to strip the defendant of every right we have enumerated, and to leave her cause to be sacrificed without a hearing and without a defender.

The facts involved call for some consideration of the authority, power, and duty of an attorney in conducting a cause in court, ¹³² and the crucial question is, whether Frank Gray, Esq., as defendant's attorney in the action, in virtue alone of his professional relation to the cause, and without the knowledge or consent of

the defendant, could legally withdraw the defendant's answer and his own appearance in the case, at the time when he did so, and for the reason which he stated in the writing which was presented to the court, and upon which the court then and there declared the defendant to be in default. In our judgment, the reason for the attempted withdrawal was trivial and wholly inadequate, legally or morally, to justify the action of the counsel, and was also legally insufficient as a basis for the ruling of the trial court declaring defendant to be in default for want of an answer. It will readily be conceded that an attorney that has been retained and has entered an appearance for a party in an action is, within his proper sphere, possessed of plenary authority and discretion, and in all matters appertaining to the remedy alone he may lawfully control, even against the wishes of his client, all of those processes which are strictly incidental to the regular course of procedure in the action. Nor do we question the right of counsel, under some circumstances, and when the act is done with an honest purpose to subserve the interests or to comply with the wishes of his client, to withdraw his own appearance and the answer of the defendant, and thereby accelerate the entry of a default judgment against a defendant. Such authority is not infrequently exercised in courts of original jurisdiction in this and in other states, and it would undoubtedly be very dangerous to the interests of suitors to abridge such authority in cases where it can be properly exercised: 1 Lawson's Rights, Remedies, and Practice, sec. 169. But the record before us presents no such facts as those we have supposed. In the case at bar, the attempted withdrawal of the defendant's answer and of her counsel from the case (while it was manifestly done to facilitate the entry of a default judgment against the defendant) was not professedly or actually done with the intention of promoting the defendant's interests or of complying with her wishes. The one ¹³³ reason assigned for the withdrawal stated in the formal notice served on plaintiff's counsel and filed in the trial court, and upon which the default of the defendant was promptly declared, precludes the idea that the action of counsel was taken with the purpose of promoting either the interests or the wishes of the defendant. It was on its face an act of bitter retaliation, and that alone, because it was not done as a means of expediting the payment of the fees claimed by counsel to be due from the defendant. If the withdrawal operated at all upon the claim of counsel for fees, its legal effect would be prejudicial to such claim. In fact, the act of deserting a cause without any justifiable excuse would wholly defeat a claim for counsel fees in the same

cause. "The contract of an attorney or solicitor retained to conduct or defend a suit is an entire and continuing contract to carry it on until its termination": 2 Greenleaf on Evidence, sec. 142. In the absence of an express stipulation for fees in advance, the contract is single and entire, and no right of action accrues for fees until the services are fully performed: *Bathgate v. Haskin*, 59 N. Y. 533. We gather from the record in this case that defendant's counsel did not demand of the defendant a cash retainer in advance, but, on the contrary, permitted himself to be retained as an attorney, and proceeded to enter an appearance and serve an answer for the defendant, without any advance retainer; nor is it claimed that there was ever an agreement for the payment of advance fees to defendant's counsel. Under such circumstances, it is very doubtful, to say the least, whether an action would lie for fees at the time the cause of the defendant was abandoned by her counsel. But, be this as it may, nothing is clearer than the fact that defendant's attorney had no warrant or excuse in law or morals for abandoning the cause of the defendant without giving his client ample notice and a full opportunity to procure other counsel to defend the case in court: 2 Greenleaf on Evidence, sec. 142. Reverting to the notice of withdrawal, it appears therefrom that the notice bears date on the eighth day of May, and that it was filed in court on the eleventh day of May, 1894. It appears, after serving the answer, defendant's counsel ¹⁸⁴ "demanded from the defendant and her representatives in said Kansas City the payment of a reasonable retainer for his appearance on or about the fourteenth day of April, 1894; the defendant and her said representatives have failed, neglected, and refused to pay the undersigned any sum whatever as a retainer or for his fees in said action; that the representatives of said defendant in Kansas City, Missouri, have been notified long prior to this date that unless the retainer of the undersigned was paid he would have nothing further to do with the action." From this it appears that defendant's counsel made a demand for fees on defendant's representatives less than one month prior to his attempted withdrawal of defendant's answer, and at some date prior to such withdrawal had notified such representative that unless the retainer was paid counsel "would have nothing further to do with the action." It will be noticed that no exact time was fixed in the demand for fees within which they were required to be paid, or the alternative stated be suffered by the defendant. It is further noticeable that there was no threat or intimation conveyed in the demand for fees that counsel would, if the de-

mand was not complied with, withdraw the answer and leave the defendant in default for want of an answer. The utmost scope of the threat was that the counsel would personally withdraw from the case if his demands were not complied with. This is quite different from a notice that he would withdraw the answer; and, in its effect upon the case, the simple withdrawal of counsel would, of course, leave the case at issue, and not to be tried until the next term of the district court, which term, as defendant had been previously informed by her said counsel, would not convene until the month of July, 1894.

Enough has been set out to clearly show that the defendant's counsel, in attempting to withdraw the answer of the defendant at the time and under the circumstances stated, did so, not only for the express and advertised purpose of betraying the cause intrusted to his protection, and allowing judgment to be entered as for a default in answering the complaint, but did so without ¹³⁵ any previous notice to the defendant that he meditated any such drastic measures. We unhesitatingly characterize the course of counsel in attempting to withdraw the answer as an act of bad faith, and as such it was an act beyond the scope of an attorney's authority, and hence, in legal contemplation, the act was without binding force or effect. The nature of the pretended act of withdrawal and the motive with which it was done were spread out in writing upon the records of the district court before the default was entered, and hence we hold that it was error in the court below to direct the entry of a default judgment in the case. The judgment in its very inception was tainted with the vice of illegality, and hence, under the settled practice, was vulnerable to attack by motion to set it aside as an illegal judgment: *Garr v. Spaulding*, 2 N. Dak. 414. The defendant had the right to move the court below to set it aside, and, in doing so, the defendant was not in the attitude of appealing to the favor of the trial court. In justice to the defendant's counsel, we will add that, in holding that the attempted withdrawal of the answer was an act of bad faith, we do not wish to be understood as stating or intimating that, in our opinion, counsel was influenced by any corrupt consideration moving from the plaintiff or his counsel. The evidence in the record will warrant no such statement, and we distinctly disclaim any such inference. We nevertheless assert, and place our ruling on that ground, that the act of the defendant's counsel was one of bad faith toward his client, and hence an act which was beyond his power to legally do or perform. We shall place our ruling upon familiar and elementary principles of the law governing the relation of attorney and

client, and do not cite or expect to find a precedent which is on all fours in its facts with the case at bar. At the foundation of the trust relation which exists between an attorney and his client lies the fundamental doctrine that so long as the relation continues to exist the attorney is without power or authority to do any act in a cause which is confessedly inspired by malevolence and hostility to the client or to his cause, and the effect of which ¹³⁶ is necessarily injurious to the cause intrusted to the guardianship of the attorney. The cases cited below will illustrate this well-settled rule: *Herbert v. Lawrence*, 21 Civ. Proc. Rep. (N. Y.) 336; 18 N. Y. Supp. 95; *Howe v. Lawrence*, 22 N. J. L. 99; *Ohlquest v. Farwell*, 71 Iowa, 231; *Haverty v. Haverty*, 35 Kan. 438; *Quinn v. Lloyd*, 36 How. Pr. 378; *Dickerson v. Hodges*, 43 N. J. Eq. 45; *Simpkins v. Simpkins*, 14 Mont. 386; 43 Am. St. Rep. 641.

Enough has been said to fully dispose of the case presented in the record, and we will not prolong this discussion further, except to state that in our judgment there is ample in the affidavits presented upon the motion to have justified the trial court in granting the motion and opening the case upon the ground of surprise, under the authority conferred by section 4939 of the Compiled Laws. True, the application under that section of the statute would be addressed to the sound judicial discretion of the trial court, and would be in the nature of an appeal to the favor, and not in the nature of a demand of a strict legal right. But in that aspect of the application the refusal to grant the defendant an opportunity to be heard, in our opinion, presents a case of an unsound exercise of judicial discretion. It is urged by counsel that shortly after the divorce was granted—about one month thereafter—the plaintiff contracted another marriage with —, referred to in defendant's answer, and that to now allow the judgment for a divorce to be vacated would be to invite results which may be disastrous to an innocent person—yet unborn—as well as the parties who have so precipitately entered into a new conjugal alliance. Upon authority, it is clear that judgments entered in divorce cases are open to attack in the same manner, upon the same grounds, and within the same periods of time as other judgments, and this court has already had occasion to apply this rule of law to a divorce case: *Yorke v. Yorke*, 3 N. Dak. 343. See, also, *Simpkins v. Simpkins*, 14 Mont. 386; 43 Am. St. Rep. 641; *Cottrell v. Cottrell*, 83 Cal. 457; *Bell v. Peck*, 104 Cal. 35. But, aside from authority, the rule commends itself to our judgment as a wise and conservative civic regulation tending ¹³⁷ to restrain divorced parties from entering into new matrimonial alli-

ances with too much precipitation, and at a time when the decree which severed a former marital connection is still legally open to assault and reversal in the courts of the state where the judgment is entered. We conclude on this point with an apt quotation taken from the opinion of the court in *Simpkins v. Simpkins*, 14 Neb. 386, 43 Am. St. Rep. 641, which case much resembles this: "Now, under all these circumstances, for plaintiff to claim that his remarriage in this hot and indecent haste is pertinent upon this motion is a sorry sort of a reply to the motion of defendant setting up the pitiable facts disclosed by this record. Nor is the situation of the person whom plaintiff purported to marry a consideration that set aside the rights of the defendant." Our conclusion is, that the judgment was irregularly entered, and that the learned trial court erred in denying the defendant's motion to vacate the judgment and allow the defendant to come in and defend her action. The defendant was not in default for want of an answer.

The order denying the motion is reversed, and the case is remanded for further proceedings in conformity with the views expressed in this opinion.

All the judges concurring.

AN ATTORNEY CANNOT ABANDON THE SERVICE OF HIS CLIENT without justifiable cause, and reasonable notice: *Tenney v. Berger*, 98 N. Y. 524; 45 Am. Rep. 263.

JUDGMENTS OF DIVORCE—ATTACK UPON.—Courts have the same power over judgments in divorce suits as in other cases, and will vacate and set aside a decree that has been obtained by fraud or imposition: Note to *Colby v. Colby*, 50 Am. St. Rep. 424. If a decree of divorce be annulled, the marital rights, obligations, and status of the parties are revived, although one of them has, in the mean time, married and borne children of the last marriage: See monographic note to *Greene v. Greene*, 61 Am. Dec. 467, discussing the subject. A decree of divorce, obtained by fraud, may be vacated at a subsequent term, although a marriage was contracted on its faith, and issue born: Note to *Simpkins v. Simpkins*, 43 Am. St. Rep. 647.

JUDGMENT—VACATING ON MOTION.—A judgment void for want of jurisdiction, or which is a nullity, may be vacated on motion at any time: See monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 105, on collateral attacks upon judgments; note to *Olney v. Harvey*, 99 Am. Dec. 532; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459. No appeal from a void judgment need be taken, but it may be vacated on motion: *Whitley v. Black*, 2 Hawks, 179; 11 Am. Dec. 753. A judgment irregularly entered may be vacated on motion, though such motion is not made within the time prescribed by statute: *Freeman on Judgments*, 4th ed., secs. 97, 105.

JUDGMENT BY DEFAULT—VACATING ON MOTION—DIVORCE.—A judgment by default is properly set aside on the ground of surprise and excusable neglect, when it was entered through the failure of counsel to act, after being engaged by defendant to enter a plea for him, and left in attendance upon the court: Note to *Bax-*

ter v. Chute, 36 Am. St. Rep. 635. Compare *Simpkins v. Simpkins*, 14 Mont. 386; 43 Am. St. Rep. 641; *Williams v. Wescott*, 77 Iowa, 332; 14 Am. St. Rep. 287. One against whom a judgment by default has been taken is entitled to equitable relief, where his failure to defend was not a negligent omission on his part: *Dunlap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143. A mutual and honest mistake between an attorney and his client with relation to the attorney's fee, whereby the client was not represented at the trial, is a sufficient cause for vacating the judgment: See monographic note to *Burnham v. Hays*, 58 Am. Dec. 398, on statutes authorizing the vacation and setting aside of judgments by default. A decree of divorce, obtained by fraud, may be set aside on motion after term rendered, by court having jurisdiction, as in case of other judgments: *Wisdom v. Wisdom*, 24 Neb. 551; 8 Am. St. Rep. 215.

JUDGMENT WITHOUT HEARING—RES JUDICATA.—A judgment against a party without giving him an opportunity to be heard is not a judicial determination of his rights: Note to *Dorrance v. Raynsford*, 52 Am. St. Rep. 269. No man can be lawfully condemned unheard: *Evans v. Johnson*, 39 W. Va. 299; 45 Am. St. Rep. 912. A judgment, to have authority of res judicata, must be a definitive judgment of condemnation or dismissal, upon the merits of the case: *Scherff v. Missouri Pac. Ry. Co.*, 81 Tex. 471; 26 Am. St. Rep. 828. A judgment from which a right of appeal exists cannot support a plea of res judicata: *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 814.

DORAN v. DAZEY.

[5 NORTH DAKOTA, 167.]

DEEDS, UNRECORDED—VALIDITY OF, AS TO THOSE WITH NOTICE.—An unrecorded deed is valid between the parties thereto and those who have notice thereof, either actual or constructive.

NOTICE, CONSTRUCTIVE — WHAT CONSTITUTES. — Knowledge of facts sufficient to put a prudent man on inquiry as to the existence of other facts, is equivalent to actual knowledge of those facts which such inquiry may, in all probability, disclose, if it is properly pursued.

NOTICE, CONSTRUCTIVE—PRIOR UNRECORDED DEED. A grantee who has actual knowledge of facts sufficient to put a prudent man on inquiry concerning the existence of a prior unrecorded deed, but who fails to make such inquiry, is deemed to have constructive notice thereof.

NOTICE, CONSTRUCTIVE — RECORDING INSTRUMENT OUT OF CHAIN OF TITLE—IGNORANCE OF PURCHASER.—The mere recording of an instrument out of the chain of title does not, of itself, constitute constructive notice of such instrument, so as to bind one who deals with the apparent owner of land according to the record, in ignorance of the existence of such instrument.

NOTICE, CONSTRUCTIVE — RECORDING INSTRUMENT OUT OF CHAIN OF TITLE—KNOWLEDGE OF PURCHASER.—If land is conveyed to a vendee, by whom it is afterward mortgaged, and the mortgage placed of record, but the deed has not been recorded, a subsequent purchaser's actual knowledge that there is a mortgage of record on the property is notice to him of such mortgage, although the mortgagor appears, by the record, to have no title; and this knowledge, being sufficient to put him upon inquiry, is equiva-

lent to actual notice of the unrecorded deed, especially where it is asserted in the mortgage that the mortgagor owns the land.

VENDOR AND PURCHASER—WHO IS NOT A BONA FIDE PURCHASER—RECORDING ACT.—To entitle one to protection as a bona fide purchaser, he must have parted with his consideration before notice of a prior conflicting right. Hence, if a purchaser of land has actual knowledge of a mortgage thereon, of record, in which the mortgagor asserts title, and pays for the land without any investigation as to title, where that would probably lead to a discovery of the owner, he is chargeable with notice of the existence of title in the mortgagor, and cannot claim protection as a bona fide purchaser under the recording act.

NEGLIGENCE.—RELYING UPON THE ADVICE OF COUNSEL cannot make that conduct prudent which the law regards as careless.

Action by J. K. Doran against Charles T. Dazey. There was a judgment for the plaintiff, and the defendant appealed.

Swiggum & Myers, for the appellant.

Phelps & Phelps, for the respondent.

¹⁶⁷ CORLISS, J. The object of this action is to secure the judicial cancellation, as a cloud on plaintiff's title, of certain deeds purporting to convey the real estate which the plaintiff claims to own. It is situated in the city of Grafton. The defendant, ¹⁶⁸ Charles T. Dazey, who is the only person affected by the judgment appealed from, and who is the appellant on this appeal, insisted in the trial court, and, having been there unsuccessful in his contention, insists in this court, that he, and not the plaintiff, has the better title to the land. Both parties trace their title from the title of Ole H. Nelson, Lewis E. Nelson, and George C. Sims, who, it is conceded, were originally the fee simple owners of this real estate. On the 7th of August, 1883, these parties executed and delivered to L. G. Sims a warranty deed of the premises in question, by which he became vested with the full legal title thereto. This deed, however, was not recorded until September 10, 1887, or more than four years later. It is under this deed the plaintiff claims. While this deed remained unrecorded, and in October, 1884, the defendant, Dazey, entered into negotiations with Laura C. Nelson and Ole H. Nelson, who claimed to be the owners of the property, looking to a purchase of it by him, in exchange for real estate owned by him in the city of Fargo. The terms of sale were finally agreed on, and these pretended owners executed a warranty deed of the property to defendant, Dazey, and the same was placed on record. Dazey, however, was not willing to part with the stipulated purchase price, to wit, the property owned by him in Fargo, until he had secured an abstract, and had ascertained that the title was all right. Ac-

cordingly, instead of delivering his deed at this time to the grantors in the deed to him, he left it in escrow with a person connected with the law office of Stone & Newman, to be delivered if the grantor's title to the Grafton property proved to be all right. Stone & Newman, acting for him, procured an abstract, and discovered from it that these grantors were not the owners of this land, but that the record showed the title to be in Ole H. Nelson, Lewis E. Nelson, and George C. Sims, their deed to L. G. Sims not then being on record. This defect in the title, however, was remedied by the execution by these parties of a deed to Laura C. Nelson, one of the grantors in the deed to defendant, Dazey. Thereupon Stone & Newman having advised ¹⁰⁰ Dazey that the title was perfect, his deed of the Fargo property was delivered. Then, for the first time, did he pay his consideration for the Grafton real estate. Before he made this payment, he was informed by his attorneys that the abstract of title disclosed the fact that one L. G. Sims, who was the grantee in this unrecorded deed, had executed a mortgage on the property in question for the sum of twelve hundred dollars; but, acting on the advice that this would not affect his rights as a bona fide purchaser, because the record did not show that L. G. Sims was the owner of the property when he gave the mortgage, or ever had been the owner of it, defendant, Dazey, closed the deal, and thereafter his deed of the Fargo property was delivered and recorded.

These facts are all uncontroverted. In view of them, we do not regard it necessary to enter upon a discussion of any of the numerous questions argued in this case, except the one whether, under these conceded facts, the defendant can possibly sustain his title as against the prior title of the plaintiff under the unrecorded deed. It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. Our statute, in express terms, declares this to be the rule: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof": Comp. Laws, sec. 3297. It is true that Dazey did not have actual notice of the unrecorded deed to L. G. Sims, but he did have actual knowledge of the existence on the records in the county in which the land was situated of a mortgage given by L. G. Sims on this very property for quite a large sum. Had he not actually known that such a mortgage was on record, it is undoubtedly true, as counsel for defendant asserts, that the mere recording of the mortgage would not have constituted constructive notice of it, within the mean-

ing of the recording law. The recording of an instrument out of the chain of title does not constitute such constructive notice. This is well settled: 20 Am. & Eng. Ency. of Law, 595, and cases there cited; Wade on Notice, secs. 205-207. But this doctrine¹⁷⁰ is not applicable to the facts of this case, for it is a conceded fact that Dazey, before he parted with his consideration, knew that such a mortgage was on record. This, under the authorities, was notice to him that such a mortgage had been given: Clark v. Holland, 72 Iowa, 34; 2 Am. St. Rep. 230; Wade on Notice, sec. 250; Musgrove v. Bonser, 5 Or. 313; 20 Am. Rep. 737; Hastings v. Cutter, 24 N. H. 481; Barnes v. McClinton, 3 Pen. & W. 67; 23 Am. Dec. 62. An examination of this mortgage would have disclosed the fact that the mortgagor, L. G. Sims, therein asserted that he was the owner in fee simple of the premises in question. A prudent man should have made inquiries of the mortgagor, if possible, to ascertain whether he in fact owned the land. Such an inquiry would, in all probability, have led to a discovery by him, before he had parted with his consideration by delivering the deed to the Fargo property, of the fact that L. G. Sims was the owner of the Grafton land under the unrecorded deed to which we have referred. Whatever conflict of authority there may be on the question, the doctrine which has the support of the great mass of the decisions, and which is certainly sustained by the better reason, is that which regards knowledge of facts sufficient to put a prudent man on inquiry as to the existence of other facts, as equivalent to actual knowledge of those facts which such suggested investigation would in all probability have disclosed had it been properly pursued: Wade on Notice, secs. 246, 250, 251; Gress v. Evans, 1 Dak. 371; Tuttle v. Jackson, 6 Wend. 213; 21 Am. Dec. 306; Morrison v. Kelley, 23 Ill. 610; 74 Am. Dec. 169; Allen v. McCalla, 25 Iowa, 464; 96 Am. Dec. 56; Bernstein v. Roth, 145 Ill. 189. Our recording statute does not require that the notice, to defeat the claim of priority, should be actual. It merely declares that notice of the unrecorded instrument will be sufficient to defeat such claim. The Compiled Laws, section 4743, provides that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." Therefore, whatever might be our conclusion,¹⁷¹ independently of the language of our statutes touching the soundness of the rule established in some jurisdictions, that mere want of caution will not affect the alleged bona fide purchaser with notice, but only willful and fraudulent blindness, we are clear that, in view of the legislation in this state, no such doctrine can here

obtain. We are not without express authority in support of our conclusion that knowledge of existence of this mortgage was sufficient to put the defendant on inquiry as to the existence of title in the mortgagor: *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624. In this case the court said: "The fact that there was of record a mortgage from Pleasants to Boyd on this property was sufficient, of itself, to warn a prudent intending purchaser thereof that Pleasants probably claimed some interest in the property. When one makes a mortgage on real estate to another, the presumption, at least, is that the mortgagor is the owner of the property mortgaged." To same effect is *Clark v. Holland*, 72 Iowa, 34; 2 Am. St. Rep. 230. We do not think that the court intended to lay down any different rule in *Chicago v. Witt*, 75 Ill. 211, although the language of the court leaves the matter in some doubt. To entitle one to protection as a bona fide purchaser, he must have parted with his consideration before notice of the prior conflicting right. This rule is too elementary to require the citation of many authorities in its support: *Wood v. Rayburn*, 18 Or. 3; *Veith v. McMurtry*, 26 Neb. 341; *Otis v. Payne*, 86 Tenn. 663. At the time defendant's deed of the Fargo property was delivered, he had knowledge of the fact, which we regard as equivalent to actual notice of the unrecorded deed, he not having made any effort to make the investigation which a prudent man should have made under the circumstances. It furnishes him no justification that he relied on the advice of counsel. Such advice could not make that conduct prudent which the law regards as careless.

We were asked by the appellant in this case to try it de novo, but we have found ourselves unable to do so, owing to the insufficiency of the judge's certificate certifying the evidence. 172 The statute requires all the evidence offered to be taken down, and provides that all this evidence shall be certified to this court: Laws 1893, c. 82, sec. 1. The certificate in this case gives no guaranty that all the evidence offered is before us, but only such as was both offered and received. Under such certificate, we cannot try the case de novo: See *First Nat. Bank v. Merchants' Nat. Bank*, 5 N. Dak. 161. But we have a right, and it is our duty, to look into the findings, and it is from the findings that we have taken the facts which have been set forth in this opinion. The appellant concedes them all to be true. He is therefore not in the least prejudiced by our inability to try the case de novo, as, in view of these conceded facts, we are all clear that in no event could he possibly succeed.

The judgment of the district court is affirmed.

All concur.

DEEDS.—AN UNRECORDED CONVEYANCE IS GOOD, except as against a person purchasing without notice thereof, and for a valuable consideration: *Lake v. Hancock*, 38 Fla. 53; 56 Am. St. Rep. 159.

CONSTRUCTIVE NOTICE—WHAT CONSTITUTES.—Whatever will put a purchaser on inquiry and lead to knowledge is notice: Note to *Pleasants v. Blodgett*, 42 Am. St. Rep. 627; *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729, and note; note to *Montgomery v. Keppel*, 7 Am. St. Rep. 129; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285. Whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 40 Am. St. Rep. 299, and note.

UNRECORDED DEEDS—CONSTRUCTIVE NOTICE TO SUBSEQUENT PURCHASERS.—A purchaser has notice not only of those facts definitely communicated to him, but of all facts which the proper use of that information, with ordinary diligence and prudence, would enable him to ascertain: Notes to *Montgomery v. Keppel*, 7 Am. St. Rep. 129; *Mercantile Nat. Bank v. Parsons*, 40 Am. St. Rep. 305. Purchasers of land are deemed to have notice of every fact disclosed by the record affecting their title, and every other fact which an inquiry suggested by the record would have led up to: Notes to *Backer v. Pyne*, 30 Am. St. Rep. 236; *Kirsch v. Tozier*, 42 Am. St. Rep. 733. A subsequent purchaser will be charged with notice of a prior unrecorded deed if the exercise of ordinary prudence and caution would have led him to knowledge: *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169, and note. If he refuses to inquire, when the propriety of inquiry is naturally suggested by the circumstances known to him, he is chargeable with notice of the facts which such an inquiry would have disclosed: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729. A purchaser of land upon which the record showed a mortgage, executed by one in whom the record showed no title to the person in whom the title stood of record, is affected with notice that at the time of the execution of the mortgage the mortgagor was the equitable owner of the property, and will take the land subject to the lien of the mortgage, where he knew of the record of the mortgage, and had heard it read, at least in part, before he purchased: *Clark v. Holland*, 72 Iowa, 84; 2 Am. St. Rep. 230.

UNRECORDED DEEDS—CONSTRUCTIVE NOTICE TO SUBSEQUENT PURCHASERS—BONA FIDE PURCHASERS—RECORDING ACTS.—Actual notice is not essential to give effect to a prior unrecorded conveyance: *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281. The notice contemplated by the recording act is not actual, as distinguished from constructive, but includes both: *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 36. Any fact or circumstance coming to the knowledge of the subsequent purchaser which would put a prudent man on inquiry, and which, if pursued, would lead to actual notice of a prior unrecorded deed lying in the apparent chain of his title, is sufficient to invalidate the subsequent purchase; and, in such case, notice is imputed to the subsequent purchaser on account of his negligence in not prosecuting his inquiries in the direction indicated: *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281. The existence of record of a mortgage on real estate is of itself sufficient to put an intending purchaser of the property on inquiry as to the interest of the mortgagor in such real estate. The presumption is, that the mortgagor is the owner of the property mortgaged: *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624. To entitle a person to invoke the aid of the rule that protects a bona fide purchaser as against a prior unrecorded deed, he must make it ap-

pear that he made his purchase and paid the purchase money before he had notice of such prior equity: See monographic note to *Anthony v. Wheeler*, 17 Am. St. Rep. 290, on presumption that subsequent purchaser is purchaser bona fide.

DUNHAM v. PETERSON.

[5 NORTH DAKOTA, 414.]

PAYMENT—DEBTOR AND CREDITOR.—A creditor may agree to receive anything in payment; and, when the thing is accepted as so much money, the debt is to that extent extinguished, and the creditor cannot, thereafter, repudiate his act.

NEGOTIABLE INSTRUMENTS—WHO IS AN INDORSEE.—To make one an indorsee of a negotiable promissory note, the form of indorsement is not material. An assignment in terms may be an indorsement.

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH CONTRACT OF GUARANTY.—One who is the payee or holder of negotiable paper, and writes above his indorsement a contract of guaranty of payment, is an indorser with enlarged liability. The mere writing of a special contract above his name does not affect the character of his act as an indorsement. It is, nevertheless, an indorsement.

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH CONTRACT OF GUARANTY—PROTECTION OF BONA FIDE INDORSEE—PURCHASER FOR VALUE.—If the payee of a negotiable promissory note indorses thereon a guaranty of payment when he transfers it, the negotiability of the note is not thereby destroyed, but the transfer is an indorsement, and the purchaser is an indorsee, within the rule which shields a bona fide indorsee, for value, before maturity, against defenses good between the original parties; and one who, in the usual course of business, takes the note in payment of an antecedent debt is a purchaser for value.

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH CONTRACT OF GUARANTY.—THE LEGAL EFFECT of an indorsement with a contract of guaranty written above it is precisely the same as that of a simple indorsement with waiver of demand and notice.

Action by M. W. Dunham against Peter L. Peterson and others. There was a judgment for the defendants, and the plaintiff appealed.

C. E. Pierson and Edward Engerud, for the appellant.

P. H. Rourke, for the respondents.

414 CORLISS, J. The only serious question before us on this appeal is, whether the indorsement by the payee of a negotiable note, upon such note of a contract of guaranty of payment at the time he negotiates it for value, destroys its negotiability, and thus renders it, in the hands of the purchaser, subject to all defenses. The notes in question were executed and delivered by defendants to A. H. Laughlin; and, before their maturity, they were trans-

ferred by him to the plaintiff. The consideration for the transfer was a credit by plaintiff upon a note held by him against Laughlin of the amount of these notes so transferred to him. At the time ⁴¹⁵ of such transfer, plaintiff was under a contract obligation to accept in payment such notes turned over to him by Laughlin as he (the plaintiff) should approve. Plaintiff testified that he approved these notes, and immediately indorsed the amount thereof with the amount of the other notes received and approved by him, upon the note he held against Laughlin, as a payment, to that extent, of such note. The indorsement thereon corroborated his testimony. That these facts constitute plaintiff a purchaser for value cannot be doubted: 2 Am. & Eng. Ency. of Law, 392; *Barker v. Lichtenberger*, 41 Neb. 751; *Phoenix Ins. Co. v. Church*, 81 N. Y. 226; 37 Am. Rep. 494; 1 Daniel on Negotiable Instruments, sec. 832. In consideration of the negotiation to him of these notes, he canceled to the extent of their face value the indebtedness he held against Laughlin. It is true he secured, in place of Laughlin's obligation as maker, his liability as guarantor. But the two are not precisely equivalent. We are entirely satisfied that the facts show that plaintiff absolutely extinguished his claim against Laughlin on such note to the amount of the notes so received in payment as so much cash, in pursuance of his previous agreement to accept them as cash. Certainly, a creditor may agree to receive anything in payment; and, when the thing is accepted as so much money, the debt is to that extent extinguished. The creditor cannot thereafter repudiate his act. The only theory on which he can claim that there was in fact no payment is by establishing the fact that the thing accepted was worthless. This cannot be done in this case without assuming as the basis of this claim the postulate that the notes were subject to defenses, on the ground that plaintiff was not a purchaser for value. But this is the very point in controversy. If the plaintiff could not take such a position to defeat the fact of payment, the defendants cannot claim that he (the plaintiff) is not a purchaser for value. We do not care to place the decision on this branch of the case on the ground that one who takes negotiable paper merely as security for an antecedent debt is a purchaser for value. We think, on principle, this is the better rule. This doctrine prevails in ⁴¹⁶ England, and it has been adopted in most of the states of the Union: 1 Daniel on Negotiable Instruments, secs. 831 a, 831 b; 2 Randolph on Commercial Paper, sec. 465, note 6; *Rosemond v. Graham*, 54 Minn. 323; 40 Am. St. Rep. 336; *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464. What, in the absence of any statute on the subject, would be decisive with us even if

we were in that state of mind on this question described by the phrase "halting between two opinions," is the fact that in the federal courts this more universally accepted rule has become the law, by reason of the decision of the federal supreme court in the case of *Railroad Co. v. National Bank*, 102 U. S. 14. There should be only one rule in this state, whether the litigant resort to the federal court or the state tribunals. But it is a serious question whether the legislature has not, by section 5130 of the Revised Codes, settled this question against our view of the better doctrine on principle.

We are therefore brought to the question whether plaintiff's standing as an indorsee of these notes is destroyed by the form of the indorsement. Such indorsement was in the following words: "For value received, I hereby guaranty the within note, waiving notice of protest and demand." Beneath this guaranty the payee, Laughlin, signed his name. In determining whether, under the facts of this case, plaintiff is an indorsee of these notes, we must fall back upon elementary principles, and especially must we keep in mind the foundation of the rule which exempted negotiable paper in the hands of a bona fide purchaser from equities existing against it in the hands of the payee. The assignee of an ordinary chose in action took it subject to all defenses. The reason for this rule was the defect in his title. The assignment did not transfer to him the legal title. It was only in equity that he was regarded as the owner. In a court of law, he was obliged to sue in the name of the assignor, and on this account the assignment was without prejudice to defenses against the chose in action in the hands of the assignor. But a different rule has long prevailed with respect to negotiable paper. The necessities of commercial life impelled the courts to resort to the fiction that, when such an instrument was transferred, the legal title to ⁴¹⁷ it passed, so that the purchaser could sue on it in his own name, and therefore be unaffected by defenses against it in the hands of the former owner. No precise form of transfer was required to be adopted to pass the legal title, provided it was upon the paper itself. But the courts did insist that nothing should be done by the person negotiating it to affect the negotiable character of the paper. There must always be a transfer of the legal title, and such transfer must take such form as not to indicate a purpose to destroy the negotiable quality of the instrument. Accordingly, it has been held, and it is now the law, that the payee, if the note is not also payable to bearer, must indorse it; otherwise, he manifests a purpose to assign the paper as a mere chose in action. Of course, the test is not whether, under existing laws, the legal title

to a note is transferred, for this is now true as to all choses in action, whatever form the transfer of them assumes. The inquiry is twofold: 1. Was the note so transferred as to pass the legal title to it at common law? 2. Does the manner of the transfer indicate a purpose to destroy the negotiable character of the instrument? The extent of the liability of the payee who indorses the note is not a decisive test. Indeed, it is no test at all. He may incur no liabilities whatever, as by indorsing without recourse, and yet in such a case the note has been negotiated to an indorsee within the law merchant, and the latter is protected as a bona fide purchaser if the other elements necessary to such protection exist. Indeed the payee need not indorse at all to entitle the purchaser to protection if the note be payable to bearer, or to the payee by name or bearer: *Tescher v. Merea*, 118 Ind. 586. This is also true after it has been indorsed generally by the person who is named as payee. His indorsee may, without himself indorsing it, transfer it, and cut off all defenses. On the other hand, it is elementary that the indorser may enlarge his liability without destroying the right of his indorsee to protection as an innocent purchaser. By waiving demand and notice, he changes a conditional liability into an ⁴¹⁸ absolute one. Yet, although such a waiver is made, the indorsee can claim the same exemption from the interposition of defenses to the paper that he could have claimed had there been no waiver. It is therefore apparent that the inquiry whether one is an indorsee of negotiable paper does not depend upon the question whether the person negotiating it has incurred the precise obligation of an indorser. He may incur more liability, or less liability, or no liability at all; and yet the purchaser may be an indorsee, and protected as such. Nor is the form of the indorsement material. It is an indorsement, although it is in terms an assignment. This was held at an early time in England: *Richards v. Frankum*, 9 Car. & P. 221. And, with the exception of two states, it appears to be the law in this country: *Adams v. Blethen*, 66 Me. 19; 22 Am. Rep. 547; *Davidson v. Powell*, 114 N. C. 575; *Sears v. Lantz*, 47 Iowa, 658; *Sands v. Wood*, 1 Iowa, 263; *Merrill v. Hurley*, 6 S. Dak. 592; 55 Am. St. Rep. 859; *Bisbing v. Graham*, 53 Am. Dec. 510; *Haley v. Falconer*, 32 Ala. 536; *Duffy v. O'Conner*, 7 Baxt. 498; *Shelby v. Judd*, 24 Kan. 166; *Brotherton v. Street*, 124 Ind. 599; *Hatch v. Barrett*, 34 Kan. 230; *Crosby v. Roub*, 16 Wis. 616; 84 Am. Dec. 720. See, contra, *Aniba v. Yeomans*, 39 Mich. 171; *Hatch v. Barrett*, 34 Kan. 223.

The only argument against the proposition that such an indorsement constitutes an indorsement according to the law mer-

chant is, that by expressing the contract of transfer which is always implied from the mere fact of indorsement, the negotiator of the paper has manifested a purpose to destroy the negotiable character of such paper. But the courts, with the two exceptions above noted, have refused to draw such an inference from the fact that an assignment in terms is written above the indorsement. On what principle, then, can it be said that the fact that a guaranty is written above the indorsement discloses a purpose to affect the negotiable character of the paper. Such a contract is an indorsement, and it is more. It is, indeed, under our statute, exactly equivalent to an indorsement with waiver of demand and notice. An indorser who is not entitled to insist upon ⁴¹⁹ demand and notice, or who, being so entitled, has been charged as an indorser, is a guarantor of the payment of the instrument: See Rev. Code, secs. 4636, 4642, 4876, 4881. But, even if we were of opinion that his liability was different from that of an ordinary indorser—even if we should conclude that in some respects his obligation was more, and in other particulars less, onerous than that of one who indorses in blank—still the fact would remain that he had transferred the legal title to the paper in a mode sufficient to transfer such legal title according to principles of common law, and that he had not evinced a purpose to destroy the negotiable character of the paper. In such a case it would be true that he had indorsed it, notwithstanding the fact that he had so indorsed it as to alter his liability as an ordinary indorser. As we have already seen, the fact that the exact liability of an indorser is not incurred by one who transfers negotiable paper is not the true criterion whether the purchaser is an indorsee within the scope of the doctrine which throws about an indorsee a distinctive protection. One who is payee or is the holder of negotiable paper, and writes above his indorsement the contract of guaranty of payment, is an indorser with enlarged liability. It is on this ground that the decisions rest which hold that such a transfer of a negotiable instrument is an indorsement of it, within the purview of the rule which shields a bona fide indorsee against defenses good between the original parties: *State Nat. Bank v. Haylen*, 14 Neb. 480; *Helmer v. Commercial Bank*, 28 Neb. 474; *Partridge v. Davis*, 20 Vt. 499; *Robison v. Lair*, 31 Iowa, 9; *Buck v. Davenport Sav. Bank*, 29 Neb. 407; 26 Am. St. Rep. 392; *Van Zant v. Arnold*, 31 Ga. 210; *Judson v. Gookwin*, 37 Ill. 286; *Heaton v. Hulbert*, 3 Scam. 489; *Childs v. Davidson*, 38 Ill. 437; *Heard v. Dubuque etc. Bank*, 8 Neb. 10; 30 Am. Rep. 811; 2 Daniel on Negotiable Instruments, sec. 1781. We are aware that authorities can be found on the

other side of the question: *Trust Co. v. National Bank*, 101 U. S. 70; *Omaha Nat. Bank v. Walker*, 5 Fed. Rep. 399; *Tuttle v. Bartholomew*, 12 Met. 454; *Lamourieux v. Hewit*, 5 Wend. 307; *Belcher v. Smith*, 7 Cush. 482; *Taylor v. Binney*, 7 Mass. 481. But Massachusetts at one time ⁴²⁰ inclined to the doctrine we regard as sound: *Upham v. Prince*, 12 Mass. 14; *Balkely v. Grant*, 6 Mass. 386.

In view of the fact that it has long been the usage in this state of persons and corporations engaged in the business of purchasing and discounting commercial paper to have the indorser sign a guaranty of payment, and in view of the further fact that the legal effect of such an indorsement is precisely the same as that of a simple indorsement with waiver of demand and notice, we would regard it as a very unwise and entirely unjustifiable decision to hold that such a negotiation of such paper was not an indorsement of it within the law merchant. That a guaranty indorsed by a payee on the paper itself is equivalent to an indorsement with waiver is clear under our statutes, and also independently of them, upon common-law principles. Said the court in *Brown v. Curtiss*, 2 N. Y. 225, at page 230: "The direct engagement of the indorser of a negotiable note, and of the guarantor of the payment of a note, whether negotiable or not, is the same. Both undertake that the maker will pay the amount when it shall become due. If there is a failure in such payment, both contracts are broken. Ordinarily, upon the breach of a contract, the party bound for its performance immediately becomes liable for the consequent damages. In the case of the indorser of a negotiable promissory note, however, the liability does not become absolute, unless due notice of nonpayment is given to the party whom it is intended to charge. This is not because the indorser has thus stipulated in terms, but it is a condition annexed by the rules of the commercial law. In the case of a guarantor there is nothing to exempt him from the ordinary liability of parties who have broken their contract, which is direct, and not conditional. No condition requiring notice of nonpayment is inserted in the contract, nor is any inferred by any rule of law." In our judgment, this mooted question, whether the fact that, in addition to indorsing the paper, the person who negotiates it writes above his indorsement a special contract, takes from the act of indorsing the legal character of an indorsement ⁴²¹ of the instrument, was intended to be put at rest in this state by section 4868 of the Revised Codes. This section provides as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to another

person, is called an indorser, and his act is called indorsement." It will not do to assert that this section was passed to settle the question whether one out of the chain of title who indorses negotiable paper before delivering it to the payee, to give it credit, is liable as indorser or guarantor or as joint maker. Section 4877 of the Revised Codes specifically relates to the subject. It declares that "one who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." The only other purpose it could be enacted for, unless we assume it to be a purposeless enactment, was to declare that the act of writing his name upon negotiable paper by the holder thereof, as part of the negotiation thereof to a third person, should be an indorsement, despite the fact that, in connection with the act of indorsement, the indorser has, by special contract, restricted or enlarged his liability as indorser. We think this section is limited to the indorsement by the holder of the paper as part of the act of negotiation thereof. When these facts exist, the mere writing of a special contract above his name will not affect the character of his act as an indorsement. It is an indorsement, nevertheless. We are of opinion that the plaintiff was entitled to protection as a bona fide purchaser of negotiable paper, and that, therefore, it was error for the court to permit the defendant to prove a defense good as against the maker.

For this error, the judgment is reversed, and a new trial is ordered.

All concur.

PAYMENT—DEBTOR AND CREDITOR.—Payment may be made in any mode which the parties agree shall be treated as the equivalent of a money payment: *Note to State Bank v. Byrne*, 37 Am. St. Rep. 335. A person accepting a note in satisfaction of his debt is paid by his own agreement: *Hutchins v. Olcott*, 4 Vt. 549; 24 Am. Dec. 634.

NEGOTIABLE INSTRUMENTS—FORM OF INDORSEMENT.—An indorsement in the form of an assignment will vest the title to a note in the indorsee: *Rowe v. Haines*, 15 Ind. 445; 77 Am. Dec. 101. Compare *Adams v. Blethen*, 66 Me. 19; 22 Am. Rep. 547. A writing on the back of a promissory note, designed for the purpose of transferring title, does not destroy the negotiability of the instrument, unless words apparently intended for that purpose are used: *Merrill v. Hurley*, 6 S. Dak. 592; 55 Am. St. Rep. 859.

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH ENLARGED LIABILITY.—The written words, "demand, notice, and protest waived, and payment guaranteed," signed by the payee on the back of a negotiable note, constitute an indorsement with an enlarged liability: *Buck v. Davenport Sav. Bank*, 29 Neb. 407; 26 Am. St. Rep. 392, and note.

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH CONTRACT OF GUARANTY.—The legal title to a negotiable note may be transferred by guaranty as well as indorsement, and when trans-

ferred by guaranty, it remains negotiable: *Crosby v. Roub*, 16 Wis. 616; 84 Am. Dec. 720, and note. An indorsement by a payee in the form of a guaranty transfers the title in a note to the holder as an indorsee: *Herring v. Woodhull*, 29 Ill. 92; 81 Am. Dec. 296; *Myrick v. Hasey*, 27 Me. 9; 46 Am. Dec. 583.

NEGOTIABLE INSTRUMENTS—NOTE TAKEN FOR ANTECEDENT DEBT—BONA FIDE PURCHASER—EQUITIES.—One who takes a promissory note before maturity, in good faith, in payment of, or as security for, an antecedent debt, holds it for a valuable consideration and free from equities: *Mix v. National Bank*, 91 Ill. 20; 83 Am. Rep. 44, and note, showing the conflict of authority.

NORTHWESTERN CORDAGE COMPANY v. RICE.

[5 NORTH DAKOTA, 482.]

SALES BY DESCRIPTION—IMPLIED WARRANTY.—A sale of goods by particular description imports a warranty that the goods are of that description. Hence, if a buyer orders "pure Manilla twine," and the order is filled by sending Manilla twine, there is an implied warranty that the twine delivered is "pure Manilla twine."

SALES BY DESCRIPTION—ACCEPTANCE WITH KNOWLEDGE OF DEFECT.—A purchaser's acceptance of goods bought by description, even with a knowledge that they do not correspond with the warranty implied, does not, as a matter of law, bar his right to rely upon the warranty, because the purchaser does not owe the duty of careful inspection to one who has warranted an article.

SALES BY DESCRIPTION—BREACH OF WARRANTY—WAIVER—QUESTIONS FOR JURY.—In cases of sales by a particular description, where goods not corresponding to the implied warranty have been accepted, it should be left to the jury to determine whether there is a breach of warranty, whether the purchaser relies on the warranty, and whether he has waived his right to take advantage of its breach.

SALES BY DESCRIPTION—BREACH OF WARRANTY—REMEDY OF BUYER.—If goods sold by description do not correspond with the warranty, the vendee may either reject them, or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods.

SALES BY DESCRIPTION—EFFECT OF GIVING NOTES FOR PURCHASE PRICE AFTER KNOWLEDGE OF DEFECT.—The fact that a purchaser, who has bought goods by description, gives his renewal notes for the purchase price, after knowledge that the goods do not correspond with the warranty, does not prejudice his rights, especially where he expressly asserts his right to rely upon his claim for damages, and where the notes are given with the understanding that such claim will be recognized by the seller. In other words, the mere giving of renewal notes would not, of itself, extinguish his cause of action, if it once existed.

Action by the Northwestern Cordage Company against D. E. Rice. There was a judgment for the plaintiff, and the defendant appealed.

McCumber & Bogart, for the appellant.

Curtiss Sweigle and Morphy, Ewing, Gilbert & Ewing, for the respondent.

⁴³³ CORLISS, J. Defendant ordered of the plaintiff seven thousand pounds of pure Manilla twine. Plaintiff, acting on this order, shipped to defendant a lot of twine, which the evidence tends to prove was not pure Manilla twine, but an inferior article, worth much less in the market. Defendant having been sued upon the notes given for the purchase price of this twine, he interposed as a counterclaim an alleged cause of action founded upon breach of warranty. On the trial the district judge directed a verdict in favor of the plaintiff. Defendant appeals.

⁴³⁴ At the outset, we are required to determine whether, in fact, there was a warranty. It is true that the plaintiff did not, in terms, warrant that the twine sold by it to defendant was pure Manilla twine. Indeed, it made no representations whatever in written instrument, or by oral statement. But, when it accepted from defendant an order for pure Manilla twine, it, in contemplation of law, agreed to sell defendant an article answering to that description. That a sale of an article by a particular description constitutes a warranty that the article answers to that description is well settled: Benjamin on Sales, 619-622, and cases cited; Brigg v. Hilton, 99 N. Y. 517; 52 Am. Rep. 63; Dounce v. Dow, 64 N. Y. 411; Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438; Fairbank Canning Co. v. Metzger, 118 N. Y. 260; 16 Am. St. Rep. 753; White v. Miller, 71 N. Y. 118; 27 Am. Rep. 13; Lewis v. Rountree, 78 N. C. 323; Hastings v. Lovering, 2 Pick. 214; 13 Am. Dec. 420; Forcheimer v. Stewart, 65 Iowa. 593; 54 Am. Rep. 30; 28 Am. & Eng. Ency. of Law, 776; Gould v. Stein, 149 Mass. 570; 14 Am. St. Rep. 455; Love v. Miller, 104 N. C. 582; Morse v. Moore, 83 Me. 473; 23 Am. St. Rep. 783. Said the court in Gould v. Stein, 149 Mass. 570, 14 Am. St. Rep. 455: "The general rule is familiar and admitted, that a sale of goods by particular description imports a warranty that the goods are of that description."

We cannot say, under the facts of this case, that the defendant, as a matter of law, has waived his right to rely upon the warranty. The twine delivered was Manilla twine, but it was not pure Manilla. It is probable that a special examination of it before acceptance would have resulted in the discovery that it was not as warranted. But the case is not one of the failure of the vendor to deliver any article of the character of that ordered. It was not the purchase of twine, followed by the delivery of some other article.

We hold that, under the facts of this case, the defendant cannot be deemed, as a matter of law, to have waived his right to rely upon the warranty. It is impossible to lay down a rule on this subject which can be readily applied to the varied facts of different cases. Cases may arise where it is apparent that the purchaser could not have relied on the warranty when he accepted ⁴³⁵ the goods, or that he has waived his right to insist upon such warranty. But we think it would be an extremely unjust rule to interpret as an implied waiver the conduct of the purchaser in receiving the goods which do not exactly correspond to the warranty, merely because he might, by examination, have discovered the defect. It often happens that the purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in this position should be allowed to escape liability on his contract of warranty. In many cases, the inference of a purpose to rely upon the warranty is stronger than the inference of a purpose to pay the price of a good article for a defective one. In the case at bar, the jury would have been justified in finding that defendant could not, without particular examination, have discovered that the twine was not pure Manilla. In favor of one who has warranted an article, the purchaser does not owe the duty of careful inspection. He may rely on the warranty. There is much confusion in the authorities. This is the consequence of too much refinement in reasoning, and the making of many nice distinctions. The law on this subject should be adjusted to the needs of the business world, and be made as simple as possible. Without attempting to anticipate the exceptions to the general rule which in the future it may be found necessary to establish, we believe it to be in the interests of justice, and to fairly express the sense of business men upon the subject, that whatever form a warranty assumes, if there is in fact a warranty, the mere acceptance of the property will not, as a matter of law, bar a recovery for breach of the warranty, although an inspection of the property would have led to a discovery of the breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach: *Gould v. Stein*, 149 Mass. ⁴³⁶ 570; *English v. Spokane Commission Co.*, 48 Fed. Rep. 196; *Lewis v. Rountree*, 78 N. C. 323; *Best v. Flint*, 58 Vt. 543; 56 Am. Rep. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; 26 Am. St. Rep. 890; *Hege v. New-*

som, 96 Ind. 431; English v. Spokane Commission Co., 57 Fed. Rep. 451; 2 Benjamin on Sales, 6th Am. ed., 856, note 29; Dayton v. Hooglund, 39 Ohio St. 671; Holloway v. Jacoby, 120 Pa. St. 583; 6 Am. St. Rep. 737; Parks v. Morris etc. Tool Co., 54 N. Y. 586; Zabriskie v. Central etc. R. R. Co., 131 N. Y. 72; Morse v. Moore, 83 Me. 473; 23 Am. St. Rep. 783; Fairbank Canning Co. v. Metzger, 118 N. Y. 260; 16 Am. St. Rep. 753. In Morse v. Moore, 83 Me. 473, 23 Am. St. Rep. 783, the best considered case to be found on the point in the books, the court say: "The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond—evidence of more or less force, according to the circumstances of the case. If the goods be accepted without objection at the time, or within a reasonable time afterward, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defect, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency; placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court." In English v. Spokane Commission Co., 57 Fed. Rep. 451, the court say, at page 456: "There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the ⁴³⁷ warranty; some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found, upon examination, to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled, that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable, in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty; and if there has been no waiver

of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods." There is nothing in the decisions of this court conflicting with our views in this case.

It is claimed by plaintiff that defendant, by renewing the notes given by him for the purchase price of the twine, waived his right to recoup damages for breach of the warranty. But it is evident that, if a cause of action once existed in his favor for damages, the mere giving of renewal notes would not, of itself, extinguish that cause of action. Even payment of the purchase price would not have that effect: *Gilmore v. Williams*, 162 Mass. 351. The circumstance that a purchaser had given his note, or had paid for the property, with full knowledge of the facts, would generally be persuasive—and might, unexplained, be conclusive—evidence that there was in fact no breach of warranty, or possibly that the purchaser had waived his right. We do not, however, wish to be understood as holding that a mere waiver by implication, without consideration, would necessarily operate to defeat the claim for damages. But the purchaser might negative the presumption of waiver, if such an act could create such a presumption, by showing that as a matter of fact, he distinctly asserted his right to rely upon his claim for damages. In the ⁴³⁸ case at bar, it appears that the new notes were given at the solicitation of the plaintiff's agent and on his promise that defendant should be allowed his damages. We do not say that a cause of action can be predicated on this arrangement. Serious questions of the extent of the agent's authority, and of the contradiction of a written contract by parol evidence, would have to be met, before we could decide the case on that theory. But the evidence was certainly competent to explain the circumstances surrounding the giving of the new notes, to the end that defendant might rebut any possible inference from that fact unfavorable to his claim for damages. The trial court should have submitted the question of breach of warranty to the jury, with proper instructions.

For the error of the court in refusing to do so, and in directing a verdict for plaintiff, the judgment is reversed, and a new trial is ordered.

All concur.

SALES BY DESCRIPTION—IMPLIED WARRANTY.—The sale of goods by a particular description imports a warranty that the article sold is of the kind specified: *Columbian Iron Works etc. Co. v. Douglas*, 84 Md. 44; ante, p. 362; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753; *Morse v. Moore*, 88 Me. 473; 23 Am.

St. Rep. 783, and note; Holloway v. Jacoby, 120 Pa. St. 583; 6 Am. St. Rep. 737; Best v. Flint, 58 Vt. 543; 56 Am. Rep. 570; Forcheimer v. Stewart, 65 Iowa, 594; 54 Am. Rep. 30; White v. Miller, 71 N. Y. 118; 27 Am. Rep. 13; Hastings v. Lovering, 2 Pick. 214; 13 Am. Dec. 420.

SALES BY DESCRIPTION—BREACH OF WARRANTY—RIGHTS AND REMEDIES OF BUYER.—A purchaser of goods with warranty is not bound to return them upon discovery of the breach of warranty; he may retain them and seek his remedy founded upon the breach of warranty: Note to Fairbank Canning Co. v. Metzger, 16 Am. St. Rep. 759; Bushman v. Taylor, 2 Ind. App. 12; 50 Am. St. Rep. 228, and note. If there is a warranty in the sale of goods, the vendee is not bound to inspect the goods before using them, and, if he is sued for the price, he may set up a breach of such warranty as a counterclaim for the purpose of recouping damages: Tacoma Coal Co. v. Bradley, 2 Wash. 600; 26 Am. St. Rep. 890; Woodruff v. Graddy, 91 Ga. 333; 44 Am. St. Rep. 33. Acceptance of goods, though the contract of sale was executory, does not prevent the vendee from recovering for a breach of warranty of the quality of such goods: Morse v. Moore, 83 Me. 473; 23 Am. St. Rep. 783, and note.

SALES—PURCHASE MONEY NOTES.—A BREACH OF WARRANTY is a defense to a note given for the purchase money of property sold under a warranty, even though the note was executed subsequently to the time the contract of warranty was made: Note to Gale Sulky Harrow Mfg. Co. v. Stark, 23 Am. St. Rep. 742.

STATE v. ROOT.

[5 NORTH DAKOTA, 487.]

CONTEMPT — DISBARMENT — COMPOUND PROCEEDING.—The statute governing criminal prosecutions for contempt is wholly independent of the statute authorizing disbarment proceedings, and each is designed to accomplish a different result. Hence, an attorney at law cannot be punished for criminal contempt and be disbarred from practice in one and the same proceeding. In other words, a proceeding for contempt and one for disbarment, founded on the contempt, cannot be joined.

CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—EXCEPTION, BY MOTION, TO JURISDICTION—PREJUDICIAL ERROR.—When an attorney at law is charged with criminal contempt of court, and is ordered to show cause why he should not be punished therefor, and be debarred from practice, it is prejudicial error to deny him the right of excepting, by a preliminary motion, to the jurisdiction of the trial court, and to require him, by express mandate, to plead at once to the facts set out in the affidavit charging him by admitting or denying them.

CONTEMPT.—AN AFFIDAVIT charging a criminal contempt of court will be tested by the rules of criminal pleading, which are applicable to indictments or informations, as this is the formal accusation upon which the accused is to be tried for a criminal offense.

CRIMINAL LAW—PRESENTING QUESTIONS OF JURISDICTION.—A court must at all times be prepared to vindicate its own authority to proceed in a case, and the right to be heard, at least to the extent of presenting objections to the jurisdiction of the court in which one is charged with a criminal offense, is fundamental and to deny the accused that right is to deny him "due process of

law." The question of jurisdiction may even be raised, for the first time, in the appellate court.

CONTEMPT—PRACTICE—RIGHTS OF ACCUSED—CURING ERROR.—An attorney at law, charged by affidavit with criminal contempt of court, has the right to except to the jurisdiction of the trial court before he can be compelled to answer matters of fact, and he may do so by preliminary motion, without specifying any grounds, although the statute regulating contempt proceedings does not, in terms, make provision for reaching defects in the accusation, by motion or otherwise. Such motion may be leveled at either matters of substance or mere irregularities of procedure; and a fundamental error committed in denying the accused the right to interpose preliminary objections before being called upon to answer as to the facts, is not cured by later proceedings.

CONTEMPT—IRREGULAR PROCEDURE—RIGHTS ON APPEAL.—If an attorney at law, charged by affidavit with contempt of court, is denied the right of pleading to the jurisdiction of the trial court by preliminary motion, he will, on appeal, be given the benefit of all preliminary motions which he could properly have made in the court below.

CONTEMPT—WHAT IS NOT—LANGUAGE NOT IN PRESENCE OF COURT.—Abusive and defamatory language, used by an attorney at law concerning a judge and his official action in cases pending, which the attorney is prosecuting, and which language attacks the private character of the judge as a citizen, does not constitute contempt of court, where it is not used in the courthouse or in the immediate view and presence of the court.

CONTEMPT.—AN AFFIDAVIT does not charge contempt of court where it contains no averment that the language charged was used in the immediate view and presence of the court, and fails to state the particular date or time when the offensive words were spoken.

CONTEMPT—WORDS SPOKEN IN COURTROOM.—The fact that obnoxious words were spoken of a judge in his courtroom is not important, upon a charge of contempt, unless coupled with the fact that, at the time they were spoken, the court was sitting and discharging judicial functions and that the words were spoken in the immediate view and presence of the court, and were calculated to interrupt its proceedings or to impair its authority.

DEFINITIONS.—"IN SESSION," as applied to a court, expresses not only the idea that the judge is sitting on the bench and engaged in the discharge of judicial functions, but that the court has convened for a term, and has not yet adjourned for the term.

CONTEMPT—CHARGE—PROOF.—If it is charged that offensive behavior was exhibited while the court was sitting, and in its immediate view and presence, the charge can be made out by proof without showing that the offensive act took place within the sight or hearing of the judge.

CONTEMPT WHILE COURT IS SITTING—BRANCH OF COURT.—A contempt is established where offensive behavior is exhibited while the court is sitting in the discharge of judicial functions, if it is committed in the presence of some branch of the court when so engaged.

CONTEMPT—DISBARMENT—COMPOUND PROCEEDING—PREJUDICIAL ERROR.—When an attorney at law is charged with criminal contempt of court, and is ordered to show cause why he should not be punished therefor, and be debarred from practice, it is highly prejudicial error to deny him the right to demur to the accusation so far as it is sought to be used as a basis for the revocation of his license to practice law, and to compel him to answer

interrogatories under oath touching the facts bearing upon the charges against him.

CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—UNAUTHORIZED PUNISHMENT.—When an attorney at law, charged with a criminal contempt of court, is tried upon such charge, and no other, and found guilty, the court has no authority to suspend or disbar him from practice as a punishment for the contempt. To do this, the accused must first have been accorded a trial under the safeguards of the special statute governing disbarment proceedings.

CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—DEFENSIVE MOTIONS.—If an attorney at law is charged with criminal contempt of court, and is ordered to show cause why he should not be punished therefor, and be debarred from practice, he has a right to make a preliminary motion that the proceeding be quashed, and, if that is overruled, to follow it by a motion requiring the prosecution to elect and declare, at the outset, upon which branch of the case it will first proceed.

CONTEMPT — DISBARMENT — COMPOUND AND UNAUTHORIZED PROCEEDINGS.—It is an irregular and unauthorized proceeding where an attorney at law is charged with criminal contempt of court, to order that he show cause why he should not be punished therefor and be debarred from practice, to try him for the contempt, and, after finding him guilty thereof, to include in the sentence therefor, an order of disbarment from practice.

Appeal from a conviction of contempt of court and suspension from practicing as an attorney at law.

Newman, Spalding & Phelps, and Herbert Root, for the appellant.

Herman Winterer, state's attorney, and John F. Cowan, attorney general, for the state.

⁴⁹¹ WALLIN, C. J. The record in this case shows that Herman Winterer, state's attorney for Barnes county, on December 28, 1895, presented to the district court for said county (which was then in session, at Valley City) a number of affidavits purporting to contain charges against the appellant of various criminal contempts of court, committed by him at diverse times and places. Upon filing the affidavits, the district court issued an order to show cause, as follows: "It is ordered by the court that Herbert Root, the party named in said affidavits, be, and is hereby, ordered to show cause before this court on the second day of January, at 10 o'clock A. M. of that day, why he should not be punished for contempt of court, and why he should not be debarred from practicing law in this county, in this court." The order, together with said affidavits, was served upon the appellant—and, in response thereto, he appeared before the district court; whereupon the following proceedings were had: "On January 2, 1896, this case was called for trial. The defendant, Herbert Root, being present in court, attempted to except to the

jurisdiction of the court, but was refused permission to do so until the following proceedings were had: 'Court: Mr. Root, do you admit the facts in the affidavits served upon you? Mr. Root: I do not, sir.' The state's attorney is now ordered to file interrogatories in accordance with section 5942 of the Revised Codes of 1895, specifying the facts and circumstances of the offenses charged. Thereupon the interrogatories were duly filed." For the purposes of this ⁴⁹² opinion, it will be unnecessary to set out the interrogatories at length. It is enough to say that they consist of pointed questions, requiring specific answers, touching the truth of the several charges as contained in said affidavits. Before answering the interrogatories, the record shows that the accused filed with the clerk, and read to the court, a motion to vacate the order to show cause. The ruling was as follows: "Motion overruled by the court, the defendant not being permitted to present any argument or explanation as to said motion; whereupon the following proceedings were had: 'Mr. Root: You will not hear any law on this? Court: No; I don't want to hear any law.'" Upon the following day (January 3d), the defendant filed his answer to the interrogatories. Upon the issues thus joined, a trial was had, at which the prosecution called a number of witnesses, who were sworn and examined touching the subject matter of the various charges set out in the affidavits; whereupon the court, after filing findings of fact, entered judgment against the defendant, as follows: "I do hereby adjudge and consider that the defendant is guilty of contempt against this court, in this: that he has used language respecting this court in the courtroom, and in the presence of the court, respecting cases pending for trial in this court at the present term, such as to impair the respect due to its authority, and thereby directly tending to interrupt its proceedings, and whereby the administration of justice has been and is brought into disrepute, and the court disgraced; that the defendant has used such language aforesaid concerning this court, and respecting cases pending in this court, at the last term of the court, being the June term 1895, of this court, in Barnes county, North Dakota, as did impair the respect due to this court and to its authority, and such as to bring the administration of this court into disrepute, and to disgrace this court; that the language aforesaid, and the conduct of the defendant as aforesaid, has been such that he is not a fit and proper person to longer practice law at this bar, until further order by this court. And I hereby adjudge and direct that the defendant be confined in the county ⁴⁹³ jail of Barnes county, North Dakota, for a period of thirty

(30) days, commencing at noon of this fourth day of January, A. D. 1896, and that he pay a fine of two hundred (\$200) dollars to the clerk of this court; that in case of default made by the defendant of the payment of this fine, that he be committed to the county jail of Barnes county, North Dakota, until such fine is paid, or for a period not exceeding thirty (30) days; that defendant's imprisonment for nonpayment of said fine shall commence at the expiration of the first term or period of the defendant's imprisonment herein mentioned; and that defendant be suspended from further practicing law in this court until the further order of this court; and that a commitment be issued to carry this judgment into effect. January 4, 1896." The accused appeals to this court from said judgment, and the record sent up embraces a statement of the case, with the evidence and procedure had in the trial court.

Considering the record before us as a whole, its most striking feature lies in the fact that it attempts to fuse and mass together in one proceeding two distinct special proceedings, which are wholly independent of each other, not only with respect to the results which each is designed to accomplish, but with respect as well to the practice and procedure laid down in the statute for the government of each respectively. A proceeding for the punishment of a criminal contempt of court, whether committed in *facie curiae*, or committed out of the view and presence of the court, is a summary proceeding of a quasi criminal character, in which the contemner may be punished criminally by both fine and imprisonment; while the proceeding to suspend or revoke an attorney's license, as laid down in the code, while it is special in its character, is neither criminal nor quasi criminal, either in its procedure or in its consequences. The important differences in the remedies will be seen at a glance by reading and comparing the two statutes: See Rev. Codes, sec. 5932, et seq., regulating contempts, and sections 432-437, regulating the proceeding to revoke an attorney's license. It will be noticed that, in a ⁴⁰⁴ disbarment proceeding, the accused may elect whether he will demur or plead to the accusation brought against him; and, if he pleads, he is not hampered by statutory requirements compelling him to respond categorically to interrogatories framed by the prosecution, and which, peradventure, may require him to furnish damaging evidence against himself. Section 435 reads: "To the accusation he may plead or demur, and the issue joined thereon shall in all cases be tried by the court; all the evidence

being reduced to writing, filed, and preserved." The only judgment which can follow is a suspension or revocation of the attorney's license. An appeal will remove the whole case to this court, including the evidence, without the necessity of settling a bill or statement of the case: Rev. Codes, sec. 437. Turning to the statute regulating procedure in summary contempt cases, we shall at once discover a vitally different method of procedure, and one followed by results wholly dissimilar. Where the contempt is committed while the court is sitting, and in its immediate view and presence, no pleadings are essential, and none are required—in cases where the facts constituting the contempt are within the personal cognizance of the presiding judge. In such cases, there are no pleadings required, because there are no issues to be tried. All that is requisite to a complete record in such cases is an order of the court "stating the facts which constitute the offense, and reciting that the same occurred in such immediate view and presence, and plainly and specifically prescribing the punishment to be inflicted therefor": Rev. Codes, sec. 5935. This section epitomizes the settled common-law practice also: Rapalje on Contempts, sec. 93, and cases cited; 4 Ency. of Pl. & Pr. 775, and note 4. See, also, 5 Crim. Law Mag. 484, and cases cited in notes.

In the case at bar, as has been seen, the trial court did not proceed upon the theory that the contemptuous language and behavior charged were committed within the sight or hearing of the presiding judge of the district court. The proceeding had in the court below is only adapted to a case where the offensive behavior did not occur within the judge's personal observation. ⁴⁹⁵ The judgment of conviction follows certain findings of fact made and filed with the clerk, and which findings are based upon evidence brought out at a trial of the issues formed by the pleadings. The judgment is based upon such findings. It recites that, "upon the original affidavits, the answer, and the subsequent proofs offered and made by the state's attorney, the court finds that the defendant did use contemptuous language," etc. The record therefore precludes the idea that the conviction resulted from any contempt of court occurring in the sight or hearing of the judge. It has been suggested that the behavior of the accused upon the trial of this case below was positively contemptuous; and that such behavior was exhibited not only technically, within the view and presence of the court while sitting, but actually in the face and presence of the trial judge; and that the

same was of so flagrant a character that it would justify the infliction of criminal penalties as and for a contempt of court. If it were conceded that the accused did commit such contempts, we cannot see how the fact becomes pertinent in this court, and upon this record. It is manifest that this court can consider no charges against the accused other than those appearing of record, and upon which it affirmatively appears that the accused was tried and convicted. Where, however, as in the case at bar, the fact of the commission of the offense is not within the personal observation of the judicial officer presiding over the court, it becomes necessary to bring the facts before the court by a formal accusation. This is done at common law and under the statute by an affidavit: 4 Ency. of Pl. & Pr. 776, and notes. Where this course is pursued, the affidavit at once assumes great importance, as it is not only the foundation for issuing the order to show cause (Rev. Codes, sec. 5936), but also constitutes—and this is its most important office—the accusation upon which the accused is to be tried for a criminal offense. Under the modern authorities, at least, the sufficiency of such accusation is to be tested by the rules governing the framing of indictments and informations. All the material facts and essential ingredients of the offense are required to be set out by ⁴⁹⁸ distinct and positive averments; nor can any essential allegation be supplied by implication: *Batchelder v. Moore*, 42 Cal. 412; *Young v. Cannon*, 2 Utah, 560; *McConnell v. State*, 46 Ind. 298; *Stewart v. State*, 140 Ind. 7. See 5 Crim. Law Mag. 487, and cases cited in the notes. Section 5942 of the Revised Codes directs that when the accused appears upon “an order to show cause, the court or judge must, unless the accused admits the offense charged, cause interrogatories to be filed specifying the facts and circumstances of the offense charged against him. The accused must make written answer thereto under oath.” The proofs may consist of either affidavits or other proofs, but the statute contains no provision requiring the preservation of the evidence, as is done in the case of disbarment proceedings; and if the accused appeals, and desires a review of the evidence in the supreme court, a statement of the case, embracing the formalities prescribed by section 5466, becomes indispensable. This feature also, as has been seen, is not found in cases of appeal under the statute governing disbarment proceedings. It will be further noticed that no demurrer is mentioned in connection with a contempt proceeding, while, on the other hand, that form of pleading is expressly allowed in cases arising under the other statute.

This cursory examination of the two statutory proceedings we have been considering brings into view the very important practical differences which exist in their procedure, and particularly with reference to the various defensive measures which the accused may resort to under each respectively. In the case at bar, we have seen that the accused, as soon as he appeared in court in obedience to the order to show cause, and before pleading, "attempted to except to the jurisdiction of the court, but was refused permission to do so until the following proceedings were had: 'Mr. Root, do you admit the facts in the affidavit served upon you? Mr. Root: I do not sir. Court: The state's attorney is now ordered to file interrogatories in accordance with section 5942 of the Revised Codes of 1895.'" The interrogatories were then promptly filed. The facts will call for a ruling upon a point⁴⁹⁷ of practice arising under the proceeding for the punishment of contempts of court which has recently come into operation by the adoption of the Revised Codes. The point can be stated by a question: Can the accused, after being cited before the court by an order to show cause, based on an affidavit, be compelled forthwith to enter a plea to the facts set out in the affidavit, i. e. be compelled to admit or deny the offense, as provided in section 5942, without being permitted to make any preliminary attack by motion upon the regularity or sufficiency of the proceeding brought against him? The statute makes no reference in terms to any preliminary motion, but we are clearly of the opinion that elementary principles of procedure demand that such motions should be allowed before the accused is called upon to frame an issue of fact. If there is no valid criminal charge to be investigated by the court, or if the court, for any reason, is irregular in its procedure, or without jurisdiction or lawful authority to hear and determine the case, it is certainly true that the accused cannot, under established principles of the law, be forced into an investigation of questions of fact. In civil actions and in criminal actions proper, the sufficiency of a complaint or indictment can be raised by a demurrer; and, in special and summary proceedings, similar questions are commonly raised by a motion to quash or other preliminary motions. That this is the practice in all special proceedings is elementary. It must, in fact, follow necessarily from the established doctrine, that the accusation in a criminal contempt case is required to be sufficient, in substance, that the accused shall be permitted to challenge the sufficiency of the charge against him in matters of law, before being compelled to answer to matters of fact. One element essential

to a conviction upon such charge would be the jurisdiction of the court which assumes to adjudicate upon the case; another, that the offense is well pleaded; another, that the facts charged are such as, under the law, would constitute a contempt of court; and many others might be mentioned. If the written accusation which is the basis ⁴⁹⁸ of the charge is defective either in form or substance, we know of no means, other than by motion, whereby the defect can be brought to the attention of the court entertaining the case. Certainly, the code makes no provision, in terms, for raising such questions, by motion or otherwise. It is clear to our minds, nevertheless, that the accused should not be arbitrarily compelled to join issue upon the facts without first giving him an opportunity to be heard by motion, whether such motion is leveled at matters of substance or at mere irregularities of procedure. Applying these well-settled principles and rules of practice to the facts as they appear of record in this case, we shall be compelled to rule that the court below erred fundamentally, to the prejudice of the accused, in denying him the right to attack the proceedings against him by a preliminary motion. The accused attempted, before doing anything else, to challenge the jurisdiction of the court below, by an exception to such jurisdiction. He was not allowed to attack the proceedings at that stage, but was compelled, by a mandatory ruling of the court, to move forward to a later stage, and plead to the facts. He was required to say and declare at once whether he confessed the facts set out in the affidavits. The record is silent as to the particular ground or reason which the accused would have presented to the court as the basis for his attempt to challenge the jurisdiction. The groundwork of the exception, whether of fact or law, is left to conjecture. We only know that he "attempted to except to the jurisdiction of the court, but was refused permission to do so until the following proceedings were had," viz., until he pleaded to the facts set out in the affidavits. In our opinion it is not at all important to inquire whether the groundwork of the exception to the jurisdiction of the trial court was or could have been valid in law. The accused was confronted by a very serious charge, one branch of which was attended by criminal penalties, and the other with consequences of a disastrous character. In such a dilemma, the accused cannot be restricted to valid objections to the proceedings brought against him. It was proper to except to ⁴⁹⁹ the jurisdiction then and there, and do so by a motion; and in such a motion the grounds thereof need not be specified at all. The court must at all times be prepared

to vindicate its own authority to proceed in a case. In fact, the point of jurisdiction could be raised for the first time in this court. Moreover, we think that it is our duty, under the circumstances of this case, to give the accused the benefit of any motion, whether made or not, which might, under good practice, have been interposed by him before pleading to the facts.

The right to be heard, at least to the extent of presenting objections, is fundamental, and is, we think, of the very essence of "due process of law." It follows that if the accused, before pleading to the facts, had a legal right under good practice, to interpose motions of a preliminary nature, which right was denied him in the trial court, he should in this court, at least, have the benefit of all such motions, the same as if they had been made. To deny the accused such right would be manifest injustice. True, the accused was allowed at a later stage, and after being compelled to plead to the facts, to except to the jurisdiction of the trial court, and also to move to vacate the order to show cause. The record set out above discloses what occurred when these motions were made. The accused was not permitted to argue his legal propositions, nor to cite law in support of either of said motions; and the record, upon the motion to vacate the order, is as follows: "Motion overruled by the court, the defendant not being permitted to present any argument or explanation as to said motion." It may be conceded that a court, in the exercise of its discretion, can deny to counsel the privilege of arguing questions of law or fact. Such privilege is liable to abuse, and can be controlled. But we have serious doubts whether a court can so restrict counsel as not to accord to him the right to "explain" a motion to the extent of stating its groundwork. But we refer to these later proceedings only to say that, in our opinion, they do not cure the fundamental error involved in denying the accused the right to interpose preliminary objections before being called upon to answer as to the facts.

⁵⁰⁰ We will now briefly consider the record as it stood before the accused was required to plead to the facts. It consisted of five separate affidavits, made by five citizens of Barnes county, which affidavits embodied the charges against the accused, and also constituted the basis for the order to show cause. The offenses charged, or sought to be charged, in these affidavits, consisted of language attributed to the accused as being used by him, on divers occasions in the months of June, August, and December, in the year 1895, in the city of Valley City, and constituting in the aggregate some eight or nine distinct criminal of-

offenses, if either were an offense, committed at different times and places, under varying circumstances. With the exception of one charge, which will be considered separately hereafter, all of the language as set out in the affidavits and attributed to the accused was spoken by him not only strictly out of the view and presence of the court while sitting, but away from the courthouse, and not in the presence or hearing of the presiding judge of said court. The charges are to the effect that the offensive language was uttered in the stores and in the streets and public places of Valley City. The accused, at the June term of the district court, as well as at the December term, 1895, had been, and was when tried, actively engaged in the prosecution of a number of cases arising under the prohibitory liquor law. He seemed to be greatly displeased by the course which the court pursued with reference to such cases, and all the language set out in the affidavits had reference to such cases, and to the action of the court and judge with respect thereto. The language which the accused was charged with using was very abusive in character, and of a nature highly defamatory and slanderous. It reflected in terms of severity upon the presiding judge of the very court in which the accused was practicing as an attorney at law, and assailed the judge, not only on account of his offensive action in the liquor cases, but also attacked his private character as a citizen. We can scarcely conceive of any circumstances which could justify an attorney in the use of such language, even when out of court, and out of the ⁵⁰¹ presence or hearing of the judge to whom it was applied. But the question before this court is, whether the language we have thus far considered would constitute the crime of contempt of court. We are clear that it would not. No case is cited on the part of the state to support the contention, and, after a diligent quest, we have been unable to find any modern authority to sustain the prosecution upon this feature of the case: See, for general principles of contempt, *Neel v. State*, 9 Ark. 259; 50 Am. Dec. 209.

If we are correct in this view, it must follow that the charges we have thus far considered would, upon a motion seasonably interposed, have been stricken from the case, and not further considered in prosecuting the criminal branch of this case.

The remaining charge is embraced in the affidavit of one Ir- gens, which was filed with the others, on December 28, 1895. It charges the appellant with using contemptuous language toward the presiding judge of said court during the term of the district court then pending, but omits to state the particular date or time

when the offensive words were spoken. We think this omission would be fatal in an information charging this offense. Irgens was a defendant in one of the liquor cases before the court at that time. After reciting that the Honorable Roderick Rose was presiding at the time, and that a motion had been made for a continuance of his case over the term, the affidavit proceeds as follows: "That said Herbert Root approached me in the courtroom, in the presence of various people, and stated to me in substance, and in the presence of various bystanders: 'You fellows are damned chumps for paying out your money for attorneys to defend you. The judge will look out for you. He knows what he is here for. He understands his business. He knows what he is elected for. You fellows don't need to fear.' That the said case wherein affiant was defendant was a case brought under the prohibition law of this state. That said Root had been actively engaged, as he claimed, as a special counsel for the purpose of prosecuting the liquor cases. That the said remarks of the said Root at the said time, by reason of the circumstances, clearly ⁵⁰² conveyed the idea that the judge of the said court was using his official position to shield and protect and save from punishment persons who were prosecuted for violations of the prohibitory law of this state. That the said remarks were made in a tone and in a manner calculated to cast reflections upon the presiding judge, and to create the impression that the judge was corrupt, and did reflect upon the honor and dignity of the court. That the cases referred to by the said Root in the presence of affiant and others were then and there pending in said court. The said remarks were made while the court was in session, and in the courtroom. That jurymen and citizens were sitting around and about within hearing distance of said remarks." It will be noticed that the accused is charged with using the contemptuous words in the courtroom, and while the court was in session, and in the presence of divers persons and jurors, "who were sitting around and about within hearing distance." But it is not charged that the words were spoken either in the view and presence of the court while sitting, or in the sight or hearing of the judge presiding over said court; nor is the claim made, even in argument, that the judge personally heard the words, and there is much in the case tending to show that he did not. But the important fact is, that no such averment is found in the accusation. To our minds, the omitted allegations are vital to the charge. The fact that the obnoxious words were spoken in the courtroom is not important, unless coupled with the fact that, at the time

they were spoken, the court was sitting and discharging judicial functions, and words were spoken in the immediate view and presence of the court, and were calculated to interrupt its proceedings or impair its authority. No such charge is made, and the fact that it is charged only that the words were spoken in the presence of jurors and citizens is to our minds significant. However willing we might be to do so, we cannot, under the rules governing the statement of criminal offenses, indulge presumptions in aid of charges, and in this case infer that the offense was committed while the court was actually sitting, and in its immediate view ⁵⁰³ and presence, when no such allegations appear in the affidavit. It is charged that the words were spoken while the court was in "session." But the expression "in session" is commonly used not only to express the idea that the judge is sitting on the bench and engaged in the discharge of official functions; the same term is quite as often employed to convey the idea that court has convened for a term, and has not yet adjourned for the term. But if the terms "sitting" and "session," as applied to courts, were precisely equivalent and interchangeable terms, the affidavit is still open to the criticism that it is not alleged that the language was used in the immediate view and presence of the court. We regard this averment essential in this offense, whether the prosecution is under the statute or not. It is obvious that language, however offensive, may be spoken even while the court is in session, and in the courtroom, in such a way that it would not constitute an offense committed in the immediate view and presence of the court, and tending to interrupt its proceedings.

If we are correct in our conclusion as to the Irgens affidavit, it will follow that the exception to the jurisdiction of the district court to proceed to the trial of the contempt feature of this case was well grounded and valid. The court would certainly be without jurisdiction in the sense of being without lawful authority to proceed with the contempt branch of the case, if there was no valid charge of contempt on file; and we hold that there was none. To prevent being misunderstood, we say expressly that it is our opinion that where it is charged that the offensive behavior was exhibited while the court was sitting, and in its immediate view and presence, the charge can be made out by proof without showing that the offensive act took place within the sight or hearing of the judge. The cases cited next below will illustrate what is meant by the expression "immediate view and presence of the judge": See *People v. Barrett*, 9 N. Y. Supp. 321; 56 Hun, 351; affirmed 121 N. Y. 678; *In re Griffin*,

1 N. Y. Supp. 7. Under the rule applied in these cases, a contempt is established where the behavior is exhibited while ⁵⁰⁴ the court is sitting in the discharge of judicial functions, if it is committed in the presence of some branch of the court when so engaged.

We are also clear that it was fundamentally erroneous and prejudicial to the appellant to require him to plead to the facts at the threshold of the case, and without allowing him to raise the preliminary objection that the proceeding brought against him was irregular and void, because it was unauthorized by any law or practice. It would have been proper practice to test the validity of the compound proceedings attempted to be brought against the accused by a preliminary motion to quash the same, and, if that had been overruled, to follow it by a motion requiring the prosecution to elect and declare at the outset upon which branch of the case it would first proceed. It cannot be overlooked that the appellant was deeply concerned in these preliminary questions. He had been cited into court for a double purpose, and was threatened by twofold penalties. He was required to show cause why, on account of the charges on file against him, he should not be punished criminally, and also why he should not suffer even more seriously by a disbarment as an attorney. Confronted by such a dilemma, he was entitled to such protection, at least, as the statute in terms affords. He should have been accorded the right to demur to the accusation in so far as the same was sought to be used as a basis for the revocation of his attorney's license; and in that branch of the case it was seriously prejudicial to compel him to answer interrogatories under oath touching the facts bearing upon the charges against him.

It is, in our opinion, needless to further discuss the facts in the record. Obviously, the whole proceeding was not only unprecedented, but was in the highest degree prejudicial to the legal rights of the accused. The objections to this proceeding cannot be answered by saying that the proceedings at the trial which were actually had were those only which may be taken in a contempt case. This would not be true either in fact or in legal ⁵⁰⁵ effect. The order to show cause required the accused to show cause why he should not be disbarred from practice as an attorney; and, pursuant thereto, the learned trial court, after imposing the highest penalty allowed by the statute for a criminal contempt of court, proceeded, in the same judgment to suspend the accused from practicing as an attorney in said court for an indefinite period, i. e. "until the further order of the court." It thus appears

that, from the inception to the close of the proceedings in the district court, the vitally important matter of the appellant's disbarment from practice was an ever present factor; and the further fact stands out prominently that the statute regulating disbarments, and surrounding an attorney with many safeguards not available in contempt proceedings, was wholly ignored. It is manifest that the court below proceeded to try and doubly punish the accused upon a wholly mistaken view of the law, namely, that when an attorney charged with a criminal contempt, and tried on such charge, and no other, is found guilty, he may at once be suspended or disbarred from practice. It is doubtless true that certain gross contempts of court, when done by an attorney, will furnish ground for prosecution for misbehavior in office, punishable by disbarment; but in all such cases the procedure in the statute must be observed. In this state there is a statute framed expressly to regulate proceedings against attorneys for disciplinary purposes, and under which an attorney's license may be suspended or revoked: Rev. Codes, sec. 432. See, also, *State v. Start*, 7 Iowa, 499; *Ex parte Smith*, 28 Ind. 47; *Withers v. State*, 36 Ala. 252; *Ex parte Bradley*, 7 Wall. 364. Disrespectful language used in court by counsel is at once a criminal offense, punishable summarily, and a ground for disbarment for official misconduct: 3 Am. & Eng. Ency. of Law, 785; *Holman v. State*, 105 Ind. 513; *Sharon v. Hill*, 24 Fed. Rep. 726; 1 Am. & Eng. Ency. of Law, 945, 946, and notes. Insulting communications, made directly and personally to the judge, respecting his action in a pending case, are punishable as a contempt: *In re Pryor*, 18 Kan. 72; 26 Am. Rep. 747. Such conduct is also ⁵⁰⁶ ground of disbarment: *People v. Green*, 7 Colo. 237; 49 Am. Rep. 351. Conduct which is not criminal may, nevertheless, be ground for disbarment: *Beene v. State*, 22 Ark. 149; *Weeks on Attorneys at Law*, secs. 80, 81; *People v. Green*, 9 Colo. 506; 7 Colo. 237; 49 Am. Rep. 351; *Cramer v. Tittel*, 79 Cal. 332.

But, from our views of the law as already set forth, it becomes necessary to reverse the judgment of the trial court for irregularities of procedure highly prejudicial to the appellant, and this would be our holding in this case irrespective of the question as to the sufficiency of the affidavits to charge a criminal offense. We cannot, however, conclude this opinion without an allusion to the fact that this record furnishes ample evidence that the appellant has repeatedly assailed the official rulings of the Honorable Roderick Rose, presiding judge, of said court, with respect to the liquor actions pending in his court, and has repeatedly

assailed both his official and private character. The persistence by the accused in the use of abusive and vituperative language applied to the judge, although in his absence, is, in our judgment, entirely inconsistent with the obligation of an attorney "to maintain the respect due to the courts of justice and judicial officers": Rev. Codes, sec. 427. Nor do we wish to be understood as holding in this case that the language charged would not, in a proper proceeding, afford sufficient ground for the disbarment of the accused, under subdivision 3 of section 433 of the the Revised Codes. Upon this question we are not called upon now to pass, nor shall we here intimate our views upon it. The questions in the case supposed, should such a case ever arise, would involve special investigation, and the consideration of the constitutional rights of all citizens, attorneys as well as others, to criticise the action of public officials in a proper manner, and within certain legal limitations of that right, and would further and especially necessitate inquiry as to the rights of attorneys to indulge in too severe strictures upon the official conduct of judges presiding over courts in which attorneys are licensed to practice. These inquiries cannot be further prosecuted here; but on this aspect of the question, ⁵⁰⁷ see *People v. Green*, 7 Colo. 237; 49 Am. Rep. 351; *Beene v. State*, 22 Ark. 149; *People v. Green*, 9 Colo. 506; *Ex parte Bradley*, 7 Wall. 364.

The judgment will be reversed.

All the judges concurring.

ATTORNEYS—CONTEMPT AND DISBARMENT—APPEAL.—
The power possessed by courts to disbar attorneys is dependent upon other grounds distinct from those upon which rests the power to punish for contempt: See monographic note to *Burns v. Allen*, 2 Am. St. Rep. 849, on summary jurisdiction; and to *State v. Kirke*, 95 Am. Dec. 343, on causes and proceedings for the disbarment of attorneys. When an affidavit is presented as the basis for a proceeding for contempt, the court must, in the first instance, examine the same, and if the facts presented do not show that a contempt has been committed, the court is without jurisdiction to proceed: *Mullin v. People*, 15 Colo. 437; 22 Am. St. Rep. 414. An attorney should not be disbarred for contempt unless the offense is of so gross and serious a character as to render him unworthy of his office: See monographic note to *State v. King*, 95 Am. Dec. 343. A contempt may be a ground for disbarment; but a cause of disbarment need by no means constitute a contempt. There may be acts for which an attorney may be both fined for contempt and disbarred; but a court will not punish by disbarment for contempt when the act has not been committed in its presence, and there is another mode of punishment: Note to *State v. Kirke*, 95 Am. Dec. 343. Even if courts have power to disbar an attorney for offensive language concerning proceedings in court, they should proceed with very great caution, and decline to act otherwise than by inflicting punishment as for a contempt, except in very aggravated or extraordinary

cases: See monographic note to *In re Philbrook*, 45 Am. St. Rep. 83, 85. A criminal contempt is an act in disrespect of the court or of its process, or which obstructs the administration of justice, or tends to bring the court into disrepute: *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207. There are decisions, like the principal case, which go very far toward affirming that an attorney may employ very extreme language of and concerning a judge and his motives and rules of action as such, provided the language was not used in court, but is a mere expression of the ill-feeling and ill opinion of one man toward another. But even if such language used toward a court or judge is unjustifiable, and constitutes a contempt, such as may, and ought to, be punished, the punishment therefor can never properly be the disbarment of the offender, unless his conduct is such as to establish his unfitness to discharge the duties of his profession: Note to *In re Philbrook*, 45 Am. St. Rep. 86. Protection will be afforded to attorneys against a wrongful exercise of the power of disbarment, and the supreme court will interfere where a case of wrong or injustice is brought to its attention: Note to *People v. MacCabe*, 36 Am. St. Rep. 274. An attorney disbarred for a contempt has a right of appeal, for this is not, properly speaking, a punishment for contempt: See monographic note to *Clark v. People*, 12 Am. Dec. 186, on the power to punish for contempt.

OBJECTIONS FOR WANT OF JURISDICTION, if it exists, may be raised by answer, or at any subsequent stage of the proceedings: *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448; even on appeal: *Green v. Creighton*, 10 Smedes & M. 159; 48 Am. Dec. 742. It is always competent to inquire into the jurisdiction of a court, for on this the judgment must depend for its validity: *Smith v. Tupper*, 4 Smedes & M. 261; 48 Am. Dec. 483.

FINLAYSON v. PETERSON.

[5 NORTH DAKOTA, 587.]

TIME—MORTGAGES—FORECLOSURE—PUBLICATION OF NOTICE OF SALE.—If the statute requires a publication of notice of sale, upon the foreclosure of a mortgage, by advertisement, to be made "for six successive weeks at least once in each week," the first publication must be made at least forty-two days before the day of sale, and there must be at least six publications, one of them being in each of the six weeks between the first publication and the day of sale. If there are but six publications, all exactly a week apart, and the day of sale is less than a week after the last publication, the foreclosure proceedings are void.

DEFINITIONS.—THE WORD "FOR" in a statute requiring a publication of notice of sale, upon the foreclosure of a mortgage, by advertisement, to be made "for six successive weeks at least once in each week" means "throughout" or "during the continuance of." It is obvious that a notice of sale has not been published "during the continuance of" a week when the day of sale follows the day of publication at an interval of less than a week.

STATUTES—CURATIVE LAWS, WHEN VALID.—Defects, such as those in a deed or acknowledgment, or other defects which it would be unjust for one to take advantage of, may be cured by retroactive legislation, for the reason that no one has a vested right to be unjust or to do a moral wrong.

STATUTES—CURATIVE LAWS, WHEN VOID.—The legislature have no power to validate void foreclosure proceedings by retroactive legislation which attempts to cure defects in falling

to publish the notice of sale for the full period prescribed by statute, as this invades the vested right which the mortgagor had to insist upon the full statutory notice being given, and in which there was no injustice. The tendency of recent judicial decision is to limit strictly the power to pass curative laws.

PLEADING.—A GENERAL PRAYER for such relief as may be just and equitable warrants the court in granting to the plaintiff such relief as the facts upon the trial justify.

Action by Alexander Finlayson against Peter C. Peterson. There was a judgment for the defendant, and the plaintiff appealed.

Bangs & Fisk and W. H. Standish, for the appellant.

J. H. Bosard, for the respondent.

587 CORLISS, J. The ultimate problem to be solved in this case is the legality of certain foreclosure proceedings. The plaintiff is conceded to be the owner in fee simple of the premises in question, if such proceedings are void. On the other hand, it is also agreed that her title has been destroyed, and is fully vested in the defendant, if those proceedings are valid. The only point urged against their legality is, that the first notice of sale was not published at least forty-two days before the day of sale. There were six different publications, and they were all exactly a week apart. But the day of sale was less than a week after the last publication. The question before us, then, is whether the statute, as it stood at the time of this foreclosure, required that full six weeks should intervene between the day of first publication and the day fixed for sale. The language of the statute is that the notice must be given "by publishing the same for six successive weeks at least once in each week." The word "for," in this statute, means 588 "throughout," or "during the continuance of": 3 Century Dictionary, 2314, definition 15 of word "for." It is obvious that a notice of sale has not been published during the continuance of a week, when the day of sale follows the day of publication at an interval of less than a week. Five weeks added to this fragment of a week will not constitute six weeks, unless a part of a week—the added fragment—is equal to a whole week. We agree with counsel for plaintiff that the statute contains two elements. The first requires a publication "for," or "during the continuance of," six weeks, and nothing short of a publication for forty-two days will satisfy this branch of the act. The other requires at least six publications, and that one of them shall be in each of the six weeks between the first publication and the day of sale. If the statute had declared that the notice should be published once a week in each of six successive weeks, its meaning

would have been different. But it does not so declare. Its explicit provision is that the notice shall be published for six successive weeks. We find our construction in harmony with the views of many courts, although some of the cases cited may perhaps be regarded as not directly in point, owing to a difference in the language of some of the statutes interpreted: *Bacon v. Kennedy*, 56 Mich. 329; *Wilson v. Northwestern etc. Ins. Co.*, 65 Fed. Rep. 38; *Boyd v. McFarlin*, 58 Ga. 208; *Pratt v. Tinkcom*, 21 Minn. 142; *Ogden v. Walker*, 59 Ind. 460; *Bunce v. Reed*, 16 Barb. 347, 350, 351; *Brod v. Heymann*, 3 Abb. Pr., N. S., 396; *Richardson v. Bates*, 23 How. Pr. 516; *Parsons v. Lanning*, 27 N. J. Eq. 70; *Early v. Doe*, 16 How. 610; *In re North Whitehall Tp.*, 47 Pa. St. 156; *Security Co. v. Arbuckle*, 123 Ind. 518; *Smith v. Rowles*, 85 Ind. 265; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 398. See, also, *Olcott v. Robinson*, 20 Barb. 148, and dissenting opinion in *Olcott v. Robinson*, 21 N. Y. 150; 78 Am. Dec. 126. The following cases are more or less in defendant's favor: *Olcott v. Robinson*, 21 N. Y. 150; 78 Am. Dec. 126; *Wood v. Morehouse*, 45 N. Y. 368; *Sheldon v. Wright*, 7 Barb. 39; *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470; *Chamberlain v. Dempsey*, 13 Abb. Pr. 421; *Pearson v. Bradley*, 48 Ill. 250; *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 415; *Dexter v. Shepard*, 117 Mass. 480.

But it is urged that an act passed March 8, 1889 (Laws 1889, c. 38), is decisive against the plaintiff. That act declares: "Whenever in any act or statute of the territory of Dakota providing for the publishing of notices, the phrase 'successive weeks' is used, the term 'weeks' shall be construed to mean calendar weeks, and the publication upon any day in such weeks shall be sufficient publication for that week, provided, that at least five days shall intervene between such publications, and all publications heretofore or hereafter made in accordance with the provisions of this act shall be deemed legal and valid." There is nothing in this statute which in terms relates to the time that must elapse between the first publication and the day of sale. It might be urged with much force that that act was passed to settle a somewhat mooted question—whether each successive publication must be made on the same day of the week—and that for this purpose, and for this purpose only, it declares that a week means a calendar week. There has been a division of judicial opinion whether the notice should be published on the same day in each week, although the weight of authority is against the necessity of publishing the notice on the same day in each week: *Ronkendorf v.*

Taylor, 4 Pet. 349; Wood v. Knapp, 100 N. Y. 109; Bachelor v. Bachelor, 1 Mass. 256; Raunn v. Leach, 53 Minn. 84; Savings etc. Soc. v. Thompson, 32 Cal. 347; Steinle v. Bell, 12 Abb. Pr., N. S., 171. Under these decisions, it perhaps would not be necessary to publish the notice in every calendar week, provided there was one insertion in each week commencing to calculate from the day of the first publication. If a notice should be published on Friday, the first week would not expire until the next Thursday, and the new week would not begin until the next Friday. Hence a second publication on the Wednesday of the week after might be in time. And yet in such a case there would be a gap of an entire calendar week during which no publication would be made. Now, this ⁵⁹⁰ statute prevents this. While it recognizes the soundness of the rule supported by the great majority of the cases, that the publication need not be made on the same day in each week, it yet limits that rule by declaring that, for the purpose of a publication once a week in each week, the word "week" means a calendar week. The result is, that in cases governed by this act there must be one publication in each calendar week, no matter on what day the previous publication was made. There is also a further limitation that at least five days must intervene between every two publications. There is much force, however, in the argument that it was the purpose of the legislature to declare by this act that a publication on the last day of a calendar week should relate back to the beginning of that week, and be a publication for that week, as effectually as though the notice had been published on the first day thereof, instead of on the last. But, even assuming this to be the meaning of the statute, the defendant cannot avail himself of its provisions. It was passed four years after the foreclosure proceedings in question were consummated. If it be regarded as a legislative interpretation of the existing law, it can have no conclusive force. Construction of statutes is a judicial, and not a legislative, function. In cases of doubt, a legislative construction is given some weight. But no court can allow the lawmaking power to alter by legislative enactment the meaning of a statute so as to affect vested rights. In 1885, when these foreclosure proceedings were had, the meaning of the statute under which the mortgagee foreclosed his mortgage was plain, and, as that statute required that the first publication should be made forty-two days before the day fixed for sale, no subsequent law could affect the rights of the mortgagor to treat the foreclosure as void. The legislature cannot, by the device of construing a statute, alter its meaning so as to affect vest-

ed rights. But this statute is more than a mere declaration of the meaning of a prior law. It, in terms, provides that if publication has in the past been made in accordance with statute, as so interpreted, it shall be valid. In other words, the legislature has passed a curative law, and the question ⁵⁹¹ is whether it is valid as such. We think not. While fully recognizing the power of the legislature to cure defects which it is unjust for one to take advantage of, we do not believe that this case falls within the rule. There is no injustice in the mortgagor insisting that the full statutory notice be given. The law threw about him the protection of full forty-two days' notice, and to have insisted on it at any time before the enactment of this new act would have involved no injustice to the purchaser. The latter would have been subrogated to the rights of the mortgagee, and the mortgagor, despite his successful assault upon the sale, must have paid the mortgage debt. The mortgage would still have been a lien on the property. So far as the sale might have resulted in a surplus, so that subrogation of the purchaser to the rights of the mortgagee would not afford him full protection, the mortgagor would be obliged to refund to the purchaser such surplus, as a condition of annulling the sale. The case is not like the case of a defective deed or a defective acknowledgment, the purchaser having paid full value for the property. Nor is it analogous to the case of a contract which a party ought in conscience to perform, although holding in his grasp against it some technical defense, as that she was a married woman, or that the agreement was not in writing. In these cases, the court answers the argument that the legislature cannot disturb vested rights by the conclusive reply that no one has a vested right to be unjust, or to do a moral wrong. Mr. Cooley states this as the foundation of the doctrine that defects may be cured by retroactive legislation. He says: "As the point is put by Chief Justice Parker, of Massachusetts, a party cannot have a vested right to do wrong; or, as stated by the supreme court of New Jersey: 'Laws curing defects which would otherwise operate to frustrate what must be proved to be the desire of the party affected cannot be considered as taking away a vested right. Courts do not regard rights as vested, contrary to the justice and equity of the case'": Cooley's Constitutional Limitations, 2d ed., marg. p. 378, top p. 460. We have carefully examined the whole law on this subject of ⁵⁹² curative legislation, and we have been unable to find an adjudication which has taken a position so extreme as we would be compelled to take, should we allow this statute to have a retroactive effect, and thus validate

an absolutely void sale; it not being abhorrent to natural justice for the owner of the property, under the circumstances of this case, to insist upon his strict legal rights. We do not lay so much stress on the fact that the foreclosure sale was absolutely void, for we think that even when a proceeding of any kind is void, with the exception of a judicial proceeding void for want of jurisdiction, it is nevertheless within the power of the legislature to validate such proceeding by retroactive legislation, if it would be grossly unjust for the person against whom the healing law is directed to insist upon his purely technical rights, destitute of all equity. But the case should be a clear one. Nothing short of this should prompt a court to sustain such a law. All jurists agree that this power, while highly beneficial when kept within proper limits, is liable to great abuse; and, while some of the cases have given it very wide scope, yet the unmistakable trend both of recent judicial decisions and of recent constitutional changes is in the direction of strictly limiting this power.

We have assumed so far, in the course of this opinion, that the failure to comply with the statute requiring publication for six full weeks rendered void the sale. On this point there has been no contention between counsel, and both authority and principle speak only one voice on this branch of the case. The foreclosure was void: *Pratt v. Tinkcom*, 21 Minn. 142; *Parsons v. Lanning*, 27 N. J. Eq. 70; *Wade on Notice*, sec. 1105; *Bacon v. Kennedy*, 56 Mich. 329.

Whether the plaintiff can maintain ejectment against the defendant, or must resort to an action to redeem the property, on the theory that the defendant is a mortgagee in possession, we are not called upon to decide on this appeal. The questions before us arise upon demurrer to the complaint. The facts set forth in the complaint entitle the plaintiff to some kind of relief, ⁵⁹³ and the general prayer for such relief as may be just and equitable will warrant the court in granting plaintiff such relief as the facts upon the trial will show he is entitled to. The complaint seems, however, to be framed on the theory that plaintiff has a right to maintain ejectment; and if the fact is, as set forth in the pleading that defendant forcibly ejected plaintiff from the land, it may be that ejectment will lie. On that point we express no opinion.

The order and judgment of the district court are reversed, and that court will enter an order overruling the demurrer to the complaint on such terms as that court may prescribe.

All concur.

TIME—NOTICE TO BE GIVEN FOR CERTAIN NUMBER OF WEEKS, SUCCESSIVELY.—In some of the states a notice required to be published for a given number of weeks successively is sufficient if it is published once in each week for that number of weeks, although the number of days from the first publication to the day of sale is not equal to the number of days in that number of weeks; but in others a publication for a certain number of weeks must be made for as many days before the day of sale as there are days in the number of weeks required: See monographic note to *Hoffman v. Anthony*, 75 Am. Dec. 708, on notice of sale, what is proper and sufficient. Compare *Washington v. Bassett*, 15 R. I. 563; 2 Am. St. Rep. 929.

STATUTES—CURATIVE LAWS—VESTED RIGHTS.—Acts curing formal defects in the execution or acknowledgment of deeds, etc., have been frequently decided to be constitutional and valid: *Grim v. Weissenberg School Dist.*, 57 Pa. St. 438; 98 Am. Dec. 237; *Gordon v. San Diego*, 101 Cal. 522; 40 Am. St. Rep. 73; but the legislature has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right: *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182; *Conway v. Cable*, 37 Ill. 82; 87 Am. Dec. 240. A void judgment cannot be cured by a subsequent statute: See monographic note to *Goshen v. Stonington*, 10 Am. Dec. 138, on retrospective laws, and which defines "vested rights." Compare *Gordon v. San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73, upon the general power of the legislature to pass curative laws.

PLEADING.—UNDER THE GENERAL PRAYER FOR RELIEF such relief may be granted as the facts of the case warrant: *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367; *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; *Strain v. Babb*, 80 S. C. 842; 14 Am. St. Rep. 905.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BENNETT v. McMILLIN.

[179 PENNSYLVANIA STATE, 146.]

FRAUD—CONCEALMENT OF MATERIAL FACTS—ACCOUNTING.—If a member of a partnership operating a gas well negotiates a sale thereof to a third party for one-half of the gross proceeds, and concealing this offer, and by means of false representations made by himself and his agent, that one-fourth of such proceeds is the best price obtainable, secures from his copartners a contract of sale at the latter price in blank, and then inserts his own and his agent's name and immediately resells to such third party in accordance with his offer, both the copartner and his agent are liable to account to the other members of the partnership for the profits of the latter sale, and such agent having, during all of the negotiations, represented that he was interested as one of the members of the firm, he is estopped to deny that he is one of the partners in an action for an accounting.

FRAUD—CONCEALMENT OF MATERIAL FACTS.—If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract may be avoided. Knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent.

A. L. Weil, S. W. Dana, S. D. Long, and C. M. Thorp, for the appellants.

J. N. Martin, D. B. Kurtz, and L. T. Kurtz, for the appellees.

140 DEAN, J. On April 22, 1891, through negotiations conducted by E. A. McMillin, he and William Smith took by assignment from Thomas A. Book, nineteen oil and gas leases in Lawrence county. The written assignment was to Smith, he to hold the same in trust, as follows: One-eleventh of three-fourths for McMillin, and ten-elevenths of three-fourths for such persons

as should contribute toward the common enterprise and the cost of drilling two wells for the development of the common property for oil. Smith resided in Pittsburg, and McMillin in New Castle, the last named not far from the territory to be developed. It was alleged by plaintiffs that McMillin got his brother, J. M. McMillin of New Castle, to join in the project. Smith induced a number of his friends in Pittsburg to join as contributors, they to share in the profits in proportion to their contributions. From the money two wells were drilled, which developed as good gas producers, but no oil was struck. At the time he made the assignment to Smith, Book had reserved one-fourth the oil or gas to be developed, which was afterward ¹⁵⁰ purchased by E. A. McMillin, plaintiffs alleged, for himself and brother. As to the three-fourths in name of Smith, he made a written declaration that he held the same in trust for himself, the McMillins, and the other contributors. The production of the wells indicated the property was valuable for gas purposes, and efforts were made by the parties to sell it at a profit. A committee of which E. A. McMillin was one was appointed to bring the property to notice of purchasers and conduct negotiations for a sale. Meetings were held in Pittsburg, two of them at least attended by both the McMillins, and others by E. A. McMillin alone. In January, 1893, both the brothers opened negotiations with O. C. Redic for the purpose of selling the property to him. They discovered from him, in their conversations, that the salt water which was obstructing production in one of the wells could be shut off at a small expense, and this would add largely to the value of the property. Full examination of the property by Redic resulted in an offer from him to take the gas, pipe it at his own expense to New Castle, sell it and pay to the owners one-half the gross proceeds of sales. Immediately after securing this offer, E. A. McMillin, on January 17, 1893, wrote to W. A. Zahn, one of his co-owners, and one of these plaintiffs, at Pittsburg, asking him if he could get the consent of the contributors to take one-fourth the net earnings, and pay one-fourth the cost of drilling new wells. In this letter he concealed from his co-owner, Zahn, Redic's offer of one-half the gross proceeds of sales. Zahn replied that he thought he could get such consent. E. A. then went to Pittsburg with a contract drawn, naming the Pittsburg parties as the assignors and the two McMillins as the assignees. In this agreement, it was set forth that all the parties were associated together as owners of the property, and it was stipulated the McMillins were to take the gas, pipe it to New Castle, and pay

one-fourth the net proceeds to all the owners, including themselves, they to retain three-fourths. The Pittsburg parties were urged to immediately execute the contract; but as one or more of them desired to consult counsel, its execution was deferred. They finally prepared another draft of a contract, embodying substantially the same terms, with the name of the purchasers left blank. This was executed January 31, 1893. As to this contract it is not disputed J. M. McMillin ¹⁵¹ solicited plaintiffs to affix their signatures. No disclosure of the Redic offer was made to the Pittsburg parties when they signed. After signature, the McMillins filled in the blank with their names as purchasers, and the same day contracted with Redic according to the terms of his proposition already noticed. He piped the gas to New Castle, and paid the McMillins one-half the gross proceeds of sales. About a year afterward plaintiffs discovered the facts, and filed this bill against both the McMillins for an account, averring them to be joint owners or tenants in common with them of the leaseholds, and that a fraud had been practiced upon them in obtaining the contract of January 31, 1893. The defendants made answer, denying all the material averments of plaintiffs' bill. J. M. McMillin especially denied having any interest in common with plaintiffs and his brother prior to the execution of the contract of January 31, 1893. The court below, after full hearing, dismissed the bill, and from that decree we have this appeal by plaintiffs. The principal errors alleged are the finding of fact that J. M. McMillin was not interested in the original project, and conclusions of the court that he was not liable to account on the facts, even if his interest commenced at the date of the second purchase.

The court does not seem to question that on the evidence the bill could have been maintained if filed against E. A. McMillin alone, but, being against the brothers jointly, and not sustained as to J. M. McMillin, it must be dismissed. The learned court below, in its opinion, speaks as follows:

"There are two main questions of fact upon which plaintiffs' claim for relief must ultimately rest: 1. That J. M. McMillin had an interest in the leases mentioned in plaintiffs' bill, and was a tenant in common with plaintiffs in said leases on January 31, 1893; 2. Fraud, actual or constructive, on the part of the defendants in procuring from plaintiffs the contract exhibit 'A.' If either of these grounds fails, the case must fall. . . . An examination of the whole evidence fails to show the relationship of tenant in common between the plaintiffs and J. M. McMillin.

We would hesitate to find such a relationship from the evidence of the plaintiffs if it was not contradicted. Both J. M. McMillin and E. A. McMillin, however, positively deny such relationship in their answer, and also upon the stand ¹⁵² as witnesses, and their cross-examination by plaintiffs' counsel does not in the least weaken their evidence.

"The plaintiffs also contend that, even if J. M. McMillin was not a cotenant, he occupied such a fiduciary relation toward them which required him to disclose the offer which Redic had made prior to January 31, 1893, and which offer was concluded in the contract of February 1, 1893. They urge that he had so conducted himself as to lead the plaintiffs to believe he was acting with them and for them. They also urge that he misrepresented the facts by stating that the terms of the contract he was obtaining from them were the best that could be obtained for the property.

"We have already found that J. M. McMillin was not a cotenant with the plaintiffs and E. A. McMillin. We find nothing in the evidence which should have induced the plaintiffs to believe that he was a cotenant, or that he was acting in any fiduciary capacity for them or with them. It is true that he was present at two meetings of the parties in Pittsburg, but there was no evidence to show that he took any part in the proceedings, or acted other than as a spectator. The value of the property was purely speculative, and the plaintiffs had the same opportunity to form an opinion as to its prospective value as J. M. McMillin. It is true Redic had proposed to him to lease the premises on more favorable terms than the plaintiffs were to get by their contract, but there was no such fiduciary relation subsisting between J. M. McMillin and them as required him to disclose Redic's offer."

Whether a tenant in common or merely a partner in a project for gain, E. A. McMillin, on the undisputed facts, by reason of his confidential relation with his cocontributors to the common enterprise, perpetrated upon them a palpable fraud—not a constructive fraud merely, but an actual fraud. If the brother aided and abetted him in consummating this fraud that they two might reap the fruits of it, and they have succeeded, they are jointly bound to make restitution.

On sufficient evidence, the court below has found that J. M. McMillin had no interest in the purchase from Book, April 22, 1891; there was much evidence to the contrary, but the error is not so clearly manifest in the finding as to move us to disturb it. Therefore, we assume as a fact his property interest dated ¹⁵³

from the contract of January 31, 1893. It is not denied, nor could it be, in the face of the evidence, that by that contract J. M. shares in the fruits of the fraud to which E. A. was an active party, and for which he is answerable in an account. But did J. M. by his declarations and conduct aid his brother in procuring the fraudulent contract so as to render him accountable in equity to these plaintiffs? The learned court below thinks not, because he was not one of the contributors to the first enterprise, and therefore must be treated as a stranger dealing at arm's length with the copartners or cotenants of his brother. This is a mistake, for that one fact warrants no such conclusion. If he had been a member of the first association, and had untruthfully represented a material fact to his associates to induce them to part with their interests, that would have been conclusive against him, because of the legal presumption of a confidential relation; but if there was not presumptively a confidential relation, still, was there one in fact, or such relation as warranted them in relying on the truthfulness of his statements? The principle controlling such cases, and deducible from all the authorities, is well stated by Perry on Trusts, volume 1, page 179:

"There are cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. . . . If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent. It is said that a party in such circumstances is bound to destroy the confidence reposed in him, or to state all the facts that such confidence demands."

The court's twelfth finding of fact is, that at the time the contract was entered into, J. M. represented to the Pittsburg parties the terms one-fourth the oil as embodied in the contract he was soliciting them to sign were the best that could be got; this representation was willfully false; he admits that Redic had made an offer of double that price, which had been accepted by him and his brother, on which a contract had been framed, which he had in his pocket ready to be signed as soon as the ¹⁵⁴ Pittsburg parties signed the contract for one-fourth. In whose interest was he acting when this falsehood was uttered? It is argued his own expectant interest in the contract with the Pittsburg parties. But he was also dealing as the agent of his brother; they two were the

purchasers, parties of the second part to the contract which insured to the benefit of both; he was there to conduct the negotiations and close the contract in pursuance of his brother's letter to Zahn of ten days previous, which did not hint at Redic's offer. There can be no severance of the falsehood by imputing one-half of it to E. A., who held a legal confidential relation, and the other half to J. M., who, if representing himself alone, did not hold the same relation. By taking his brother's place, and representing him, he spoke for both, and put himself in a position where the brother's cotenants were justified in relying on this false statement of a most material fact; this gave him a vantage ground, which naturally invited confidence in his statements, and he must be held to the same rule of conduct as E. A. would have been held to, had he, on the same representation, personally solicited the assent of his copartners to a sale at half price. "It is naught, it is naught, saith the buyer; but when he is gone his way he boasteth himself." This is the attitude of a stranger toward the seller whose wares he depreciates, and the one the court below finds J. M. to have held; it is not the one the facts put him in. To hold J. M. answerable it is not essential that another case exactly like this on the facts should have been decided fraudulent; this clearly is within the scope of established principles, where in equity a party dare not falsely represent a material fact. "Courts have never laid down as a general proposition what [facts] shall constitute fraud, or any rule beyond which they will not go, lest other means of avoiding equity will be found": 2 Parsons on Contracts, 769. And they certainly have never held that where a party aiding in a fraud has not theretofore acquired a fractional interest in the property which is the subject of the fraudulent bargain, he cannot be called to an accounting.

But if he had no direct interest of his own, the misrepresentation went still further than as a representative of his brother; for the very agreement he had asked them to sign says: "Whereas the said parties of the first part and of the second ¹⁵⁶ part are associated together as owners of leases for oil and gas purposes, on one thousand acres of land in Shenango and Slippery Rock township, Lawrence county, . . . the said first parties owning one hundred and twenty shares, and the said second parties owning fifty-six shares. And whereas two wells have been drilled at the joint expense of all of said owners, . . . and whereas all of said owners are desirous of having said gas used . . . so as to realize a profit." True this was not the agreement signed three days thereafter, but it was one E. A. McMillin had, acting

for both, asked them to sign. E. A. was then acting for J. M. in efforts to secure a contract in which both concurred, and which was framed with a view to accepting the Redic proposition, and was therefore a false representation by both. It was not signed, only because the Pittsburg parties desired their own counsel to frame it. The one adopted by the two brothers, and first exhibited to the Pittsburg parties, contained a deliberate declaration in writing that J. M. McMillin was then a copartner. This was a direct invitation to the copartners to deal with them in securing the best price. The conduct of J. M., for months before and during all the negotiations, seems to us on this printed testimony reconcilable only with the theory that he was interested in the leases at the date of the contract with the Pittsburg parties. Assuming, however, that when he said on the witness stand he was not interested he told the truth, he did not tell the truth to the confidants and partners of his brother when he contracted for himself and his brother at half price for their interests; the law cannot undertake to draw a line between his misrepresentation as agent for E. A. and his misrepresentation in his own interest as a stranger to the original association. And if his declarations and conduct misled, as they plainly did, the Pittsburg parties, and induced them to believe him interested with them in a common enterprise, he is estopped now from denying the truth of the representations. On both grounds the bill is sustained as against him, and both should account to plaintiffs as prayed for in the bill.

As to the remark of the court, that when the contract was made the value of the property was purely speculative, and all parties had the same opportunity for forming an opinion, it is certainly an error. The court must have overlooked the fact ¹⁵⁶ that J. M. McMillin had in his pocket, at the very time he was soliciting the signatures of the plaintiffs, the draft of the proposed agreement with Redic, which was to be signed as soon as the Pittsburg parties had executed their contract, and which was afterward on the same day actually executed by Redic. As concerned the McMillins, there was nothing speculative in their estimate of value; they knew exactly the worth of the property, by knowing what they were to get for it; their profit depended only on how low they could beat down the price by methods which some dealers call only shrewd, but which the law pronounces fraudulent, and holds the parties to a strict accountability.

It is ordered that the decree of the common pleas be reversed and plaintiffs' bill be reinstated, and further: 1. That the said

E. A. McMillin and J. M. McMillin were trustees *ex maleficio* for all the owners of said leaseholds in making said contract with Oliver C. Redic, and that said contract and all the rights of the first parties thereunder are the property of all the present owners of said leaseholds, to whom, through their treasurer, all payments under the same should be made; 2. That the said E. A. McMillin and J. M. McMillin account to the orators for, and pay over to the said treasurer, all moneys received by them under said contract with Oliver C. Redic; 3. That an injunction issue restraining the said E. A. and J. M. McMillin from selling, assigning, encumbering, or in any manner disposing of said last-mentioned contract; 4. That an injunction issue restraining the Big Meadow Gas Company from paying any further sum or sums of money to the said E. A. and J. M. McMillin under said last-mentioned contract.

It is further ordered that defendants pay the costs.

PARTNERSHIP—LIABILITY OF ONE HELD OUT AS PARTNER.—One not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except when such holding out is done by him or by his consent, and was known to the person seeking to avail himself of it at the time the contract was made. In such case, the liability rests on the principle of equitable estoppel: *Hahlo v. Mayer*, 102 Mo. 93; 22 Am. St. Rep. 753, and extended note; *Webster v. Clark*, 84 Fla. 637; 43 Am. St. Rep. 217, and note.

PARTNERSHIP—SUITS TO COMPEL ACCOUNTING—DEALINGS BY ONE PARTNER WITH PARTNERSHIP PROPERTY IN FRAUD OF OTHER PARTNERS.—One partner may be compelled to account to his copartners for profits derived from clandestine dealing with third parties in fraud, or to the disadvantage of the copartners: *Kilbourn v. Latta*, 5 Mack. 304; 60 Am. Rep. 373, and note. As to suits between partners to compel an accounting in general: *Gerard v. Bates*, 124 Ill. 150; 7 Am. St. Rep. 850; *Crescent Ins. Co. v. Bear*, 23 Fla. 50; 11 Am. St. Rep. 331; *Gray v. Church*, 84 Ga. 125; 20 Am. St. Rep. 348.

FRAUD—FALSE REPRESENTATIONS BY ACTS AND BY SUPPRESSION OF TRUTH.—Such a fraud as will sustain the action for false representations may grow out of actions as well as by words. A false representation may consist in the suppression of the truth as well as in the assertion of a falsehood, and an action lies in either case if the intention to deceive exists and is the cause of the suppression or assertion: Extended note to *Cottrill v. Krum*, 18 Am. St. Rep. 556. *Suppressio veri* vitiates a contract equally with *suggestio falsi*: *Beard v. Campbell*, 2 A. K. Marsh. 125; 12 Am. Dec. 862, and note; *Pickering v. Day*, 8 Houst. 474; 95 Am. Dec. 291, and note.

REBER v. PITTSBURG & BIRMINGHAM TRACTION Co.

[179 PENNSYLVANIA STATE, 839.]

NEGLIGENCE—ELECTRIC STREET RAILWAY—DEGREE OF CARE REQUIRED.—If there is an invitation or permission to passengers to ride on the rear platforms of electric street-cars, it is the duty of the company to exercise a higher degree of care than usual in running cars at points where there is danger that such passengers may be thrown off, and there must be a corresponding increase of care and vigilance on the part of the passenger who voluntarily assumes such a position of danger.

NEGLIGENCE—ELECTRIC STREET-CARS.—If a passenger on an electric-car at night is unable by reason of its crowded condition to get inside, and, at the request and invitation of the conductor, takes a standing position on the rear platform, and while in such position the electric current is turned off and the car allowed to run down a grade at the rate of twenty miles an hour, when, upon striking a curve, the passenger is thrown off and injured, the question of negligence on the part of the company and of contributory negligence on the part of the passenger is for the jury when it appears that the passenger was familiar with the locality and with the curve, and that it was the custom of the company to carry passengers on the platform of its cars.

A. W. Duff and W. F. Wise, for the appellant.

W. J. Brennan, for the appellee.

342 FELL, J. The only question to be considered is, whether the case should have been withdrawn from the jury. In considering this we must assume that the plaintiff has established these facts: Late at night he got on a crowded car of the defendant company to go to his home. There was no room inside, and he stood with a number of other passengers on the rear platform. His position on the platform was a comparatively safe one, as he stood between the controller and the brake, facing forward, with his back against the railing of the platform. After riding some distance he was requested by the conductor, who desired to use the trolley rope, to change his position. He then attempted to enter the car, but because of its crowded condition was unable to do so, and he took a position which the conductor told him to take, at the outer edge of the platform near the step, and stood with his back to the car holding with his right hand to the iron railing behind him. While he was in this position, the electric current was turned off, causing the lights to be extinguished, and the car was allowed to run at the rate of fifteen or twenty miles an hour down a grade in which there was a sharp curve. When the car struck the curve, the plaintiff's hold of the railing was broken, and he was thrown off. It was the habitual custom of the company to carry passengers on the platform of its cars,

and the plaintiff was there with the consent of the conductor, and was unable to get elsewhere on the car. The plaintiff was familiar with the locality, and knew of the curve, and was aware of the danger of his position.

The use of electricity as a motive power by passenger railway companies has created new conditions from which new duties ³⁴³ arise. The greater speed at which cars are moved increases the danger to passengers and to persons on the streets, and of these dangers all persons must take notice. When there is an invitation or permission to passengers to ride on the rear platforms, it is the duty of the company to observe a higher degree of care in the running of the cars at points where there is danger that they may be thrown off, and there should be a corresponding increase of care and vigilance upon the part of a passenger who voluntarily assumes such a position of danger. In this case it was clearly for the jury to say whether there was negligence in running a car with the platform crowded with passengers at a high rate of speed around a sharp curve; and as it was not, under the circumstances disclosed by the testimony, negligence per se for the plaintiff to stand on the platform, the question of the exercise of due care by him in a position which he knew to be dangerous was also for the jury. These questions were submitted in a charge that was full and clear and eminently fair and just to both parties. The learned judge pointed out to the jury the duty of the company to take into consideration the greater risk to passengers who by its invitation occupied the platform of the car, and told them in substance that it was the duty of the plaintiff to go inside the car if he could reasonably do so, and that if he chose to stand on the platform he was held to a high degree of care to avoid the known dangers of his position, and that he took all the risks of the position which were reasonably to be apprehended.

The judgment is affirmed.

RAILROAD COMPANIES — STREET RAILWAYS — NEGLIGENCE—DEGREE OF CARE REQUIRED.—Street railway companies are common carriers, and, as such, answerable for the negligence of their servants, upon the principles of the common law. In providing for the safety of passengers, they are bound to exercise the highest degree of care and diligence consistent with the undertaking, and are responsible for the slightest negligence on the part of their employes: *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717, and note. A street railway is bound to exercise the utmost skill, diligence, and human foresight in conveying its passengers, and is liable for slight negligence: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; 38 Am. St. Rep. 753, and note.

RAILROAD COMPANIES — STREET RAILWAYS — NEGLIGENCE—OVERCROWDED CARS.—It is negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its cars, and permit such passengers to ride on the platforms and footboards thereof, so as to expose them to danger: *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717, and note. See, also, *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375; 5 Am. St. Rep. 754, and note.

NEGLIGENCE—CONTRIBUTORY—WHEN A QUESTION FOR THE JURY.—When considerable doubt exists as to whether or not the plaintiff is guilty of contributory negligence, that question should be submitted to the jury for its determination: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403, and note; *Consolidated Traction Co. v. Scott*, 58 N. J. Eq. 682; 55 Am. St. Rep. 620, and note. If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question of negligence is one for the jury; otherwise, it is for the court: *Ryder v. Kinsey*, 62 Minn. 85; 54 Am. St. Rep. 623, and note.

MARSHALL v. MELLON.

[179 PENNSYLVANIA STATE, 371.]

MINES AND MINING—OIL AND GAS.—Petroleum oil and natural gas are minerals.

LIFE ESTATE—OIL AND GAS LEASE.—A tenant for life of land upon which there has never been any oil or gas operations previous to the time that the life estate accrued, has no right to operate thereon for oil or gas himself, and cannot give such right to another by lease. If such right is attempted to be given by lease, the life tenant cannot enforce the covenants thereof.

W. H. S. and F. Thompson and A. P. Marshall, for the appellant.

E. S. Craig, for the appellee.

³⁷⁴ GREEN, J. In *Stoughton's Appeal*, 88 Pa. St. 198, we said: "Oil, however, is a mineral, and, being a mineral, is part of the realty: *Funk v. Haldeman*, 53 Pa. St. 229. In this it is like coal or any other mineral product which in situ forms part of the land." In *Gill v. Weston*, 110 Pa. St. 312, we said of petroleum, "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." In *Westmoreland Nat. Gas Co. v. De Witt*, 130 Pa. St. 235, we said: "Gas, it is true, is a mineral, but it is a mineral with peculiar attributes." In *Blakley v. Marshall*, 174 Pa. St. 425, a lease for oil and gas purposes was made by lessors who were tenants for life and also as trustee for those in remainder. The leased premises proved to be productive. A question arose upon a case stated as to the interests respectively of the life tenants and those in remainder. The life

tenants claimed the whole of the oil, and for those in remainder the same claim was made. The court below appointed a trustee to receive all the oil due to the lessors, and to invest the proceeds, and pay the interest annually realized therefrom to the life tenants during their joint lives and the life of the survivor, and, at the death of the latter, to pay the principal to the ³⁷⁵ remaindermen. This court sustained the court below and said: "As was said in *Stoughton's Appeal*, 88 Pa. St. 198, and other cases in the same line, oil in place is a mineral, and, being a mineral, is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per centum thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represents the respective interests of the lessors in the premises. If there be life tenants and remaindermen, the former are entitled to the enjoyment of the fund (interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remaindermen." This distribution was made because all the interests concurred in making the lease, and it was to the manifest interest of all that the oil should be taken from the land, lest it should be drawn away by other wells on adjacent premises. In that respect, of course, there is a difference between oil and gas, and solid minerals, but in respect of the interests of life tenants, as contrasted with those in remainder, there was no departure from the common-law rule that tenants for life only may not open new mines or take minerals from the premises, except in case of mines opened by the former owner. This was recognized in *Westmoreland Coal Co's Appeal*, 85 Pa. St. 344, where we held that while the life tenant's right to work previously opened mines was undoubted, there was no right in a life tenant of several tracts to open a new mine on one of the tracts upon which no previous opening had taken place. *Mercur, J.*, said, in the opinion: "Neither tract is appendant or appurtenant to the other. If she had a life estate in the distant tract only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened."

We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. She had no right therefore, to operate for oil or gas herself, and she could not give such a right to any lessee

from her. Neither the original lessee nor the defendants, his assignees, ever held any such right. They ³⁷⁶ would have been trespassers if they had undertaken to exercise such a right. The lease was "for the sole and only purpose of drilling and operating for petroleum, oil, or gas," and "to have and to hold the said premises for the said purpose only." All the terms and conditions of the lease relate to that purpose alone, and no right to the use of the surface for any other purpose is conferred. It is manifest, therefore, that as no interest whatever was acquired under the lease, the lessees are under no obligation to pay for a right or privilege which they never obtained, or in damages for not performing an illegal covenant therein. We think the judgment entered by the court below was entirely right.

It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or near-by lands, in order to preserve the interests of both life tenants and remaindermen, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end.

Judgment affirmed.

MINES AND MINING—MINERALS—PETROLEUM OIL AND NATURAL GAS.—Water, petroleum oil, and gas are generally classed by themselves as minerals possessing, in some degree, a kindred nature: *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 483. Gas is a mineral, but it is a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions: *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235; *Williamson v. Jones*, 39 W. Va. 231. Petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands: *Gill v. Weston*, 110 Pa. St. 305; *Kier v. Peterson*, 41 Pa. St. 357.

ESTATES FOR LIFE—MINERALS—RIGHTS OF LIFE TENANT.—A life tenant may lawfully mine, sever, and convert the mineral from land into personalty, if the mines were open when the tenancy for life was created: *Koen v. Bartlett*, 41 W. Va. 559; 56 Am. St. Rep. 884; *Lynn's Appeal*, 81 Pa. St. 44; 72 Am. Dec. 721, and note.

YOST v. McKEE.

[179 PENNSYLVANIA STATE, 381.]

ARBITRATION—REVOCABLE AGREEMENT.—If an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be eventually chosen by the parties, it is revocable by either party.

INSURANCE—OWNERSHIP.—A condition in a fire insurance policy as to the ownership of the property insured is to be understood, not in its technical sense, but as requiring that the insured shall be the actual and substantial owner.

INSURANCE—OWNERSHIP.—If a fire insurance policy, providing that the interest of the insured in the property shall be an "unconditional and sole ownership," is issued on property acquired by the insured by devise "to be his forever for his own proper use," subject only to a restriction of alienation until he attains a certain age, having yet thirteen years to run, he is the owner of the property within the meaning of the policy.

WILLS—DEVISE IN FEE—CUTTING DOWN.—If there is a clear gift in a will of an estate in fee, such estate cannot afterward be cut down except by something in the will which with reasonable certainty indicates the intention of the testator to cut it down or to defeat or modify it.

S. J. Graham and W. F. McCook, for the appellant.

W. Yost, for the appellee.

³⁸³ **McCOLLUM, J.** The refusal of the insured to comply with the condition in the policy in regard to the appointment of appraisers to ascertain the amount of the loss in case of a disagreement concerning ³⁸⁴ it does not constitute a good defense to this action. The condition was nothing more than an agreement to refer to three appraisers, to be appointed at a future time, to determine the amount of the loss by the award of any two of them. It was a revocable agreement, and the insurance company is in no position to complain, here or elsewhere, of the revocation of it. It has not shown that it admitted the validity of its policy, or its liability under it, but, on the contrary, it has, in the language of the learned judge of the court below, "always denied its liability on ground which, if sustained, cut up the contract by the roots." The foregoing views are fully warranted and sustained by the decision of this court in *Mentz v. Armenia etc. Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80. In *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407, 2 Am. St. Rep. 562, it was distinctly held in an opinion by Mr. Justice Clark that where an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be eventually chosen by

the parties, it is revocable by either party. Further consideration of this branch of the insurer's contention is deemed unnecessary, because the cases cited furnish a sufficient answer to it.

Another defense to the action is, that the interest of the insured in the property destroyed was "other than unconditional and sole ownership," and this depends on the construction of the will by which he acquired title to it. The property destroyed was a dwelling-house included in the devise by David McKee of his homestead to John D. McKee, "to be his forever for his own proper use," subject only to a restriction of alienation until he attained the age of thirty years, which in his case was for the period of thirteen years. In *Jaureche v. Proctor*, 48 Pa. St. 466, Woodward, C. J., said: "A partial restriction, such as not to alien to a particular person or for a limited time, may be supported, but a general restraint of alienation, when annexed to an absolute estate, is void, upon the familiar principle that conditions repugnant to the estate to which they are annexed bind not." This is in accord with the view expressed by Tilghman, C. J., in *McWilliams v. Nisly*, 2 Serg. & R. 507, 7 Am. Dec. 654, and by Coulter, J., in *McCullough v. Gilmore*, 11 Pa. St. 370. It is said in 6 *American and English Encyclopedia of Law*, page 877, note 4, that "the weight of authority seems to be against such restraints, however limited as to time." The ground on which a partial ³⁸⁵ restraint of alienation is supported is, that it is not inconsistent with a reasonable enjoyment of the fee: *McWilliams v. Nisly*, 2 Serg. & R. 507; 7 Am. Dec. 654; *Libby v. Clark*, 118 U. S. 250. While the cases on this point are conflicting, the Pennsylvania cases we have cited seem to sustain a partial restraint of alienation. But we may assume that the restriction in question is valid without conceding that it relieves the insurer from liability on its policy. The conditions of the policy are to be understood, not in their technical sense, but as requiring that the insured be the actual and substantial owner: *Beach on Insurance*, sec. 405. The risk was not affected by the restriction. It was not inconsistent with a reasonable enjoyment of the estate devised, and the insured was the actual, sole, and substantial owner of the property destroyed. For the reasons above stated, the restriction in question cannot be regarded as affording a defense to the action.

It is contended, however, that if the insured, by the devise to him of the homestead, acquired an estate in fee simple, it was, by another provision of the will, defeasible on his death under thirty years of age without issue. The provision referred to is

preceded by the devise of the homestead, by gifts of annuities to the brothers, sisters, and children of the testator, and by the appointment of executors. It is as follows: "On the death of my heirs herein named all property and bank stock to be sold and divided among all the heirs should my grandson John D. McKee die before he is thirty without leaving any heirs his estate to be divided pro rata among the heirs." We have quoted it entire and as it was written. It is quite clear that by "my heirs herein named" the testator meant the annuitants, and that "all the heirs" included John D. McKee. It is also obvious that "all property and bank stocks" did not include the homestead previously devised in fee. The part of the provision which relates to the division of John D. McKee's estate may be fairly referred to his share of the proceeds of the property previously directed to be sold. It may be possible to construe it as including the homestead, but it seems to us that this is not the reasonable interpretation of it. "The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention": 336 Sheetz's Appeal, 82 Pa. St. 213. "Where there is a clear gift in a will it cannot afterward be cut down, except by something which with reasonable certainty indicates the intention of the testator to cut it down": 2 Jarman on Wills, 443. Applying this well-settled rule of construction to the will under consideration, we hold that there is nothing in it which clearly indicates that it was the intention of the testator to defeat or modify his devise of the homestead. There is no other question raised by the specifications which requires discussion. All the specifications are overruled.

Judgment affirmed.

ARBITRATION—AGREEMENT FOR—WHEN REVOCABLE.—A stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person, or to any particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject matter of the controversy: *Home Fire Ins. Co. etc. v. Kennedy*, 47 Neb. 138; 58 Am. St. Rep. 521, and note. A submission to arbitration may be revoked at any time before the closing of the proofs and the final submission of the cause for decision: *McKenna v. Lyle*, 155 Pa. St. 599; 35 Am. St. Rep. 910, and note.

INSURANCE—FIRE—OWNERSHIP—"UNCONDITIONAL AND SOLE"—WHAT IS SUFFICIENT.—A person in whom the entire legal title is vested at the time an insurance on property is effected is the sole and unconditional owner thereof within the meaning of the policy, notwithstanding the insured had made a lease or bill of

sale of the property, reserving title until the full payment of the consideration; and the insurer has no standing to assert that the transaction was a legal fraud: *Burson v. Fire Assn.*, 136 Pa. St. 267; 20 Am. St. Rep. 919, and note; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245; 41 Am. St. Rep. 355, and note; *Johannes v. Standard etc. Office*, 70 Wis. 196; 5 Am. St. Rep. 159, and note. Although the insured premises have been conveyed to the insured without consideration, and for the fraudulent purpose of placing them beyond the reach of the grantor's creditors, this is not any defense for the insurer under a policy providing that it shall be void if the interest of the insured in the premises is other than unconditional and sole ownership: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note.

WILLS—DEVISE IN FEE—LIMITATION OF—INTENTION OF TESTATOR.—Where a testator gives his wife an absolute fee by will, with express power to consume or convey, without devising the unconsumed residue himself, but desiring his wife to do so in a certain manner, putting his request in strong words, ordinarily importing command, but so used as to indicate only an intent to control one of the incidents of the estate already devised, such request will not change, qualify, or reduce the estate previously given: *Good v. Flichthorn*, 144 Pa. St. 287; 27 Am. St. Rep. 630, and note. When a clause in a will contains a limitation on a devise under a certain contingency, and such contingency never has occurred nor ever can, the clause has no controlling influence in the construction to be put upon the remainder of the will: *Dukes v. Faulk*, 97 S. C. 255; 34 Am. St. Rep. 745.

BURK v. HOWLEY.

[179 PENNSYLVANIA STATE, 539.]

ARREST WITHOUT WARRANT.—While an arrest on an exigency, when reasonable grounds of suspicion exist, may be made without a warrant, yet it is the duty of the person or officer making the arrest to immediately take the accused before a magistrate for formal accusation and hearing.

MALICIOUS PROSECUTION.—PROBABLE CAUSE for an arrest does not depend on the state of the case in point of fact, but upon the reasonable and honest belief of the party prosecuting. What facts and circumstances amount to probable cause is a question of law, and whether they exist in a particular case is a question of fact. When the facts are in controversy, the subject must be submitted to the jury under instructions as to what facts constitute probable cause.

MALICIOUS PROSECUTION.—PROBABLE CAUSE—FALSE IMPRISONMENT.—If a person, upon discovery that his house has been robbed, and knowing the good character of his servant, procures an officer, who, in his presence, charges such servant with the theft, and arrests him without a warrant, and detains him at the request of the owner of the stolen property for eight days for the purpose of forcing a confession of guilt, such owner is a party to the arrest and detention, and, if it turns out to be illegal and without probable cause, he is liable for false imprisonment in an action of malicious prosecution.

FALSE IMPRISONMENT—EVIDENCE.—In an action to recover for false imprisonment, a conversation between the plaintiff and the arresting officer, not had in the presence of the defendant, concerning the matter over which the arrest took place, is not admissible in evidence.

TRESPASS—JOINT TORT FEASORS.—Of two joint trespassers the party injured may sue both or either, and, if he proceeds against one, that one cannot relieve himself from responsibility by showing that the other participated in the illegal act.

D. F. Patterson and E. J. Kent, for the appellant.

F. Ammon and S. A. Ammon, for the appellee.

547 DEAN, J. On the night of Sunday, November 11, 1894, the dwelling-house of William E. Howley, defendant, was entered, and a quantity of silverware and other articles, to the value of eight hundred dollars, stolen. The plaintiff, Martha Burk, a colored woman thirty years of age, had been in the service of Howley for about one week, and on the night of the theft slept in the house. She was the sole occupant, and in charge of the house. Howley had just been married, and he and his wife were staying with his mother, who lived next door. The property taken had been kept in the diningroom on the first floor of the Howley house. Martha, on rising in the morning about 6 o'clock, discovered the robbery, and at once gave the alarm to Howley, next door; he immediately, on examination, directed that nothing be disturbed until he brought an officer; he then left and soon returned with officer Kramer, who, in presence of Howley, charged Martha with the theft; she protested her innocence, but was arrested without warrant, taken to the patrol box a short distance off, and from there, in an open patrol wagon, to Oakland police station, placed in a cell, where she was kept eight days and nights, during which time she slept on a wooden bunk, without blankets, surrounded by such vagabonds and criminals in other and adjoining cells as the criminal population of a large city daily empties into a police station-house. She alleged that by this rude treatment and exposure she was made ill and contracted rheumatism, which disabled her from service for that winter, besides subjecting her to expense for medical attendance. She had, so far as appears, always borne a good character, and had not before been charged with any crime or misdemeanor. The theft, and her arrest for it, formed the subject of sensational items for the newspapers the same and the next day. She then brought this action to recover damages for false imprisonment against Howley, officer Whitehouse, keeper of the station, and Roger O'Mara, chief of police. On the trial in the court below, it was shown no information was ever made or warrant lodged against her; in the absence of regular proceedings by information **548** either before or after her arrest, her detention for eight days was wholly illegal, and the court below so held. There was

no evidence connecting chief of police O'Mara with either the arrest or imprisonment, and, as to him, the court properly directed a verdict for defendant. As to Howley, the court, in effect, instructed the jury the arrest under the circumstances without warrant, and her detention in prison without lodging information against her, was illegal, and those guilty of it were answerable in damages; and, further, that if Whitehouse, even though not concerned in the arrest, detained her in prison, with knowledge that she had not been arrested on view of the officer in commission of a felony, nor by warrant on information made, he also was answerable to her in damages for the long detention. The jury rendered a verdict for plaintiff against both defendants for eight thousand two hundred and fifty dollars. On motion for a new trial heard before the full bench, a new trial as to Whitehouse was granted; as to Howley, an order was made that if plaintiff, as to him, released all of the verdict in excess of three thousand dollars, the motion for a new trial be overruled, and judgment be entered on the verdict for that amount; otherwise that a new trial be granted to him also. Plaintiff filed the release, and judgment was accordingly entered against Howley for the reduced amount, and we now have this appeal by him.

The appellant prefers nine assignments of error, all except the last alleging errors of law in the charge of the court. The first complaint is to the refusal of the court to unqualifiedly affirm defendant's written point, as follows: "If the jury believe the house of the defendant, W. E. Howley, was robbed, and he made known that fact to the police authorities of the city, and truthfully stated to said authorities the facts tending to cast suspicion upon the plaintiff as the thief, but that he made no information charging her with the offense, nor caused a warrant to be issued for her arrest, nor had any part in making or directing her arrest and imprisonment, the verdict of the jury should be in favor of the defendant, W. E. Howley." Answer: "This point is too broad, and cannot therefore be affirmed. It is not necessary to a conviction that Howley should have been an active party in making or directing the arrest and imprisonment of the plaintiff. If the arrest was made at his instance, with his knowledge and consent, it is sufficient, although ⁵⁴⁹ he may not have directed the officer to arrest her. But further, even if the arrest was without his knowledge and consent, yet, if he was a party to continuing her in the lock-up in the hope of getting a confession of some kind from her, he then became a party to the illegal imprisonment."

To a proper apprehension of the scope of this request, and the

significance of the court's answer, the facts should be recalled. The arrest presumably was illegal, the detention palpably so. There was evidence on part of plaintiff that her arrest was brought about by statements of Howley to the officer. Kramer, the officer who made the arrest, thus testifies: "Q. You can state whether he [Howley] said anything to you about suspecting her of having committed the robbery. A. He said somebody on the inside of the house must have opened it, and he said she was the only one on the inside of the house that he knew was there." This witness was put on the stand by defendant, and thereby he impliedly asked the court and jury to credit his testimony, which shows that Howley directed suspicion against the girl, which suspicion had no other foundation than that some one inside the house must have opened it, and she was the only one inside. He does not intimate to the officer the girl's previous good character, which he had satisfied himself of when he employed her the week before, and which, if known to the officer, would have prompted him to caution. Whether these facts would have warranted an information of belief before a magistrate that she was guilty, or whether he would have issued thereon a warrant for her arrest, or whether, on hearing these facts, they would have justified her commitment or holding to bail, were not the questions to be determined. The question was, whether Howley, by words or acts had pointed her out to the officer brought to the house by him as the thief? Howley called the officer to the stand to testify he had so pointed her out. In view of this and other evidence to the same effect, the court refused to affirm the point, and explained why; it was too broad, in view of defendant's own evidence. The court properly said in answer to it: "If the arrest was made at his instance, with his knowledge and consent, it is sufficient, although he may not have expressly directed the officer to arrest her." But further it would have been manifest error to have affirmed the point, and to have directed a verdict for defendant, ⁵⁵⁰ because there was evidence to sustain another ground of recovery. The plaintiff had been illegally imprisoned for eight days. Mrs. Florence Briggs, a highly respectable woman, in whose service plaintiff had been for two or three years, and who had known her for ten years, testifies that Howley called on her the day after the arrest, and after Mrs. Briggs had told him of the plaintiff's established good character, and that the charge of dishonesty against her was incredible, he replied: "We had her locked up, and we will keep her locked up until she does confess. . . . I don't want to punish the girl, I just want to find my

silverware. I won't punish her if she will just tell me who assisted her. I don't believe the girl herself did it, but she had an assistant. All I want is for her to admit the theft." There was evidence that frequent visits were made to the station by Howley and his brother, and plaintiff was importuned by them to confess her guilt, which she persistently denied, and that at last, by direction of Howley, she was released. No comment is needed on such conduct; that an humble citizen who has always borne a good character can, on mere suspicion, at the instigation of a private person, be arrested, locked up, and detained in a station-house with its disagreeable surroundings for eight days, without information or warrant, and this with the knowledge of, if not with the connivance of two officers of the law, suggests its own comment. But there was ample evidence to show she was detained in prison by request of Howley, and that she was not released until he authorized it. His purpose was to extort a confession of guilt, a revival in a somewhat milder form of the rack and thumbscrew process to establish crime, and just as flagrantly unlawful. The court was bound to say in its qualified answer to the point, as it did say: "Even if the arrest was without [Howley's] knowledge and consent, yet if he was a party to continuing to keep her in the lock-up in the hope of getting a confession of some kind from her, he then became a party to the illegal imprisonment." The point, as framed, might properly have been peremptorily denied.

The assignments of error from second to eighth inclusive are mainly to the charge of the court defining the authority to arrest for a felony, on reasonable grounds of suspicion, without warrant. The court distinctly said that while an arrest, on an exigency where reasonable grounds of suspicion existed, might ⁵⁵¹ be made, it was the duty of the person or officer making the arrest to take the accused before a magistrate for formal accusation and hearing; that the exigency which prompted the arrest on suspicion could not justify such a detention as this without hearing. In this there was no error. To sustain, however, the charge of error in this particular appellant cites and relies on *McCarthy v. DeArmit*, 99 Pa. St. 63. That case is undoubtedly the law, but the scope of the decision must, to a great extent, be defined by the facts there appearing. It was an arrest made by the direction of Mayor McCarthy of Pittsburg. In the aggravated riots of 1877, many persons, more than twenty, in efforts to suppress the riots and keep the peace had been murdered by the lawless. One man, called "Pat, the avenger," was seen to

have shot two of the state troops, and was accused of killing more. Many arrests of rioters were made, but "Pat" could not be found; a reputable citizen informed an officer that the real name of the accused person was DeArmit, and strongly intimated he lived on 48th street; the mayor, on investigation, directed his arrest late on Saturday night; on Monday morning he was taken before a judge on a writ of habeas corpus, but was held for a further hearing; on Monday afternoon, a respectable witness informed the mayor he had seen the man "Pat" when he shot the soldiers, and had also that day seen DeArmit, and DeArmit was not the same man. The mayor immediately informed the district attorney of this, and DeArmit was discharged by the judge before whom the writ was returnable. DeArmit brought suit for damages against the mayor. At the trial, among others, this point was put to the court and answered: "The testimony of defendant, if believed, does not disclose any ground of probable cause, and the verdict should be for plaintiff. Answer: This point is affirmed." This was generally the purport of the instructions. The verdict was for plaintiff in the sum of two thousand five hundred dollars, and defendant appealed to this court. The judgment was reversed, Trunkey, J., in delivering the opinion, after a citation of most of the authorities, saying: "Probable cause does not depend on the state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting. . . . What facts and circumstances amount to probable cause is a question of law. Whether they exist in any particular case is a question of fact. When the facts are in controversy, the subject must be submitted ⁵⁵² to the jury, in which event it is the duty of the court to instruct them what facts will constitute probable cause, and submit to them only the question of such facts. This principle is well settled. If all the evidence is insufficient to establish probable cause, the court shall so instruct the jury." Then, after adverting to the facts at length, this is the conclusion: "By law the mayor is the chief conservator of the peace of Pittsburg. Upon the verity of the testimony adduced by the defendants, the mayor had probable cause to suspect that the plaintiff had committed the crime. The condition of the community during the time covered by the testimony was material for him to consider, with the fact that citizens appeared in fear and evaded the inquiries of the detective officer. Probably they feared the mob or the murderer. . . . If the mayor had good reason to suspect, it was his duty to act, to the end that the felon should not escape."

The charge before us, in the assignments complained of, in substance, instructs the jury this arrest was without probable cause, or rather, that there were no reasonable grounds of suspicion. Clearly, there are no facts in this case to which the principle announced in *McCarthy v. DeArmit*, 99 Pa. St. 63, will apply. DeArmit, in a time of turbulence, destruction of property, and murder, was pointed out to the mayor as one who had deliberately shot two men; he was arrested at the direction of the chief executive of the city, who was doing his utmost to quell the riots; the arrest was at midnight of Saturday, an hour when magistrates are not accessible; on the first juridical day thereafter, Monday, in the morning, he was brought before a judge and remanded; on the afternoon of the same day, he was discharged; his apprehension without warrant was not, under the circumstances, unreasonable, neither was his detention, and the court below was reversed for peremptorily instructing the jury that the arrest was illegal. But this colored girl was not charged with riot and murder in a time of great public alarm, and suspected of planning an escape. When Howley started and announced he was going for an officer, she voluntarily remained in the house. He could almost as easily have procured a warrant and put it in the hands of an officer, then returned with him, as return with the officer and instigate her arrest without warrant. But why detain her in a cell for more ⁵⁵⁸ than a week? Obviously, because there were no reasonable grounds of suspicion on which to base an information. His whole subsequent conduct shows that the imprisonment was prompted for the purpose of extorting an admission, without which there was no reasonable ground to suspect guilt. Clearly, if the exigency called for a sudden arrest without warrant, no such exigency existed for the eight days following, every hour of which was an illegal detention.

The ninth assignment is to ruling out part of the testimony of officer Kramer, a witness called by defendant. Kramer was not a party to the suit; if he had been, the evidence would have been admissible. The offer was to prove a private conversation he had with plaintiff immediately before her arrest as to the appearance of the rooms, but not in presence of Howley. What she said to Kramer, if Howley did not hear it, would not protect him, for Kramer testified positively that the arrest was made partly at Howley's suggestion, and not solely on his own responsibility. The only effect the testimony could have had, if admitted, would have been to show that Kramer ought to have been joined in

the suit with Howley. Of two joint trespassers, the plaintiff could sue both or either; and if she proceeded against but one, that one could not relieve himself from responsibility by showing the other participated in the illegal act.

As the constitutional mandate that "the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures" is still in force, we think the judgment should be affirmed.

It is affirmed accordingly.

ARREST WITHOUT WARRANT—AUTHORITY OF OFFICER
The authority of a constable, sheriff, or other peace officer to arrest without process, upon reasonable suspicion, one who is charged with the commission of a felony, and to retain him for a reasonable time, until a warrant can be procured is well established: *Diers v. Mallon*, 46 Neb. 121; 50 Am. St. Rep. 598, and note. A peace officer has the right, without a warrant, to arrest any person in the night, when he has reasonable ground to believe that such person has committed a felony: *People v. Kilvington*, 104 Cal. 86; 43 Am. St. Rep. 73, and note. See monographic note on the subject of arrest, *Hawkins v. Commonwealth*, 61 Am. Dec. 151-164.

MALICIOUS PROSECUTION—ARREST WITHOUT WARRANT—PROBABLE CAUSE—WHAT IS.—Probable cause for an arrest is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty: *Diers v. Mallon*, 46 Neb. 121; 50 Am. St. Rep. 598, and note.

MALICIOUS PROSECUTION—ARREST WITHOUT WARRANT—PROBABLE CAUSE—WHEN A QUESTION OF FACT AND WHEN OF LAW.—The question whether an officer arresting a person without a warrant had reasonable grounds for suspicion that he had committed a felony is one of law for the court where the facts are undisputed: *People v. Kilvington*, 104 Cal. 86; 43 Am. St. Rep. 73, and note. If, however, there is a conflict of evidence as to the probable cause for prosecution, the contradicted facts should be passed upon by the jury before the court can determine the issue of probable cause, but, in either contingency, the question is still one of law to be determined by the court from the facts established in the case: *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174, and note; *Barbight v. Tammany*, 158 Pa. St. 545; 38 Am. St. Rep. 853. See, also, *Diers v. Mallon*, 46 Neb. 121; 50 Am. St. Rep. 598, and note.

FALSE IMPRISONMENT—PROCURING AN ARREST WITHOUT PROBABLE CAUSE—LIABILITY FOR.—Falsely accusing a person of a crime, and giving the officers the facts upon which such accusation is based, maliciously and without probable cause, resulting in his arrest and imprisonment by such officers, will not sustain an action for false imprisonment against the informant, if the arrest was not based upon the command nor direction, and the officers acted upon their own volition: *Rich v. McInerny*, 103 Ala. 345; 49 Am. St. Rep. 32, and note. See, also, *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note. The arrest need not be procured through malice if it be without probable cause, and the person thus causing it to be made is liable in damages to the person arrested: *Maliniemi v. Gronlund*, 92 Mich. 222; 31 Am. St. Rep. 576, and note.

FALSE IMPRISONMENT—EVIDENCE.—In an action for false imprisonment, it is not error to admit evidence that the officers, when making the arrest, said that the defendant had accused the plaintiff of stealing a ring, especially where there is evidence tending to prove that the arrest was made at the command and procurement of the defendant: *Rich v. McInerney*, 103 Ala. 345; 49 Am. St. Rep. 32, and note. See, also, *Neall v. Hart*, 115 Mass. 347; 2 Am. St. Rep. 559; *Filler v. Smith*, 96 Mich. 347; 35 Am. St. Rep. 603.

JOINT LIABILITY—JOINT TORT FEASORS—LIABILITY OF. When one has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are jointly and severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff has his election to sue all jointly, or he may bring his separate action against each or any of them: *Wisconsin R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49, and note. One of several wrongdoers is liable to the full amount of a conversion or misappropriation in which he has participated: *Russell v. McCall*, 141 N. Y. 437; 38 Am. St. Rep. 807, and note. See, also, *Vandiver v. Pollak*, 107 Ala. 547; 54 Am. St. Rep. 118, and note.

PACKER v. PACKER.

[179 PENNSYLVANIA STATE, 580.]

WILLS—CONFLICT OF LAWS.—An olographic paper, purporting to be the will of a married woman, but invalid at the time of its execution for want of witnesses, is not rendered valid by a subsequent statute dispensing with that requirement.

WILLS—CONFLICT OF LAWS.—The validity of a will must be determined by the law as it stood at the time of the execution of the will, and not at the time of the death of the testator.

W. H. Sponsler, for the appellant.

A. V. D. Watterson, A. B. Reid, and H. A. Miller, for the appellee.

582 **STERRETT, C. J.** This issue devisavit vel non between the plaintiffs, claiming as devisees of Electa Packer, who died in October, 1890, and the defendants, heirs at law of said deceased, presents the single question of law whether an olographic paper, purporting to be the will of a married woman, but invalid at the time of its execution for want of witnesses, is validated by the act of June 3, 1887, dispensing with that requirement. As was correctly said by the learned trial judge, there was no evidence whatever to go to the jury on the question whether the paper was executed in the presence of two witnesses, as required by the law, as it was prior to the passage of the act of 1887, and hence the paper in question had to stand or fall under the provisions of that act.

As recognized by this court, from *Mullen v. McKelvy*, 5 Watts, 399, to *Camp v. Stark*, 81* Pa. St. 235, the rule relating to the

proper execution of a will is, that it "must be judged of by the law as it stood at the time of its execution, and not at the time of the death of the testator." It was accordingly held in *Taylor v. Mitchell*, 57 Pa. St. 209, that a charitable bequest in a will attested by a single witness, prior to the act of April 26, 1855, was good at the death of the testator after that date, although that act required two subscribing witnesses. Speaking for the court in that case, Mr. Justice Sharswood said: "When a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, ⁵³³ it would unjustly disappoint his lawful right of disposition to apply to it a rule subsequently enacted though before his death. While it is true that everyone is presumed to know the law, the maxim in fact is inapplicable to such case; for he would have an equal right to presume that no new law would affect his past act, and rest satisfied in security on that presumption. . . . It is true that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time."

It was held in *Mullock v. Souder*, 5 Watts & S. 198, that section 10 of the act of April 8, 1833, which provides that real estate acquired by a testator after the date of his will shall pass by a general devise, does not apply to a will made prior to its passage. In *Kurtz v. Saylor*, 20 Pa. St. 205, it was decided that the will of a married woman, invalid for want of authority from her husband under the wills act of 1833, was not validated by the act of 1848, passed during her lifetime. That case is followed in *Gable v. Daub*, 40 Pa. St. 217. In *Camp v. Stark*, 81* Pa. St. 235, the principle of these cases was applied to the competency of witnesses to a will; and it was there held that a witness incompetent at the execution of a will was not made competent by the enabling act of 1869. This is now the well-settled rule as to the competency of attesting witnesses in this country as well as in England: 29 Am. & Eng. Ency. of Law, 238.

Applying these principles to the case at bar, it is very evident that the rulings of the learned trial judge were substantially in accordance therewith; and there appears to be nothing in the record that would justify a reversal of the judgment. In *Lane's Appeal*, 57 Conn. 182, 14 Am. St. Rep. 94, substantially the same

question was decided, in same way, largely on the authority of *Taylor v. Mitchell*, 57 Pa. St. 209. *Lawrence v. Hebbard*, 1 Bradf. 252, and *Hamilton v. Flinn*, 21 Tex. 713, relied on by the plaintiffs, were decided upon the peculiar wording of their statutes. Neither of the specifications of error is sustained.

Judgment affirmed.

WILLS—VALIDITY—BY WHAT LAW DETERMINED.—The validity of the execution of a will is to be determined by the law in force at the time of its execution, and not by the law in force at the death of the testator, unless the later law is clearly retrospective: *Lane's Appeal*, 57 Conn. 182; 14 Am. St. Rep. 94. In our judgment, the better view is that a will ought to be regarded as taking effect, or rather consummated, at the death of the testator, and not before, and therefore as valid as if executed and attested in conformity with the laws in force at the date of such death, though not in conformity with the statutes existing when it was in fact signed, published, and attested: *Note to Lane's Appeal*, 14 Am. St. Rep. 100. See, also, *Elcock's Will*, 4 McCord, 39; 17 Am. Dec. 703.

DOCK v. DOCK.

[180 PENNSYLVANIA STATE, 14.]

EVIDENCE—PRODUCTION OF LETTERS OR PAPERS.—If there is an issue, either direct or collateral, on the forgery of papers, courts of law or of equity may compel their production for inspection in advance of trial.

EVIDENCE.—PRODUCTION OF PRIVATE WRITINGS in which another has an interest may be had either by bill of discovery in proper cases in equity, or by writ of subpoena duces tecum at law, directed to the person who has them in his possession. Courts of law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other. Such order may also be obtained by a defendant on a special case, such as if there is reason to suspect that the writing is forged, and he wishes that it may be seen by himself and his witnesses.

EVIDENCE—PRODUCTION OF WRITINGS.—If a party is entitled to the production and inspection of a written document as being applicable to his case, his right to such discovery is not affected by the fact that the same document is evidence for the other party's case also.

LETTERS—PROPERTY IN.—Letters written by one to another are the latter's property, and he has a right, not only to have them produced in litigation, but also to have them delivered to him as the true owner thereof.

LETTERS—PROPERTY IN.—A writer of letters has a special property in them to prevent their publication or communication to others, or their use for any illegal purpose by the party wrongfully in possession of them, and this special right can be adequately protected only in a court of equity, which, having acquired jurisdiction for discovery, may go on and order the letters to be restored to their true owner.

Bill in equity for the discovery of certain letters alleged to be forged, for the return of certain other letters alleged to be stolen,

and for general relief. A demurrer to the bill was sustained. Judgment accordingly, and plaintiff appealed.

F. C. Brewster, for the appellant.

R. O. Moon and G. W. Harkins, for the appellee.

²¹ MITCHELL, J. The reasons assigned in support of the demurrer are wholly insufficient.

The remedy at law is neither convenient nor adequate. The bill is first for discovery in aid of a defense to the suit. Under the act of 1798, the appellant might have had a rule to produce at the trial such letters and alleged copies as appellant could specify with reasonable precision beforehand, but the bill avers that she had in fact written no such letters as appellee charged, and the contents of the alleged copies were therefore entirely unknown to her. The effect of deferring the production of such papers until the trial would be to complicate the issue in the suit by a collateral issue on the forgery or genuineness of these letters. Such a double issue could not be tried before the same jury without putting the appellant to the manifest disadvantage of having evidence sprung upon her which she could not by any care prepare in advance to meet. Where there is an issue either direct or collateral on the forgery of papers, it is the constant practice, even of courts of law, to compel their production for inspection in advance of trial. "The production of private writings, in which another person has an interest, may be had either by a bill of discovery in proper cases, or in trials at law by a writ of subpoena duces tecum, directed to the person who has them in his possession. The courts of common law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other. . . . Such order may also be obtained by the defendant on a special case; such as, if there is reason to suspect that the document is forged, and the defendant wishes that it may be seen by himself and his witnesses": Greenleaf on Evidence, sec. 559; and see Story's Equity Pleading, sec. 859. And the fact that they are evidence ²² for the other side does not prevent. "If a plaintiff is entitled to the production of a deed or other document as being applicable to his case, his right to such discovery will not be affected by the circumstance that the same document is evidence of the defendant's case also": Bispham's Equity, sec. 561. As a mere bill of discovery, therefore, the bill is maintainable.

But the bill is for much more than discovery. It is for substantial relief. It charges that the defendant surreptitiously and illegally took from the trunk of appellant's son, and from

appellant's own bureau, certain letters written by appellant to her son and by her son to her. The letters written by the son to appellant are the latter's property, and she has a right not only to have them produced but delivered up to her as the true owner. In the letters written by her to her son she has a special property to prevent their publication or communication to other persons, or use for any illegal purpose by the party wrongfully in possession of them. The special right in these letters is one that can only be adequately protected in equity, and the court, having acquired jurisdiction for any part of the substantial relief sought, will go on and administer full relief as to all the matters in the bill, both the letters and the alleged copies: *Bispham's Equity*, 566.

Decree reversed, demurrer overruled, and defendant ordered to answer.

EVIDENCE—PRODUCTION OF LETTERS, PRIVATE PAPERS, ETC.—WHEN COURT WILL COMPEL.—It is said that, unless for some satisfactory reason, to be made apparent to the court, each party ought to be required, when it is desired, to disclose to the other any books, papers, and documents within his power which may contain evidence pertinent to the issue to be tried. And the discretion vested in the court on such application should be liberally exercised to enable parties to properly prepare for trial. The party desirous of a discovery must show, to the satisfaction of the court or officer, that the books or papers which he seeks to have produced contain evidence relating to the merits of the action: *Monographic note to Lester v. People*, 41 Am. St. Rep. 388-396. See, also, extended note to *State v. Davis*, 32 Am. St. Rep. 643-648.

LETTERS—PROPERTY RIGHTS IN—SENDER AND RECEIVER.—There are necessarily two parties to a letter, and both have interests in it which the law recognizes and protects. It is well settled that the author of an unpublished manuscript has, independent of any question of copyright, an exclusive property therein, until he dedicates it to the public. The receiver of a letter, sent without reservation, has the exclusive property in it for all purposes except for publication, and may keep or destroy it as he sees fit: *Extended note to Hoyt v. Mackenzie*, 49 Am. Dec. 180-184. See, also, note to *Tabor v. Hoffman*, 16 Am. St. Rep. 743. The receiver of a letter, though marked "private" and "confidential," may be compelled to produce it in court even against the will of the writer, but he may be required to give security against publishing it: *Note to Hoyt v. Mackenzie*, 49 Am. Dec. 184.

ROBERTSON v. PENNSYLVANIA RAILROAD COMPANY.

[180 PENNSYLVANIA STATE, 43.]

NEGLIGENCE—RAILROADS—BICYCLES—DUTY TO STOP, LOOK, AND LISTEN.—A “bicycler’s stop” by circling round and round on his bicycle is not a stop within the meaning of the rule requiring persons approaching a railway crossing to stop, look, and listen before attempting to cross or go upon the track.

NEGLIGENCE—RAILROADS—DUTY OF BICYCLIST TO STOP, LOOK, AND LISTEN.—A bicyclist approaching a railway track at a public crossing where, before reaching a position of actual danger, there is a space of seven feet, from which an unobstructed view up and down the track may be had, and who does not dismount, but circles on his wheel round and round at a distance of from five to ten yards from the track waiting for a freight train to pass, and then, without dismounting and in attempting to cross the track, is killed by a train approaching from an opposite direction, is guilty of contributory negligence, and his widow cannot recover damages for his death.

NEGLIGENCE—RAILROADS—DUTY OF BICYCLIST TO STOP, LOOK, AND LISTEN.—A bicyclist, when approaching a railway crossing, must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen in the manner required of a pedestrian.

H. Budd and B. F. Gilkeson, for the appellant.

D. W. Sellers, for the appellee.

⁴⁰ MITCHELL, J. The facts in regard to the decedent’s negligence are not disputed. He was riding a bicycle, and when he came to defendant’s road, which at that point had four tracks, a freight train was passing, for which he had to wait. He did not dismount, but made what the appellant calls a “bicycler’s stop” by circling on his wheel round and round at a distance of five to ten yards from the track, and when the freight train had passed he started across without dismounting, and was struck by a train coming in the opposite direction on another track. Passing by the questions raised as to his ability to see the coming train from other points, it is admitted that before reaching a position of actual danger there was a space of not less than seven feet between the toolhouse and the nearest track, from which an unobstructed view of the train could have been had. It was the duty of the deceased to stop there and to dismount in order to make his stop effective for the purpose of looking and listening. The real contention of the appellant is embodied in the proposition that the circling round and round constituted a legal as well as a “bicycler’s stop.” No such proposition can be entertained for a moment. In so circling the rider must to some extent have his attention fixed on his wheel, and at parts of the circle must have his back to the track which he is professing to

watch. The law requires a full stop, not only for the sake of time and opportunity for observation, but to secure undivided attention, and the substantial and not merely perfunctory performance of the duty to look and listen. Riding round and round in large or small circles, waiting for a chance to shoot across, is not a stop at all, either in form or substance. Considering the ease of dismounting and the control of the rider over his instrument, a bicycler must under all ordinary circumstances be treated as subject to the same rules as a pedestrian. We do not say that there may not be cases of accident by broken gearing, or steep grade or other casualty which will require a modification of the application of such rules, but these cases will be exceptional, and must be decided on their own facts when they arise. The ⁴⁷ general rule to be applied requires that a bicycler must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen, in the manner required of a pedestrian. It is plain that the deceased in the present case did not do this, and that his failure to do it was an efficient element of the unfortunate accident by which he lost his life.

Judgment affirmed.

RAILROAD COMPANIES — NEGLIGENCE — PERSONS APPROACHING RAILROAD CROSSING—DUTY TO STOP AND LISTEN—BICYCLISTS.—There is a general duty resting upon all persons when approaching a railroad track to exercise ordinary care and due diligence to ascertain whether a train is approaching; and if a person, before attempting to cross, and being in full possession of his senses, fails to look and listen, he is guilty of such negligence as will preclude his recovery for an injury sustained from a collision with the train: Note to *Schexnadrye v. Texas etc. Ry. Co.*, 49 Am. St. Rep. 323. A railroad track is, of itself, a warning of danger, and there can be no recovery of damages for death resulting to one who was guilty of contributory negligence in attempting to cross a railroad track directly in front of a rapidly approaching train: *Vincent v. Morgan's etc. Co.*, 48 La. Ann. 933; 55 Am. St. Rep. 287, and note; *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284; 45 Am. St. Rep. 278, and note. A person riding a bicycle upon a highway has, by the weight of authority, been treated as possessing the same rights, and as subject to the same duties, as persons using other vehicles: *Holland v. Bartch*, 120 Ind. 46; 16 Am. St. Rep. 307, and note; *Thompson v. Dodge*, 58 Minn. 555; 49 Am. St. Rep. 533, and note; *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76, and note; contra, *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305. If an accident happens to a bicycle rider failing to observe conditions open to his observation, and which he could have seen had he looked, he is guilty of such carelessness that he cannot recover for the injuries received: Extended note to *Riepe v. Elting*, 48 Am. St. Rep. 378. See *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St 506; 21 Am St. Rep. 914, as to whether a traveler by vehicle on a highway, about to cross a railway track, is bound to alight in order to look and listen for approaching trains.

GILLESPIE v. KEATING.

[180 PENNSYLVANIA STATE, 150.]

EXECUTIONS—LIABILITY OF OFFICER FOR DELAY.—An execution creditor, who places his execution in the hands of the sheriff with directions to make the money upon it, and who does not countermand or modify his instructions but repeats them from time to time, does not lose his lien by the delay of the sheriff in making the sale.

EXECUTIONS—DELAY IN MAKING SALE—PRIORITY BETWEEN CREDITORS.—If a judgment creditor places his execution in the hands of the sheriff, with directions to make the money upon it, and the officer delays making the sale, though repeatedly requested to do so, and, in the mean time, an attachment execution in favor of a third person is issued against the debtor, and, after the latter has made an assignment for the benefit of creditors, the attachment execution is pursued to judgment, and an execution thereunder is placed in the hands of the sheriff, who subsequently sells the property, the lien of the first execution creditor on the proceeds of the sale is superior to that of the second execution creditor or the general creditors, in the absence of a claim and proof of fraud by either of the latter.

EXECUTIONS—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—There can be no valid levy made on a writ of execution after the execution debtor has made an assignment for the benefit of creditors.

On July 10, 1894, T. A. Gillespie, having recovered a judgment against A. F. Keating, issued an execution thereon and placed it in the hands of the sheriff, with directions to make the money on it. The sheriff, on July 16, 1894, levied on the stock of stationery goods belonging to Keating. This execution was for the sum of eleven hundred and seventeen dollars and thirty-four cents. On August 22, 1894, Hoffman Brothers Company took out execution for seventeen hundred and ninety-four dollars and six cents on a judgment against said Keating and on the same day the sheriff levied this execution on the same stock of goods. When these levies were made, the sheriff left the goods levied upon in the hands of the debtor, who continued to carry on business as before, making occasional payments to the sheriff on account under the executions. Prior to October 24, 1894, these execution creditors had repeatedly from time to time given to such sheriff notices, both verbal and in writing, to proceed and sell the goods. On December 3, 1894, the Western Electric Company, having a judgment against one Livingston, issued an execution attachment, which was served on said Keating as garnishee. On December 22, 1894, said Keating voluntarily assigned his property to his brother for the benefit of his creditors. The assignee took possession of the stock of goods and carried on the business as before. On December 29, 1894,

the Western Electric Company procured judgment on said attachment against Keating, as garnishee, for two thousand nine hundred and eighty-two dollars and sixty-four cents, and on December 31, 1894, placed an execution for that amount in the hands of the sheriff, who served it the same day. On March 9, 1895, the sheriff sold the property, and realized the sum of fifteen hundred and ninety-seven dollars and fifty cents, which he paid into court for distribution. The court below gave judgment on an auditor's report deciding that the lien of Gillespie and of Hoffman Brothers Company on the fund in court was superior to the lien of the Western Electric Company, and the latter appealed.

A. L. Weil and C. M. Thorp, for the appellant.

E. G. Ferguson and J. S. Ferguson, for Gillespie, appellee.

F. Whitesell and W. W. Whitesell, for Hoffman Brothers Company, appellee.

¹⁵⁴ McCOLLUM, J. We agree with the learned court below that the sale was not ¹⁵⁵ made on the Western Electric Company's writ. The auditor did not find that it was, but he said "presumably it was advertised on all the writs." The sheriff's return showed a sale on the Gillespie writ, but it did not show a sale on the writ of the Western Electric Company. The evidence on this point was that the sheriff refused to sell on the latter writ without a bond of indemnity; that the bond was furnished to him, and that before the sale he surrendered it to the company. The fair inference from this evidence is, that the company abandoned its purpose to sell, and determined to rely on its levy. It offered no explanation of the surrender of the bond, nor evidence to show that the sale was made on its writ. As this writ was issued on a judgment obtained after the assignment for the benefit of creditors was made, the sheriff was justified in refusing to sell upon it without indemnity. The assignment, being valid, passed the title to the property to the assignee subject only to the antecedent liens. If there were no such liens upon it, a seizure and sale of it on a writ issued on a subsequent judgment would have subjected the sheriff to a liability to the assignee for the full value of it. We think that under the circumstances the supposition of the auditor that the sale was on all the writs was unwarranted. On this point Judge White agreed with his associates, although he dissented from the decree because it did not give the fund to the assignee for the benefit of creditors. It may also be stated in this connection

that they agreed with him and the auditor that if the liens of the prior levies were lost by the laches of the sheriff the fund should be awarded to the assignee. Were the liens so lost? Certainly not as against the defendant in the judgment at whose instance and for whose accommodation the sale of the property was postponed. The execution creditors had no part in the postponement, and there was no taint of actual fraud in it. It was the act of the sheriff based on the solicitation of the debtor, and intended to enable the latter to pay his debts without a judicial sale of his property. Prior to the assignment, the execution creditors might have complained of the delay and possibly have instituted proceedings to put an end to it, but no one else could. After the assignment and the sale of the property, the general creditors were in a position to claim the fund upon proof that the levies were collusive and fraudulent as to them. But no ¹⁵⁶ general creditor could acquire priority over the others by issuing an execution and levying upon the property after a valid assignment for the benefit of all the creditors had been made and the property had passed under the control of the assignee. This is precisely what the Western Electric Company seeks to do. Its contention is, that the fund realized by the sale belongs to it or to the prior execution creditors, and its effort is to postpone the latter for its exclusive benefit. No general creditor as such is contesting the validity of the levies made on the Gillespie and Hoffman writs or the claims of the plaintiff in them to the fund.

The evidence is clear and convincing that the executions issued before the assignment were delivered to the sheriff with directions to make the money upon them; that these directions were not countermanded or modified by the parties, and that they were repeated more than once by the plaintiff in the first execution. The plaintiffs in the executions are thus exonerated from responsibility for the delay in making the sale, and, if they lose by it, their loss is chargeable to the sheriff's disregard of their positive instructions. No case has been cited which can be justly likened to the one before us, or which furnishes a clear warrant or precedent for the decree contended for on this appeal.

In Earle's Appeal, 13 Pa. St. 483, the court found from the evidence that the plaintiff "did not put his execution in the hands of the sheriff with a bona fide intent that he should proceed and make the money according to law." In Weir v. Hale, 3 Watts & S. 285, it was the arrangement between the first execution creditor and the defendant which was adjudged to give the subsequent executions priority. These cases are plainly dis-

tinguishable in their facts from the case at bar. That they have not been considered heretofore as overruling *M'Coy v. Reed*, 5 Watts, 302, is shown by *McGinnis v. Prieson*, 85 Pa. St. 116, in which it was said that "an execution will not be postponed for the officer's default. His procrastination, even by the sufferance of the creditor, is not fraudulent per se and postpones only when the creditor directs him not to proceed." In the case now under consideration, the auditor's findings of fact approved by the court furnish an adequate basis for the decree appealed from, and they appear to be well sustained by the evidence.

The Western Electric Company is not in the position of an ¹⁵⁷ execution creditor having a levy before the assignment. It does not dispute the validity of the assignment, and it has acquired by its levy no priority over the other creditors, or standing to contest the preceding levies. Whatever rights it had respecting these levies were those of a general creditor and exercisable under the assignment. In *Missimer v. Ebersole*, 87 Pa. St. 109, it was held that there could be no valid levy made on a writ issued after the assignment.

The specifications of error are overruled.

Decree affirmed and appeal dismissed at the costs of the appellant.

EXECUTION—DELAY IN MAKING THE SALE—EFFECT OF. A lien on land existing by virtue of a levy under execution is not lost by delay in proceeding to sale when no fraudulent purpose is shown on the part of the execution creditor. The lien remains in force until the statute of limitations has barred any right to proceed to foreclose it: *Ludeman v. Hirth*, 96 Mich. 17; 35 Am. St. Rep. 588, and note. Delay in selling after an execution does not destroy the lien: *Locke v. Coleman*, 2 T. B. Mon. 12; 15 Am. Dec. 118. See, also, note to *Sweetser v. Matson*, 46 Am. St. Rep. 916, as to the effect of a dormant execution.

EXECUTION—LIABILITY OF OFFICER FOR FAILURE OR NEGLIGENCE TO LEVY.—Reasonable diligence is all that is required of a sheriff in making a levy under execution. What is reasonable diligence depends upon the particular facts in connection with the duty: *Guterman v. Sharvey*, 46 Minn. 183; 24 Am. St. Rep. 218, and note. See the monographic note to *People v. Palmer*, 95 Am. Dec. 423-441, on the diligence and celerity required of sheriffs in serving executions and other process, and their liability for loss resulting from want of such diligence.

EXECUTION—DELAY IN MAKING SALE—PRIORITY BETWEEN EXECUTION CREDITORS.—An execution issued in good faith, to take property for the purposes of sale, and not merely to create a lien, will not be postponed simply because the goods were permitted by the officer to be sold under a subsequent execution: *Miller v. Getz*, 135 Pa. St. 558; 20 Am. St. Rep. 887, and note. When a sheriff has two executions in his hands against the same defendant, at the same time, he is bound to apply any levy he makes, whether of goods or money, to that writ which first came into his hands, giving the second the benefit of any surplus that may remain

after satisfaction of the first: *Rudy v. Commonwealth*, 85 Pa. St. 166; 78 Am. Dec. 830, and note; *Mitchell v. Anderson*, 1 Hill, 69; 26 Am. Dec. 158; *Knox v. Webster*, 18 Wis. 406; 86 Am. Dec. 779, and note. But an execution creditor, by consenting to a postponement of sale under execution to allow his debtor to settle with his creditors, thereby loses his priority of lien as against a junior execution, levied during such postponement, although consent to such postponement is granted through kindness, without intent to hinder or defraud creditors: *Sweetzer v. Matson*, 153 Ill. 568; 46 Am. St. Rep. 911, and note.

CLINCH VALLEY COAL AND IRON COMPANY v. WILLING.

[189 PENNSYLVANIA STATE, 165.]

CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—EVIDENCE.—The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted.

CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—FRAUD.—It is a fraud to secure the execution of a contract by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the written contract, and, after the contract has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would not have been signed.

CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—BREACH OF AS DEFENSE.—In an action on notes given to secure deferred payments on lots secured by trust deeds thereon, an affidavit of defense is sufficient which alleges the breach of a parol agreement executed at the time that the notes were made, providing that the lots were to be at once reconveyed to a trustee, who should hold them as security for the sums due, and who should exhaust the security thus furnished before the payment of the notes should be required of the maker.

J. B. Henry, for the appellant.

J. C. Jones and L. W. Barringer, for the appellee.

166 WILLIAMS, J. The plaintiff was the seller and the defendant was the buyer of certain town lots in the village of Richlands, Tazewell county, Virginia. A portion of the purchase money was not required to be paid at the date of the sale, but was deferred and made payable, one-half in one year, and one-half in two years thereafter. Notes were given by the defendant for these deferred payments, which were under seal and made payable to the plaintiff company "or its assigns." They each contained a recital of the fact that the payment of the note was secured by a trust deed executed by the defendant and wife to Frank M. Dick bearing even date with the note. The last of

these notes fell due in May, 1892. This action was brought in January, 1896, and copies of the notes with their recitals were incorporated into the plaintiff's statement. The defendant filed an affidavit of defense which the court below held to be insufficient, and judgment was entered against the defendant for this reason: this appeal depends on the correctness of this ruling of the learned judge. It will be noticed that the affidavit admits the execution of the notes and the ultimate liability of the ¹⁶⁷ defendant for their payment, but sets up a contemporaneous parol agreement on the faith of which the notes were signed. This agreement is alleged to be that the lots were to be at once reconveyed to a trustee, who should hold them as a security for the sums due upon the notes, and who should exhaust the security thus furnished before the payment of the notes should be required of the maker. After the lots had been sold and their proceeds applied upon the notes, the balance, if any remaining due upon the notes after such application, was all that the defendant was to be called upon to pay. The affidavit further alleges that the trust deed conveying the lots to Mr. Dick to hold as security for the notes, and authorizing their sale by him if the notes were not paid at maturity, was duly executed and delivered; that the lots are still held by the trustee under the arrangement stated, and that before resort should be had to his personal responsibility, the said lots should be sold in accordance with the agreement, and the balance, if any remaining due, should be ascertained.

This affidavit states a good defense, and one which it is competent for the defendant to make. It was a mistake, therefore, for the court below to enter judgment against the defendant for want of a sufficient affidavit of defense.

The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all. Among the more recent cases in which this has been distinctly declared are *Keough v. Leslie*, 92 Pa. St. 424; *Martin v. Kline*, 157 Pa. St. 473; *Martin v. Fridenberg*, 169 Pa. St. 447.

These cases are not in conflict with *Clarke v. Allen*, 132 Pa. St. 40, and *Ziegler v. McFarland*, 147 Pa. St. 607, for in these cases the agreement set up was wholly inconsistent with the terms of the note. The written contract and the alleged parol contract set ¹⁶⁸ up as the inducement to its execution were so inconsistent that both could not stand. In the case before us, this is not true. The note is left in full force by the averments of the affidavit of defense which set up a pledge of the lots for the balance due upon them as shown by the notes. The notes recited this pledge made for the payment of the money due upon them. The only question at issue between the parties is as to when the pledge was to be enforced. The affidavit alleges it was to be done in the first instance and before recourse should be had to an action against the maker of the notes. If this was so, as we must assume it to be for the purposes of this motion, then it is clear that this action is prematurely brought. Upon this question the defendant must be permitted to go to the jury. If he can establish the agreement he alleges, he has a good defense and will be entitled to a verdict in his favor.

The judgment is reversed and the record remitted. A procedendo is awarded.

EVIDENCE—PAROL—WHEN ADMISSIBLE TO VARY TERMS OF WRITTEN CONTRACT.—A written agreement may be added to, modified, explained or set aside, by parol evidence of an oral promise or undertaking material to the subject matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name thereto: *Cake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600, and note. See, also, note to *Sullivan v. Lear*, 11 Am. St. Rep. 394. But when a written contract is full, complete, and perfect on its face, in the absence of fraud or mistake, it cannot be shown that there was an additional contemporaneous agreement, a part of which was that the whole contract was not to be reduced to writing: Note to Appeal of *Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 894; note to *Bedell v. Wilder*, 36 Am. St. Rep. 875.

FRAUD—CONTRACTS INDUCED BY REPRESENTATIONS NOT INTENDED TO BE PERFORMED.—Ordinarily, promises to perform acts in the future, although made by one party as a representation to induce the other to enter into the contract, will not amount to legal fraud, though the promises are subsequently entirely broken, and unfulfilled without excuse: *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218; 31 Am. St. Rep. 39, and note. But in *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, it was held that making a promise with no intention at the time of performing it constitutes fraud for which a contract may be rescinded. See, also, note to *Lawrence v. Gayetty*, 12 Am. St. Rep. 36. To avoid a contract, the false representations must be the very ground upon which the transaction took place: *Adams v. Schiffer*, 11 Colo. 15; 7 Am. St. Rep. 202, and note. See, also, note to *Williams v. McFadden*, 11 Am. St. Rep. 350. False representations as to future events will vitiate a contract where those events depend upon the acts of the party making the representations and form the inducement for the contract: *Henderson v. San Antonio etc. R. R. Co.*, 17 Tex. 560; 67 Am. Dec. 675.

WHARTON v. REAL ESTATE INVESTMENT COMPANY.

[180 PENNSYLVANIA STATE, 168.]

MECHANICS' LIENS BEING PURELY STATUTORY, there is no intendment in their favor, and they must show upon their face all the statutory requisites to their validity.

MECHANICS' LIENS FOR ALTERATIONS AND REPAIRS must show upon their face the class to which they belong.

MECHANIC'S LIEN—SUFFICIENCY OF.—A mechanic's lien claim which shows upon its face by apt and sufficient words that it is for work or materials furnished to a new building indicates its class, although it does not use the statutory phrase "erection and construction," and is sufficient.

MECHANICS' LIENS—SUFFICIENCY OF—REMEDY OF OWNER.—If a claim for a mechanic's lien does not show on its face to what class it belongs, or whether it is for the construction of a new building or the alteration and repair of an old one, the claim is insufficient, and the remedy of the owner of the property is by demurrer or by motion to strike off.

MECHANICS' LIENS—SUFFICIENCY OF—REMEDY OF OWNER.—If a claim for a mechanic's lien does not use the statutory phrase to describe a class of such liens, nor words to show with any approach to certainty whether it is for the construction of a new building or the alteration or repair of an old one, the owner of the property is entitled to have it struck off on motion.

MECHANICS' LIENS—SUBCONTRACTORS—LUMPING CHARGE.—A claim for a mechanic's lien filed by a subcontractor, and containing only a lumping charge, is insufficient, and may be stricken off on motion.

D. W. Sellers and T. H. Thole, for the appellant.

T. B. Stork, for the appellee.

¹⁷⁴ MITCHELL, J. The act of 1836 and its predecessors gave a lien only for work done and materials furnished "for and about the erection and construction" of a building, and this was uniformly understood to mean a new building: See Hancock's Appeal, 115 Pa. St. 1. When, therefore, it was held in Kelly v. Brown, 20 Pa. St. 446, that the lien need not use the very words of the statute, but that any equivalent words would be sufficient, no confusion was created, for there was but one kind of lien and one kind of structure, a new building, to which it could attach. When, however, the subsequent acts of 1861 and 1868, and the general act of 1887 gave a new lien for work and materials "for or about the repair, alteration, or addition to any house or other building," an entirely new class of liens was introduced and the distinction became important. "The liens thus given differ materially in their extent and qualities. Those in the first class relate to the commencement of the building, and are without limitation as to amount; those in the second class date from the filing of the claim, and are not allowed for debts less than \$50.

. . . . The liens are again distinguished by preserving those in the first class, if filed within the six months, and denying to debts of the second class any lien if the property is conveyed to a purchaser before a claim is filed": *Thomas v. Hinkle*, 126 Pa. St. 478. The lien in that case was filed under the local act of 1868 relating to Philadelphia, and was against a "two-story building or wing, being a new structure or building attached to and adjoining a three-story stone dwelling," etc. The defense was made by a terre-tenant who had purchased within six months of the time the work was done, but before the lien was filed. It was held that although the building was described as new, and might possibly be so treated under the act of 1836, yet as it was clearly an addition within the terms ¹⁷⁵ of the act of 1868, a direction to the jury to find for the defendant was proper. The same result was reached under the act of 1887 in *Groezinger v. Ostheim*, 135 Pa. St. 604.

In the foregoing cases, the questions arose upon the facts as developed at trial or hearing before an auditor. In *Morrison v. Henderson*, 126 Pa. St. 216, however, the case turned on the form of the lien, and it was held that as the claim was filed for erection and construction, while the contract attached and made part of it showed that the work and materials were for an alteration and addition to an old building, the claim was contradictory, and bad on its face, and was properly struck off on motion. It was there said, "the claim is not filed for alteration and repair, but for erection and construction. The two kinds of claims arise under different acts of assembly, and, being purely statutory in their creation, each would be required to conform to the provisions of its own law, even if the difference between them was merely technical. But the difference is substantial in several respects, both as to the requirements of the claim and its consequences, and it is therefore important that it should be maintained."

The present case raises the question for the first time, so far as we are aware, whether the claim must specify on its face the class to which it belongs as being for original construction, or for addition, alteration, or repair. As already shown, the distinction is substantial, and when it is made to appear that the claim is filed in one class while the facts put it in the other, it has uniformly been held that the lien is incurably defective. Being altogether statutory, there is no intendment in its favor, and it should show upon its face all the statutory requisites to its validity. So far as regards the more recently authorized lien for alteration and repair, we are clearly of opinion that it must

state on its face the class to which it belongs. And our only reason for hesitation in holding the other class to the same rule is the indulgence shown in this respect in *Kelly v. Brown*, 20 Pa. St. 446. That case, however, was decided when there was only one class of lien permitted, and the decision did not go beyond the recognition of "equivalent words" used in place of the statutory phrase "erection and construction." The principle of that case need not be departed from. A claim which shows by apt and sufficient words that it is for work or materials furnished ¹⁷⁶ to a new building will indicate its class although it does not use the statutory phrase, and the indication of its class is the essence of the requirement. But that indication it must give. It is demanded by the general rule governing the statement of actions depending on special statutory privileges, and has become necessary by the fact that there are now two classes of liens, and the owner of property is entitled to know under which class his property is sought to be burdened. His remedy against defective liens is by demurrer or motion to strike off, and, on the hearing of such motion, if the lien is not self-sustaining, it must be struck off: *Fahnestock v. Speer*, 92 Pa. St. 146; *Klinefelter v. Baum*, 172 Pa. St. 652.

The claim in the present case does not use the statutory phrase to describe either class of lien, nor are there equivalent words by which it can be told with any approach to certainty whether the building to which the boiler was furnished was a new erection or the alteration of an old one. The facts were, it is true, developed at the trial, and, if the defendant had pleaded to issue without raising this point, he would have been held to have waived it and to be bound by the verdict: *Klinefelter v. Baum*, 172 Pa. St. 652. But he was entitled to know in advance the character of the claim and to have its validity in this respect settled, and his right on this point was asserted on motion in due time. The rule to strike off the lien should have been made absolute.

But the claim was also defective and should have been struck off for another reason. It is filed by a subcontractor and contains only a lumping charge. It has been settled, certainly since *Shields v. Garrett*, 5 Week. Not. Cas. 120, if not before, that such a claim is incurably bad: See *Lee v. Burke*, 66 Pa. St. 336; *McFarland v. Schultz*, 168 Pa. St. 634. The present claim is for a balance due for a "seventy-horse power Wharton-Harrison boiler, with feed-water heater, blow-off tank, and Worthington duplex pumps," furnished in pursuance of a contract with *Murphy*, the general contractor. Reference is made in the claim

to the contract and the bill of particulars, and, on turning to them, we find four distinct items specified in each of them, viz., the boiler, a "No. 1 Style A, Cochrane Feed-water Heater," a cast iron blow-off tank of a specified size, and "two $4\frac{1}{2}$ sec. X $2\frac{3}{4}$ sec. X 4 sec. Worthington Duplex Pumps," but no specification of prices, ¹⁷⁷ the whole being included in one sum. It was said in the argument without contradiction that the boiler was the only part of the whole that was made as well as furnished by the plaintiffs, and that the other parts were bought by them from third parties to complete the outfit. Whether this be so or not, it is clear from plaintiffs' own bill of particulars that the prices could have been itemized at least as to these four parts, and, where that is the case, it must be done.

It was strenuously urged that the testimony showed that though the formal contract was made with the contractor, yet the real agreement was with the owner, through the president, Mr. Ridgway. But even if such a defense could save a defective claim not filed on the alleged contract with the owner, the evidence does not come up to that point. The conversation with Mr. Ridgway as related by the contractor goes only to the extent that the latter selected the Harrison boiler as the kind he wanted and that he knew the price, but there was no reference to the other parts, the feed-water heater, tanks, and pumps that went to the making up of the heat-producing plant, and it is the absence of itemization as to price of these that makes the principal defect in the claim as filed.

The judgment is reversed, the rule to strike off the claim is reinstated and made absolute.

MECHANIC'S LIEN — STATUTES CREATING — CONSTRUCTION OF.—A statute creating a right to a mechanic's lien is in derogation of the common law, and must receive a strict construction. It must not be applied to cases which do not fall within its provisions. If they are not broad enough, it is the province of the legislature to extend them: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486, and note. The general rule seems to be that statutes creating mechanics' liens are remedial in their nature and should be given a liberal construction: See *Dugan Cut Stone Co. v. Gray*, 114 Mo. 497; 35 Am. St. Rep. 767, and note; *Vitas v. McDonough Mfg. Co.*, 91 Wis. 607; 51 Am. St. Rep. 925, and note; *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160; 53 Am. St. Rep. 819, and note. But, while a mechanic's lien law is favored, and the remedial laws for its enforcement should be liberally construed, they should not be so construed as to include persons not enumerated in the statutes: *Thompson v. Baxter*, 92 Tenn. 305; 36 Am. St. Rep. 85.

MECHANIC'S LIEN—CLAIMS FOR—SUFFICIENCY OF.—Failure to file a statement of claim in accordance with the statute relating to mechanics' liens will not deprive one furnishing material to be used in the construction of a house, of the benefit of such lien when the rights of bona fide purchasers are not involved, and by the

terms of the statute the lien attaches upon the furnishing of materials for a structure to be erected on land under a contract with the owner: *Kirkwood v. Hoxie*, 95 Mich. 62; 35 Am. St. Rep. 549, and note. A mechanic's lien notice is sufficient if it describes the premises, and states the amount due, to whom, from whom, and for what it is due: *Coburn v. Stephens*, 137 Ind. 683; 45 Am. St. Rep. 218, and note; *Hughes v. Torgerson*, 96 Ala. 346; 38 Am. St. Rep. 105, and note. A statement in a notice of lien incorporating a contract to furnish materials and do work necessary to the painting of a building in accordance with a contract between the landowner and the principal contractor, is a sufficient statement of the terms of the contract under which the lien is claimed: *Spears v. Lawrence*, 10 Wash. 368; 45 Am. St. Rep. 789, and note; *Fernandez v. Burleson*, 110 Cal. 164; 52 Am. St. Rep. 75, and note; *Maynard v. East*, 13 Ind. App. 432; 55 Am. St. Rep. 238, and note.

MECHANIC'S LIEN—CLAIM FOR—LUMPING CHARGE.—A claim for a mechanic's lien containing a lumping charge in which are mingled items for which a lien is given with items for which no lien is given is insufficient to support the lien. The defect cannot be cured by oral evidence by means of which the items subject to such lien may be separated from those not subject thereto: *Williams v. Toledo Coal Co.*, 25 Or. 426; 42 Am. St. Rep. 799. See, also, *Badger Lumber Co. v. Holmes*, 44 Neb. 244; 48 Am. St. Rep. 726.

LAUGHLIN v. SOLOMON.

[180 PENNSYLVANIA STATE, 177.]

EXECUTORS AND ADMINISTRATORS—SUIT AGAINST FOREIGN EXECUTOR.—In Pennsylvania, a foreign executor within the jurisdiction of the courts of that state is liable to suit by a resident creditor of his decedent, and such suit may be sustained unless it trenches unduly on the jurisdiction of another court already attached or would expose parties subject to such jurisdiction to inequitable burdens.

Assumpsit against an executor on notes of his decedent. The complaint was demurred to on the grounds that the plaintiff had no jurisdiction to sue for or recover on accounts outside the jurisdiction of the state of Pennsylvania, and that the defendant was appointed by and subject to the courts of the state of Delaware, and there was no averment of an appointment of said executor as ancillary administrator in the state of Pennsylvania, nor any averment of any right to administer in the latter state. The lower court sustained the demurrer and plaintiff appealed.

T. R. Elcock and B. Gilpin, for the appellant.

¹⁷⁸ MITCHELL, J. The general rule as stated in the text-books is that an executor can only sue or be sued in his own forum: Am. & Eng. Ency. of Law, c. 14, tit. Conflict of Laws. But in Pennsylvania the rule cannot be stated so broadly. Where any party invokes the assistance of a court, claiming to

act en autre droit, he must show such a right as will be recognized by the forum, and, as an executor or administrator's right to act for his decedent depends on his representative character conferred by letters testamentary, these latter cannot, of course, give authority beyond the jurisdiction of the officer granting them. Hence the deduction is plain that a foreign executor cannot sue in another tribunal by virtue of his foreign letters alone. But it is quite another step to say that he cannot be sued there.

The technical ground for refusing a right of action dependent solely on foreign letters testamentary is, that it would be giving extraterritorial force to the judgment or decree of a foreign court or officer, and an interference with the jurisdiction of our own courts. But the more practical ground is that of public policy to prevent assets from being taken out of the state to the possible injury of our own citizens, creditors, who might thus be forced to go to a foreign tribunal to obtain satisfaction of their claims. This is the ground on which it was put by Chief Justice Gibson in *Mothland v. Wireman*, 3 Penr. & W. 185, 23 Am. Dec. 71, where he said that such a rule was "indispensable to the protection of the domestic creditors." And that this is the ground on which the rule is enforced is shown by the cases on ancillary administration, which uniformly hold that the duty of the ancillary administrator here is to account to domestic creditors, and, after they are satisfied, to pay over the balance to the primary or domiciliary administrator: *Miller's Estate*, 3 Rawle, 312; 24 Am. Dec. 345; *Parker's Appeal*, 61 Pa. St. 478; *Barry's Appeal*, 88 Pa. St. 131. Some ¹⁸⁰ cases hold that the ancillary administrator may distribute to foreign creditors who present their claims here, or where there are no foreign creditors, even to legatees: *Dent's Appeal*, 22 Pa. St. 514; *Del Valle's Appeal*, 3 Cent. Rep. 163; *Welles' Estate*, 161 Pa. St. 218. But these do not affect the general principle that, after domestic claimants are protected, our courts will recognize the representative authority of a foreign administrator by turning over to him any surplus that may remain in this jurisdiction.

Pennsylvania has always been liberal in comity to other states. By the act of 1705 concerning the probate of wills (2 Stats. at Large, c. 133, pp. 195-197), all letters of administration granted out of the province, being produced here under the seals of the courts or officers granting them, were declared as sufficient to enable the executors or administrators to bring actions in any court as if said letters had been granted here; and no person proving a will or taking out letters of administration in any

county of the province was obliged to do so again in any other county, "wherever such testator's or intestate's estates may be." Following this act it was held in *McCullough v. Young*, 1 Binn. 63, that an administration granted in Maryland would enable the administrator to sue here, and this was followed in other cases noticed more particularly hereafter, though there is a notable absence of any reference to the statute, and the decisions are put on the ground of comity alone. In *Brodie v. Bickley*, 2 Rawle, 431, however, the statute was apparently overlooked entirely, Gibson, C. J., saying: "The authority of an administrator, under letters granted in a sister state, to meddle with the assets here is an anomaly, produced by an unexampled spirit of comity in the courts of this state which will probably be attended with perplexity and confusion." The act of March 15, 1832, changed the law, and withdrew the authority of parties acting under foreign letters. But that act was held in *Moore v. Fields*, 42 Pa. St. 467, not to apply to a suit by a foreign administrator for assets which had never been subject to administration in this state, and subsequent statutes have exempted certain classes of property from the prohibition of the act of 1832. The course of decision and enactment on this subject is reviewed by our brother Dean in *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656, and need not be further discussed here. It is referred to only to show that the policy of the state, both legislative and judicial, has not ¹⁸¹ been to enforce the common rule as to foreign administrators in all its breadth, even in regard to suits by them, and a fortiori in regard to suits against them which stand on a different footing. As to these the ground of the objection entirely fails. A suit by a Pennsylvania creditor against a foreign executor within this jurisdiction does not seek to take any assets away, to the prejudice of domestic claimants, but, on the contrary, enlarges the protection given by this sovereignty to its own citizens. Our cases accordingly show that such actions have been sustained, within the limitations required by due regard to the precedence of other courts as to matters within their jurisdiction, and the rights of executors and others answerable to such jurisdiction.

In *Swearingen v. Pendleton*, 4 Serg. & R. 389, the defendant, being executor in Virginia and also in Pennsylvania, was held liable here for assets in his hands without regard to whether they came to him here or in Virginia, and it was not a good defense that he had not yet accounted in Virginia. In *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717, the defendant,

being administratrix in Pennsylvania, was sued in Tennessee and decree entered against her. Suit then being brought here on that decree, and defendant pleading that, as administratrix in Pennsylvania, she was not amenable to the courts of Tennessee, judgment was given against her, Tilghman, C. J., saying: "Wherever he [the executor] goes he carries with him the obligation to administer the assets," and, citing *Swearingen v. Pendleton*, 4 Serg. & R. 389, "it was held that a suit might be sustained in Pennsylvania against an executor who had administered (i. e., taken out letters testamentary) in Virginia; so that this point may be considered as settled." *Bryan v. McGee*, 2 Wash. C. C. 337, was a bill by a creditor of decedent to charge the administrator, who demurred on the ground that he was administrator by letters in New Jersey and could only be held to account there, but the court said: "Defendant, having property in his hands belonging to the estate of Davis Magee, may, in equity, be called upon for that property in any place."

In *Brodie v. Bickley*, 2 Rawle, 431, already referred to, the reaction began, and it was said by Gibson, C. J., that the administrator's commission (i. e. his representative capacity) "extends only to assets of which the ordinary had jurisdiction; ¹⁸² and it constitutes him a representative of the intestate no farther than as regards the administration of those particular assets," but he adds also: "As was held in *Dowdale's case*, 6 Rep. 46, an administrator may be sued in a foreign country; because the action, being transitory, follows his person, and the jury may inquire of assets in his hands at home or abroad. But the judgment would not affect any assets the administration of which had not been committed to him." What, however, was decided in the case was, that an administrator was not chargeable with assets in another jurisdiction never within his control, and there was no such privity as would support an action of debt against an administrator here on a judgment against a foreign administrator of the same intestate.

The same principle was again enforced in *Mothland v. Wireman*, 3 Penr. & W. 185, 23 Am. Dec. 71. Chief Justice Gibson again asserted the merely local authority of an administrator and repeated his disapproval of the extent to which comity had been carried. But the decision went only to the extent that an administrator here was not chargeable with assets in the hands of a co-administrator in Maryland, which had never been within his control. The second paragraph of the syllabus is incorrect in stating that he would not be chargeable if he had obtained pos-

session of the Maryland assets, for although Chief Justice Gibson in the opinion says, "granting the assets to have actually come to his hands, I am unable to see why he should account for them here"; yet this was *arguendo* only, and there was no such fact in the case, as is pointed out by our brother Dean in *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656, already cited. The next case, *Magraw v. Irwin*, 87 Pa. St. 139, was regarded by the learned court below as having overruled *Swearingen v. Pendleton*, 4 Serg. & R. 389, *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717, and the cases heretofore cited, and it is plain that the opinion leans, as does Chief Justice Gibson's in *Brodie v. Bickley*, 2 Rawle, 431, and *Mothland v. Wireman*, 3 Penr. & W. 185, 23 Am. Dec. 71, against the earlier doctrine. But a careful consideration of the facts shows that, notwithstanding the unfriendly attitude of the opinion, the authority of those cases is not overthrown. Magraw, a citizen of Maryland, died there, and letters testamentary were granted there to his widow, who filed an account and was awarded certain stocks and bonds of Pennsylvania corporations, as legatee. These were the only assets ever in Pennsylvania, and they were withdrawn by the executrix ¹⁸³⁶ under the authority of the acts of 1836 and 1850. Then the executrix died, and the defendant was appointed administrator cum testamento annexo, and, coming into Pennsylvania, was sued by another nonresident, a creditor of his testator. The opinion of this court, quoting the general rule that no action lies by or against an executor except in the forum of his letters testamentary, admits that it is in conflict with *Swearingen v. Pendleton*, 4 Serg. & R. 389, and *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717, and, as already said, indicates an unfriendly attitude to those cases, but continues by a discussion of the facts, and gives the reason of the decision as follows: "By a regular and valid decree those assets were taken out of her [the widow's] hands as administratrix and given to her as legatee. . . . It therefore follows that the succeeding administrator, the plaintiff in error, cannot be chargeable either here or elsewhere, with the assets thus administered and distributed." The decision, therefore, goes no further than the principle of *Brodie v. Bickley*, 2 Rawle, 431, and *Mothland v. Wireman*, 3 Penr. & W. 185, 23 Am. Dec. 71, that an administrator is not chargeable with assets in another state which have never been within his control, or, to express it with special reference to the facts of the case, that a defense of *plene administravit* is good, although the administration was in another state and by a prior

executor. That principle is sound and in harmony with all our cases.

Notwithstanding the adverse criticism to which *Swearingen v. Pendleton*, 4 Serg. & R. 389, and the other cases have been subjected, we regard them as of unshaken authority, and it must be taken as the rule in Pennsylvania that a foreign executor within the jurisdiction of our courts is liable to suit by a resident creditor of his decedent, and such suit will be sustained unless it trenches unduly on the jurisdiction of another court already attached, or would expose parties subject to such jurisdiction to inequitable burdens. The subject of defenses to such actions we are not called upon at present to discuss.

It follows, that the demurrer should have been overruled. The docket entries show that an affidavit of defense was filed, but, as it is not before us, we cannot enter a final judgment.

Judgment reversed and record remitted for further proceedings.

EXECUTORS AND ADMINISTRATORS — FOREIGN — SUITS AGAINST.—The general rule, sustained by the weight of authority, is that no action or suit can be maintained either by or against an administrator outside the state of his appointment, until he has first taken letters in the foreign jurisdiction: Extended note to *Shinn's Estate*, 45 Am. St. Rep. 672; also, notes to *Jackson v. Johnson*, 89 Am. Dec. 273. If foreign executors or administrators come within the jurisdictional limits of a state, they are liable to be sued there by creditors or to be brought to an account by legatees or distributees: Extended note to *Alley v. Caspari*, 6 Am. St. Rep. 184; *McCully v. Cooper*, 114 Cal. 258; 55 Am. St. Rep. 66, and note.

HERON v. PHOENIX MUTUAL FIRE INSURANCE CO.

[180 PENNSYLVANIA STATE, 257.]

INSURANCE—FIREWORKS, CONDITION AGAINST KEEPING.—If a fire insurance policy provides that it shall be void, "if the hazard be increased by any means within the control or knowledge of the insured or if there be kept, used, or allowed on the above premises fireworks," and other named explosives, the temporary storing of an assorted lot of fireworks on the insured premises, though for celebration purposes, with the knowledge and consent of the insured, is such a breach of the condition of the policy as to absolutely avoid it in case of loss arising from the accidental explosion of such fireworks.

H. H. Gilkyson, for the appellant.

R. T. Cornwell and G. G. Cornwell, for the appellee.

259 STERRETT, C. J. This action of assumpsit, brought to recover the value of certain household goods, etc., insured by de-

fendant company and destroyed by fire on July 3, 1895, involves the construction of certain provisions of the policy in suit.

There is no controversy as to any of the material facts. For the purpose of celebrating the 4th of July of that year, plaintiff bought a lot of assorted fireworks, which were delivered at his residence on the morning of the 3d, and were shortly afterward, with his knowledge and approbation, placed in the parlor for use on the following evening. In some unexplained way, they took fire on the afternoon of the same day, and caused the damages for which this suit was brought.

The defense interposed by the insurance company was, that ~~260~~ placing the fireworks in plaintiff's house, with his knowledge and consent, and permitting them to remain there, was a violation of the following clause of the policy, and rendered the latter void: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the hazard be increased by any means within the control or knowledge of the insured, or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)."

The defendant's contention as to the proper construction of the above-quoted clause is clearly presented in its requests for charge recited in the first three specifications, respectively. Each of these requests were refused by the learned trial judge, and the jury was instructed to find for the plaintiff the amount of the loss he "sustained by reason of the fire." The third request was that, "under all the evidence in the case, the verdict of the jury must be for the defendant."

We have never gone to the length that other courts have in construing away express provisions or stipulations as to forfeiture. While some hold that it is permissible to use the articles prohibited by the general printed clause, provided they are such as naturally pertain to the stock of goods or property described in the written part of the policy, this court has refused to go so far. In *Birmingham Fire Ins. Co. v. Kroegher*, 88 Pa. St. 66.

24 Am. Rep. 147, where petroleum was kept for sale in a country store in violation of a printed clause very similar to that above quoted, this court said: "If the question were whether this kind of oil was an article of merchandise ordinarily included in the stock of a country store, or if it were only an inquiry as to the increase of risk, it might well be referred to the jury. But it is nothing of the kind; it is an express stipulation that petroleum or its ²⁶¹ products shall not be kept on the premises, and, if it be so kept, the policy is void. It matters not that it was part of a customary stock of goods, for by express contract it was excluded." This case was followed in *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. St. 497, 33 Am. Rep. 778, and must be accepted as the settled construction of such conditions. In the first of these cases, however—*Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 66, 24 Am. Rep. 147—a qualification was suggested which has since been adopted, and which the learned trial judge in this case sought to carry to a length not warranted by any of our cases. It was there said by Mr. Justice Gordon: "It is probable that this provision would not apply to the oil used in lighting the premises, for such a use has, in these days, become a necessity for all buildings in the country in which light is required during the night." This suggested distinction, in principle, has since been adopted in *Mears v. Humboldt Fire Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647, *Lancaster Silver Plate Co. v. National Fire Ins. Co.*, 170 Pa. St. 151, 50 Am. St. Rep. 753, and *Lancaster etc. Ins. Co. v. Manchester Fire Assur. Co.*, 170 Pa. St. 166. In the latter, our brother Dean, speaking for the court, said: "If the fact were that the use were a necessary one in conducting the business, then it must be presumed the intent of the parties was to insure the subject of the contract as it then was, and as it would continue to be during the life of the policy, notwithstanding the printed condition." A further and fuller discussion of this subject will be found in the next preceding case—*Lancaster Silver Plate Co. v. National Fire Ins. Co.*, 170 Pa. St. 151; 50 Am. St. Rep. 753. These cases rest on the necessary and contemplated use of the property, and cannot be supported on any other ground. They furnish no warrant for the advanced position taken by the plaintiff in this case. There is no ground for a presumption that the parties here contemplated even the temporary presence of fireworks in the insured building in the face of an express contract to the contrary.

If the policy had contained only the clause relating to increased "hazard" above quoted, the case should have gone to

the jury, but the additional prohibitory clause made it incumbent on the court to withdraw it from their consideration by affirmance of defendant's third point. In view of the undisputed evidence in the case, it was error not to do so.

Judgment reversed.

INSURANCE—FIRE—CONDITION AGAINST COMBUSTIBLE AND DANGEROUS SUBSTANCES.—A clause in a policy of insurance prohibiting the keeping or use of inflammable or combustible materials, is a part of the contract of insurance, and such keeping or use will avoid the policy unless they were incidental to the business, adopted from necessity or custom, and recognized by the insurer, or the combustibles were kept in small quantities for a special and not dangerous purpose: Note to *Maril v. Connecticut etc. Ins. Co.*, 51 Am. St. Rep. 107. See, also, note to *McKinney v. German etc. Ins. Co.*, 46 Am. St. Rep. 868, and *Wheeler v. Trader's Ins. Co.*, 62 N. H. 450; 18 Am. St. Rep. 582, and note.

KERN v. HOWELL.

[180 PENNSYLVANIA STATE, 515.]

DEEDS—PRESUMPTION OF DELIVERY.—The signing, attestation, and acknowledgment of a deed by the grantor and the recording of it raise a presumption of delivery, which cannot be overcome by declarations of the grantor that the deed was not delivered.

DEEDS—SUBSEQUENT POSSESSION BY VENDOR—TRUST—STATUTE OF LIMITATIONS.—The possession of land by a vendor, after execution and delivery of a deed therefor, is in trust for the vendee, and the statute of limitations does not begin to run until the vendor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee.

PARENT AND CHILD—CONVEYANCES BETWEEN—PRESUMPTION.—If a parent purchases land in the name of his son, the purchase is deemed prima facie an advancement, so as to rebut the presumption of a resulting trust for the parent.

PARENT AND CHILD—CONVEYANCES BETWEEN—ADVANCEMENT.—If land owned by a partnership is, by direction of a father, conveyed by it to his son in part payment of a debt owing from the firm to the father, and the deed, after being recorded, is left by the son with his father for safekeeping, the firm continuing to collect part of the rents until its dissolution, after which the son collects them without interference or question, although neither the father nor the son has ever been in actual possession of the property, the son is entitled to recover the property as against a tenant of his father's executor, especially when there is uncontradicted evidence to show declarations by the father that he intended to give the property to such son, and that after the execution of the deed he declared that he had provided for such son by conveying to him directly the property in dispute, together with other property.

F. P. Prichard, B. Gilpin, and J. G. Johnson, for the appellant.

G. P. Rich and H. C. Boyer, for the appellee.

⁸¹⁶ GREEN, J. The plaintiff held a deed in fee simple for the property in ⁸¹⁷ question, and on the apparent state of the title he had a right to recover, unless the defendant had a better title. The defendant being a mere tenant in possession, the defense was really made by her lessors, who were the executors of the will of William H. Kern, deceased. The plaintiff was a son of the deceased, and the title set up by the executrix was an equitable title in their testator. This equitable title was based upon an allegation that the testator had furnished the consideration of the deed, and therefore became the equitable owner by way of a resulting trust. In point of fact, the deed was taken by the firm of Hall & Kern, for bricks furnished by them, but they were so heavily indebted to William H. Kern that they turned it over to him in part payment, and therefore never held any title themselves. It is true they were allowed to collect the rents for several years, but it is manifest from the undisputed testimony in the case that this was permitted by the kind indulgence of William H. Kern, and the rents were not received by them as real owners of the equitable title. On the trial, therefore, the real question in controversy was, who was the owner as between Walter R. Kern, the plaintiff, and William H. Kern, the decedent. The learned counsel for the defendant thus states the question at issue. "The plaintiff, however, relies upon an alleged gift to him of the equitable title to this property; and the sole question in this case is, whether the evidence is sufficient to establish such a gift. The defendant contended that it was not, and that the court below should have instructed the jury to find for the defendant. The plaintiff contended that it was sufficient. This is the only question." So far as the plaintiff is concerned, he was not in the attitude of one claiming to recover land by an equitable title as against one holding the legal title, because he himself held the legal title, and it was the defendant who was trying to deprive him of that title, by proving an adverse equitable title on the part of William H. Kern. The proof to support that claim was entirely in parol, and consisted of verbal testimony to prove facts in pais essential to establish an equitable, as against a legal, title. It is scarcely correct, therefore, to say of the plaintiff's claim of title that it rests alone upon the sufficiency of parol proof to defeat a legal, and establish an equitable, title. In view of the actual state of the testimony, which was substantially undisputed, the ⁸¹⁸ contest may be regarded as a controversy between two adverse claimants to an

equitable title, the plaintiff having the advantage of holding the legal title by an unquestioned deed in fee simple.

The learned court below submitted the question arising out of the parol testimony to the jury, who found in favor of the plaintiff, and the defendant claims there was error in such submission, and that there should have been a binding instruction in favor of the defendant. As the defendant's testimony to defeat the plaintiff's clear legal title rested entirely in parol, it must necessarily have been adjudged by the jury, and, as the plaintiff's clear legal title was derived from a deed in fee simple, the question whether his claim to the equitable title, in so far as it was founded upon parol testimony, should be submitted to the jury, was scarcely debatable. We are quite clearly of opinion that the case in this aspect was necessarily for the jury. The learned court below left it to the jury in this way: "You will examine all of the testimony carefully and reach a conclusion as to whether or not William H. Kern intended to give, and did give, this property to his son Walter. If he did, your verdict will be for the plaintiff. If he did not, your verdict will be for the defendant."

An examination of the testimony shows that the actual facts of the transaction were testified to only by one witness, to wit, Howard R. Kern, a brother of the plaintiff, and a son of the decedent, William H. Kern. It is upon his testimony that the case for the defendant, as well as for the plaintiff, turns. He was a member of the firm of Hall & Kern who furnished the bricks for which the deed was given. Remembering now that the question was, whether William H. Kern intended to give, and did give, the property to Walter R. Kern, let us consider his testimony briefly.

After describing his firm and their business, he was asked: "Q. And how did the title come to be conveyed to your brother Walter, if you know? A. We were always obtaining money from William H. Kern, and very frequently in taking operations it was necessary for us to take either a mortgage or some property, and, not being able to handle it ourselves, we got money from William H. Kern, and paid him back in properties, and at his request the property was put in the name of Walter R. Kern. 319 Q. At the present I am asking you whether, at the time this title was placed in your brother's name, your father gave any reason for it at that time, or what was said upon the subject? A. He wanted to give the property to Walter. Q. He said so at that time? A. Yes, he said so. Q. Tell us what he said. A. I made the negotiation with him as I did others, and

I said, 'Pop, when we take this house we can't hold it; we want money right along, and what will we do with the house?' And he says, 'Give it to Walter, and if you want any money, if you have to have it, come and see me.' "

The witness then testified that the firm had the deed prepared and title made to Walter R. Kern. • Being inquired of as to a subsequent conversation with William H. Kern in regard to the property of the latter, he said he had such a conversation in 1891. He was asked, "Q. You mean in 1891 you had a conversation with him on the subject of property in general which he placed in Walter's name? A. In general. Q. That included this property as well? A. Yes, sir. Q. Will you tell us what that conversation was? A. In 1891 I was in the bank one day, and I said, 'Pop, don't you think you had better get your affairs into some sort of shape? Something might happen to you.' And he said, 'Yes, I do.' He says, 'I have made a will, my son.' I said, 'Is that so? Where is it?' He says, 'It is around at Mr. Gilpin's office; go around and get it and look at it, and see what you think of it.' I says, 'No; I don't think that is altogether right; you either get it or send for it, and I will come here.' So he did, and I looked at the will and read it over, and I says, 'That is all right; where do Walter and myself come in?' He said, 'Well, now, I want to talk about that matter; here are a list of properties that I have given Walter.' And he had a list there with a lot of property on it and values which he had set on each property—what he considered that that property was worth. Q. Do you recollect whether this property was on that list or not? A. Yes, sir. Q. This property was on that list? A. Yes, and he had them figured up there, and he said, 'What do you think of these values?' I said, 'Oh, that is a mere matter of opinion; of course, I presume they are worth that if you can find anybody to give it.' 'Now,' he said, 'taking that into consideration, and what I have done for you, and what I intend to do for ³²⁰ your children.' He said, 'I think that will be a fair distribution.' He gave his present wife quite a number of properties, and we talked that over, and he said he would take care later on for the children, which he did." "Q. Did you ever have any conversation with your father, prior to his marriage to the present Mrs. Kern, on the subject of this property? A. He talked about that property, and other properties, always as Walter's property, asking how they were kept up, and so forth." Speaking of another conversation with his father at the bank when his father announced his intention

to marry again, he testified that his father said, "Now, I don't want any trouble in the family, son; I want this thing to be all harmonious; I have done a great deal for Walter; I have given him certain properties," enumerating them, and said, "I have done a great deal for you, and I will do a great deal more." He said, "I want this thing to take place, and I want it to be satisfactory to the family." Q. Now you say he enumerated them. Do you recall whether this particular property was in them? A. That property was in; yes, sir." In reply to another question in regard to the deed for this and other properties he said: "I had several conversations, but the last one was on the 6th of March, 1893, just prior to his going south, in which he told me that he wanted Walter—for me to see that Walter came in there and took his deeds away. Q. Said what? A. You see that Walter comes in and takes his deeds away. He said, 'You see Walt. and tell him to take his deeds away. I told him two or three times, and he didn't do it.' . . . Q. Have you any knowledge of other properties that were purchased by your father and given to his son Walter? A. Yes; I know them all. Q. Can you tell us about how many properties there were altogether? A. Probably fifteen, may be more. I can run them all off if you want them. Q. In different parts of the city? A. Yes, sir. Q. Worth about how much in the whole, in round numbers? A. Fifty thousand dollars." In reply to another question he said, "At that time, in 1891, William H. Kern said that he had given these properties to Walter, enumerating them, and it was with a view of having Walter provided for, and he was going to provide for my children, so that the two families would not clash. He said 'I don't want, after I am dead, any fighting or quarreling at all; I want everything to be satisfactory ³²¹ and I want to do what is right for you boys.'" In answer to another question as to a conversation with his father, he said, "He was going on a trip in 1891—in the fall, I think it was, in the fall or the summer, the late summer—prior to going I happened into the bank, and father told me that Walter had been there, and that he had given him the deeds for the properties which were in his name, which he had given him, and that Walter had returned them to him for safekeeping."

The merest inspection of the foregoing testimony shows that if it was believed, and that was for the jury, it tended strongly to prove that the transaction at the very beginning was intended as an absolute gift of the property to Walter R. Kern, in fee simple, without any distinction of legal and equitable titles. The

witness said that Hall & Kern were instructed by William H. Kern to have the deed made to Walter R. Kern, as he wanted to give it to him. In all the conversations he constantly spoke of having given it to Walter, and, in discussing the division he had made of his property as between his two sons, he spoke of this property as included in the list of those he had given to Walter. This aspect of the testimony materially changes the character of the question at issue. It is not a controversy as to whether the plaintiff was seeking to acquire an equitable title, either as against the legal title or by the force of parol facts which would suffice to create an equitable title, but whether he was all the time the owner of the whole title, legal and equitable, by virtue of a solemn deed therefor duly executed and delivered. The deed in terms conveyed the whole title; it was recorded almost immediately, thus eliminating all questions of delivery, and if it was intended as a complete transfer of the whole title it was efficacious to that end from the beginning. In *Ingles v. Ingles*, 150 Pa. St. 397, it was held that the signing, attestation, and acknowledgment of a deed by the grantor and the recording of it raises a presumption of delivery which cannot be overcome by declarations of the grantor that the deed was not delivered. The possession of real estate by a vendor, after execution and delivery of a deed therefor, is in trust for the vendee, and the statute of limitations will not begin to run until the vendor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee: See, also, *Connor v. Bell*, 152 Pa. St. 444. Even, therefore, ³²² if William H. Kern had been the former owner, and had made the deed to his son himself and had it recorded, and, nevertheless, had remained in possession, he would have been a trustee for his son so far as the title was concerned. In *Ingles v. Ingles*, 150 Pa. St. 397, we said: "This well-established rule applies with special force between a father and his son. In such instances, it is not unusual for the vendee to leave the vendor in possession for an indefinite period or even for life. Such transactions are often arrangements to suit the family convenience. The possession of the vendor is the possession of the vendee."

But in this case William H. Kern was not the grantor of the title, and he never was in the actual possession of the property. He allowed Hall & Kern to take the rents for several years, as he was constantly lending them money. When they ceased business the rents were paid to William H. Kern, and Walter R. Kern did not interfere. But he certainly did not lose his title

under the deed by so doing. We discover nothing in the testimony inconsistent with the avowed purpose of William H. Kern to make an absolute gift of the property to his son, Walter R. Kern, by means of the deed of 1876, from the former owner. On the contrary, the great weight of the testimony is that he deliberately intended so to do, and to embody the conveyance as a part of the provision he wished to make, and did make, for his son's support. It would have been serious error to withdraw from the jury the question of intent to make the gift to his son, and it was, we think, quite as much as the defendant could expect to have it so submitted. The jury having found, upon testimony sufficient for that purpose, that William H. Kern did intend to give the property to his son Walter R. Kern, and caused a deed to be made in accordance therewith, the court below and this court would be precluded from any inference that the deed conveyed only the bare legal title, leaving the equitable title still open to contest. This is especially the case where the transaction is between father and son. In *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158, it was held that, if a parent purchase land in the name of his son, it will *prima facie* be deemed an advancement, so as to rebut the presumption of a resulting trust for the parent. Rogers, J., delivering the opinion said: "It is a general rule in equity that when a man buys land in the name of another, and pays the consideration money, ⁸²³ the land will generally be held by the grantee in trust for the person who so paid the purchase money. But the doctrine must be taken with some exceptions, which are not inconsistent with the general principle. For when a parent purchases in the name of the son, the purchase will be deemed *prima facie* an advancement, so as to rebut the presumption of a resulting trust for the parent. The moral obligation of a parent to provide for his children is the foundation of the exception or rather of the rebutter of the presumption; since it is not only natural, but reasonable, to presume that a parent, by purchasing in the name of a child, means a benefit to the latter, in discharge of the moral obligation, and also as a token of parental affection." In view of the whole testimony in this case, we do not see how we can sustain either of the assignments of error, and they are therefore dismissed.

Judgment affirmed and appeal dismissed at the cost of the defendant.

DEEDS—PRESUMPTIONS AS TO DELIVERY.—The acknowledgment or recording of a deed is not delivery, but only evidence of it; and such evidence is merely presumptive, not conclusive, evidence

of delivery. But in some jurisdictions, the recording of a deed, or having it recorded, is regarded as equivalent to a delivery thereof, or as sufficient, if not conclusive, evidence of delivery. At least, if the deed is placed on record with the intent that it shall pass the title to the grantee, it constitutes a good delivery. When the deed is recorded with such intent, especially when it runs from a parent to his child, actual manual delivery and formal acceptance are not essential to the validity of the conveyance: Monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 549, on what is a delivery of a deed.

ADVERSE POSSESSION—VENDOR AND PURCHASER—CONTINUED POSSESSION OF VENDOR AFTER DEED DELIVERED.—Continued use and occupation by grantor of land is not evidence that his possession is adverse to his grantee; on the other hand, his possession is presumed to be under and in subordination to the legal title held by his grantee, for he is estopped by his deed from claiming that his holding is adverse: *Schwallback v. Chicago etc. R. R. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note; *Rowe v. Beckett*, 80 Ind. 154; 95 Am. Dec. 676, and note. See, also, *Gilliam v. Bird*, 8 Ired. 280; 49 Am. Dec. 379, and extended note.

ADVANCEMENT—WHEN PRESUMED IN CONVEYANCES BETWEEN PARENT AND CHILD.—A purchase of land by a father in the name of his children is presumed to be an advancement to them by him, and the equitable, as well as the legal, title vests in them. And the fact that the father takes possession, makes improvements, and receives the rents and profits is not sufficient to show that an advancement was not intended: *Bogy v. Roberts*, 48 Ark. 17; 3 Am. St. Rep. 211. See, also, *Allen v. De Groodt*, 98 Mo. 159; 14 Am. St. Rep. 626. Conveyances of land by parent to child for a consideration named therein of natural love and affection, or for a nominal valuable consideration, are presumptively an advancement: *Hattersley v. Bissett*, 51 N. J. Eq. 597; 40 Am. St. Rep. 532, and note. A purchase of land by parent in the name of a child is *prima facie* an advancement, so as to rebut the presumption of a trust resulting for the parent: *Smith v. Strahan*, 16 Tex. 814; 67 Am. Dec. 622, and note.

FLANNERY v. JONES.

[180 PENNSYLVANIA STATE, 338.]

AUCTIONS—PUFFERS.—The employment of puffers by owners selling at auction with a view to raise the price on bona fide bidders is a fraud upon them, and such sale may be avoided at the option of the purchaser.

AUCTIONS—SECRET BIDS.—If an owner of property advertises it for sale at public auction, upon condition that the highest bidder shall be the purchaser, and that the property shall be sold without reserve, any secret bid made by such owner invalidates the sale at the option of the purchaser.

AUCTIONS.—AN AUCTIONEER MAY FAIRLY AND SECRETLY BID for a third person who employs him, but not for the owner; nor can such owner employ a third person to secretly bid for him as against a bona fide bidder.

AUCTIONS—FRAUD.—If a public sale at auction is tainted with fraud, a bona fide purchaser may avoid it, although the property is actually worth what he has bid for it.

AUCTIONS—FICTITIOUS BIDDING—EVIDENCE.—In an action to set aside a public auction sale, on the ground of fraud by secret and fictitious bidding, evidence that such bidding at such sales is customary, is inadmissible.

AUCTIONS—SECRET BIDS.—If an auctioneer conducting a public auction sale announces on behalf of the owner of the property sold, that it is to be sold to the highest bidder without reserve, and then secretly bids for one of the owners, the sale may be avoided by a bona fide bidder to whom the property is knocked down.

Bill in equity to set aside a public auction sale of land for fraud. H. W. Jones and P. A. Jones, brothers, are joint owners of a certain tract of land and buildings thereon, which property they exposed for sale at public auction, the auctioneer, at the time of the sale, announcing at their request that the property would be sold to the highest bidder without reserve. At this sale the property was struck off to John A. Flannery, the highest bona fide bidder, for the sum of three thousand eight hundred and five dollars, of which he paid ten per centum, and signed an agreement containing the conditions of sale as to the future payment of the balance of the purchase money, etc. The auctioneer was secretly instructed to bid the property up to four thousand dollars. These instructions were given in the absence of his brother, Percy A. Jones, the other defendant, just before the auctioneer began to auction the sale. The auctioneer mentioned specially that the property would be sold without reserve, that it was no sham sale, it would be sold to the highest bidder without reserve. Both Howard and Percy Jones were present during the entire bidding; neither one of them personally put a bid upon the property, but the auctioneer, the uncle of Howard Jones, did the bidding for said Howard Jones without the knowledge of those attending the sale or the bidders. The manner in which the bidding was done was this: The auctioneer started the sale at three thousand four hundred dollars; then said "three thousand five hundred dollars, thank you, sir; three thousand six hundred dollars, thank you, sir; three thousand seven hundred dollars, thank you; three thousand eight hundred dollars," and then stopped, and John A. Flannery called out in a tone of voice loud enough to be heard by all the bidders, and actually heard by the defendants, "I will give you five dollars more for it." The auctioneer used this language, "Thank you, sir," as if he had actually received these different bids, with the intention of creating the impression in the minds of those attending the sale that various parties were bidding, whereas, in truth and in fact, the only person bidding was the auctioneer himself bidding secretly for Howard W. Jones, the owner. I find the stranger, alleged by the auc-

tioneer to have made one bid, was a myth. When the bid of three thousand eight hundred and five dollars was put upon the property, the auctioneer and both the defendants and their wives had a consultation among themselves, and then the auctioneer came back and, securing no further bid, knocked the property down to John A. Flannery, the plaintiff. The defendants in their "answer" swear that the instructions given by Howard W. Jones to the auctioneer were to bid on the same for Jones as high as three thousand eight hundred dollars, and to knock it down to him at that figure, should that be the highest bid for the same. "At the hearing," Howard Jones and the auctioneer swear that the instructions were to bid it up to four thousand dollars. Percy Jones did not go upon the witness stand. These instructions were not carried out, and the bidding took place as hereinbefore found. I find that these instructions were not given in good faith, but were given with the intention of running up the property upon other bidders, done with the intention of puffing and stimulating bidders, and that John A. Flannery, by this fraudulent bidding, was induced to believe that bona fide bidders were bidding, and was induced to bid more for the property than he otherwise would have done. Immediately upon the discovery of this fraud, John A. Flannery notified the defendants to return to him the down money paid, also, that he would not be bound by the said bid or by the articles of agreement so executed by him, but would regard the transaction as void. The defendants refused to pay the money so paid, but insisted upon the performance of the agreement according to the terms thereof. On the trial, defendants sought to prove by said auctioneer that it was a custom to have persons selling property instruct the auctioneer to put in bids for them. This evidence was rejected by the court.

I. Hiester and S. M. Meredith, for the appellants.

C. H. Ruhl, for the appellee.

³⁴⁶ PER CURIAM. The correctness of the decree, declaring the sale to plaintiff void on the ground of fraud, etc., is so amply vindicated in the ³⁴⁷ opinion of the learned president of the common pleas that discussion of the question presented by this appeal is unnecessary.

The offer to show in substance that puffing or fictitious bidding at public sales is and has been customary, etc., was rightly rejected. Such a fraud, as was charged and established by ample proof in this case, cannot be legalized by custom. The findings

of fact, recited in the second specification, are fully sustained by the evidence and must be accepted as verity. The conclusion drawn therefrom, that the sale in question was void and should be so decreed, necessarily followed.

On the facts properly found and for reasons given by the learned trial judge, there is no substantial error in the decree or the proceedings leading up thereto.

Decree affirmed and appeal dismissed at appellants' costs.

THE MATERIAL PORTION of the opinion of the trial court was as follows:

"CONCLUSIONS OF LAW.

"1. The employment of puffers by owners to bid up property selling at auction, with a view to raise the price on bona fide bidders, is a fraud upon them, and will avoid the sale at the option of the purchaser.

"2. Where an owner of property advertises it for sale at public auction, and offers it upon the condition that the highest bidder shall be the purchaser, and that the property will be sold 'without reserve,' any secret bid made by such owner will, at the option of the purchaser, invalidate the sale.

"3. An auctioneer may fairly and secretly bid for a third person who employs him, but not for the owner.

"4. These principles apply equally to a case where all the owners are guilty of such fraud, or where one of them is guilty of the fraud.

"5. Whether the property was actually worth in the market the sum bid for it, and whether or not the buyer got the value of his money, does not remove the fraudulent character of the transaction.

"In support of the rulings made, it must be admitted that the credibility of witnesses is for the chancellor. He has the best opportunity of judging their credibility by their appearance upon the stand, their actions, and the manner in which they testify, and in this way I have judged of the credibility of the witnesses. The manner of the defendant and the uncle, witnesses, was not of such a character as to make a chancellor place any confidence in their credibility. Even admitting all the facts set forth in the answer of the defendants, they were guilty of legal fraud, such as will vitiate the sale at the option of the purchaser. In the case of *Rigg v. Schweitzer*, affirmed in 170 Pa. St. 549, we had occasion to review the law with regard to fraud in bidding, and the authorities are cited therein. I specially refer to *Yerkes v. Wilson*, 81* Pa. St. 10, where it was held that the employment of puffers by owners to bid up property selling at auction, with a view of raising the price on bona fide bidders, is a fraud upon them, and will avoid the sale at the option of the purchaser, and, in the trial of such questions of fraud, every circumstance or fact from which a legal inference of fraud may be drawn is evidence; that a reservation in conditions of a public sale to the owners of an open bid for themselves is proper, but the owner having made a secret bid, the sale was set aside.

"The case of *Bexwell v. Christie*, Cowp. 395, affirmed by our supreme court in *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 492, *Pennock's Appeal*, 14 Pa. St. 446; 53 Am. Dec. 561, is so pertinent to the subject that I quote from it as follows: "The question then is, whether the owner can privately employ another person to bid for him. 'The basis of all dealings ought to be good faith; for, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder; that could never be the case if the owner might secretly and privately enhance the price by a person employed for that purpose; yet tricks and practices of that kind daily increase, and grow so frequent that good men give in to the ways of the bad and dishonest in their own defense. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale and upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an underprice, he may order them to be set up at his own price and not lower; such a direction would be fair; or he might do as was done by Lord Ashburnham, who sold a large estate by auction; he had inserted in the conditions of sale that he himself might bid once in the course of the sale, and he bid at once fifteen thousand pounds or twenty thousand pounds. Such a condition is fair, because the public are then apprised, and know upon what terms they bid. In Holland it is the practice to bid downward. The question then is, Is such a bidding fair? If not, it is no argument to say it is a frequent custom. Gaming, stock jobbing and swindling are frequent. But the law forbids them all. Suppose there was an agreement to abate so much, which is the case where goods are sold by one person in the trade to another; they abate sometimes ten or fifteen per cent. Such an agreement between the owner and bidder, at a sale by auction, would be a gross fraud. What is the nature of a sale by auction? It is, that the goods shall go to the highest real bidder. But there would be an end of that if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and seller. He may fairly bid for a third person who employs him, but not for the owner.' In *Wheeler v. Collier*, 1 Moody & M., Lord Tenderden, chief justice, said: 'If the owner of an estate put up for sale by auction employ a person to bid for him, the sale is void, although only one such person be employed, and although he is only to bid up to a certain sum; unless it is announced at the time that there is a person bidding for the owner.'

"An excellent review of these various authorities appears in the case of *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195, wherein the court adopted the remarks of Chancellor Kent (2 Kent's Commentaries, *539), as the true doctrine, to-wit, that "in sound policy no person ought in any case to be employed secretly to bid for the owner against a bona fide bidder at a public auction. It is a fraud in law on the very face of the transaction, and the owner's interference and right to bid ought to be intimated in the conditions of sale.' "

"In support of all these findings, and especially the fifth, I cite *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492, wherein the supreme court held that it made no difference that without the bids of employed puffers the property would go for less than its value, and commenting upon the ruling of the court below, said: 'The ruling judge instructed the jury that if the horse was actually worth the sum to be paid for him, the buyer got the value of his money and could not have been defrauded. The fallacy of the principle is in assuming that there is a standard of value independent of the wishes and wants of the bidders, and that every man is willing to buy by it. . . . A man is defrauded whenever he is incited by artful means to bid more than he otherwise would. He has a right to buy at an under value, where the necessities of the owner compel him to sell; and whenever the price is ever so little enhanced by a secret contrivance, he is cheated. A sale by auction presupposes a sacrifice, or at least a willingness to sell for what can be had; but should the vendor stick for the last penny, it would be idle to set the property up, because his price could be as readily obtained at private sale. . . . If the owner proposes to sell without reservation as to price, let him openly reserve a right to bid. For no fair purpose is the employment of a puffer necessary; and it must vitiate every sale in which recourse is had to it.'

"*Rigg v. Schweitzer*, 170 Pa. St. 549, does not rule this question against the plaintiff. It decided that one of four executors, under the will, interested in the distribution of a decedent's estate, had a right to bid and buy at the sale held by all of the executors, subject to the power of disaffirmance in the heirs or creditors. It was not the case of an actual owner selling his own real estate. The parties were trustees. They stood in no relation of trust or confidence to the bidders at their sale: *Hamilton's Estate*, 51 Pa. St. 58. In the present case, the parties are the actual owners, and, as we have seen from the above authorities, if the owner employs a person to bid for him although he is only to bid up to a certain sum the sale is void; and to employ one secretly to bid for the owner against a bona fide bidder at public auction is fraud in law on the very face of the transaction. I therefore find that under the facts the sale was void; that the plaintiff has sustained his bill, and is entitled to the equitable relief therein prayed for."

AUCTION—EMPLOYMENT OF PUFFERS OR BY-BIDDERS—EFFECT UPON SALE.—The general rule prevailing in this country is, that the employment of puffers by the vendor, or that by-bidding in any form at an auction sale, is illegal, and that a purchaser at such a sale need not complete his purchase or may, within a reasonable time, rescind it for that cause: *Extended note to Thomas v. Kerr*, 96 Am. Dec. 266; *Miller v. Baynard*, 2 Houst. 559; 83 Am. Dec. 168, and note; *Peck v. List*, 23 W. Va. 338; 48 Am. Rep. 398. This is true whether the buyer gets the worth of his money or not: *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 492, and note. See, also, *Curtis v. Aspinwall*, 114 Mass. 187; 19 Am. Rep. 332.

AUCTION—OWNER'S RIGHT TO BID.—It is competent for seller at a public sale to fix minimum price or to reserve to himself the right to bid or to employ another to bid for him, but he must, to

render a sale under such circumstances valid, give fair notice of that fact, so that no one will be misled or deceived: *Miller v. Baynard*, 2 Houst. 559; 83 Am. Dec. 168. But the owner has no right to bid at a sale of his property at auction, unless such right is publicly reserved; and a sale at which the owner secretly becomes a bidder, through the auctioneer, with design of enhancing the price of the property sold, is fraudulent and void: *Baham v. Bach*, 13 La. 287; 33 Am. Dec. 561, and note. See, also, extended note to *Thomas v. Kerr*, 96 Am. Dec. 266.

CUSTOM—ADMISSIBILITY OF IN EVIDENCE.—A usage which is not according to law, though universal, cannot be set up to control the law: *Columbus etc. Coal etc. Co. v. Tucker*, 480 Ohio St. 41; 29 Am. St. Rep. 528, and note; *Jackson v. Bank*, 92 Tenn. 154; 36 Am. St. Rep. 81, and note. It must not be contrary to law or public policy: *Missouri etc. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776. See, also, note to *Smith v. Clews*, 11 Am. St. Rep. 682.

STOVER v. STOVER.

[180 PENNSYLVANIA STATE, 426.]

PARTNERSHIP REAL ESTATE—TENANTS IN COMMON. If two or more persons who are partners take title to lands as cotenants, the presumption arising from the deed is that they hold as cotenants in equal shares. As between themselves, the deed is not conclusive, and they hold in accordance with the facts, but, as to purchasers and creditors, they hold in accordance with the recorded title.

PARTNERSHIP REAL ESTATE—DISTRIBUTION OF PROCEEDS—PRIORITIES.—Real estate purchased with partnership funds and for partnership purposes generally becomes partnership assets, but, as to purchasers and creditors, the deed reciting that the partners take title to the lands as cotenants controls, and, in a distribution of the proceeds of a sale of the lands so held, the individual creditor of a cotenant has priority over the firm claiming by virtue of its title, and in contradiction of such deed.

PARTNERSHIP—REAL ESTATE PURCHASED AS COTENANTS—DISTRIBUTION OF PROCEEDS—PRIORITIES.—If one of two partners purchases real estate with partnership assets, taking the deed thereto to the partners as cotenants, an individual judgment creditor of the other partner is entitled to priority in a distribution of the proceeds of a sale of the lands over a claim of the first partner for a balance due from the firm in a final accounting.

E. O. Michener and H. C. Stover, for the appellant.

H. Lear and E. W. Keeler, for the appellee.

⁴²⁶ WILLIAMS, J. In April, 1864, the plaintiff and defendant entered into a verbal contract of copartnership. This partnership was dissolved ⁴²⁷ in April, 1879. During its continuance, the partners purchased several parcels of real estate and took title thereto as tenants in common. These deeds were duly recorded soon after the lands were purchased. In 1888, the plaintiff filed a bill praying for an account of the partnership transactions and a partition of the land so held by the partners

as tenants in common. The defendant did not deny any of the allegations of the bill, except that which charged that he was indebted to the firm. The account was taken, and a balance of over four thousand dollars was found due from the defendant, and, for want of any evidence showing how the real estate could be divided, a sale of it was recommended by the master, and made under the direction of the court. The proceeds of this sale were referred to an auditor for distribution. The rival claimants before the court below and in this court are the plaintiff whose claim rests on the decree showing the defendant to be indebted to the firm and the land to be as between the parties partnership assets, and a judgment creditor of the defendant whose judgment was originally entered on April 7, 1885, but was not revived until April 10, 1891. The position of the plaintiff is, that if it be conceded that the creditor had priority over him by virtue of his judgment entered in 1885, yet this priority was lost by the failure to revive within five years; and his claim under the decree of February, 1892, took precedence because the pendency of the cause in equity resulting in that decree was notice of the plaintiff's demands as a *lis pendens*. The judgment creditor replied that this pendency of the *lis* was not notice because it was not indexed as required by the act of June 15, 1871 (Pub. Laws, 387); and because his status depended not upon the lien of his judgment, but upon his position as a creditor who became such after the recording of the several deeds in which Isaac S. Stover appeared as a tenant in common with Jacob Stover, the plaintiff. The learned auditor and the court below appear to have sustained the contention of the creditor on both grounds. We are not ready at present to adopt the view of the learned court as to the effect of the act of 1871. It is not necessary to the decision of this case. The phraseology of the act is somewhat peculiar, and we prefer to consider this question when it becomes necessary to do so, and not until then.

The case was well decided upon the other ground. It is ⁴²⁸ settled that when two or more persons who are partners take title to land as tenants in common, the presumption arising from the deed is, that they hold the title as tenants in common in equal shares. As between themselves, the deed is not conclusive, but they hold in accordance with the facts. As to purchasers and creditors, they hold in accordance with the recorded title: *Ebbert's Appeal*, 70 Pa. St. 79. Taking and recording a deed as tenants in common gives character to the title of the several holders upon which the public may safely rely. They are bound

to take notice of what appears upon the records, and they have a right to act upon the faith of what they find there. Between the partners themselves the records cannot mislead, nor can they change the fact. If real estate is purchased with partnership funds and for partnership purposes the general rule is that it is thereby made partnership assets: *Meason v. Kaine*, 63 Pa. St. 335; *Warriner v. Mitchell*, 128 Pa. St. 153; *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899; *Hayes v. Treat*, 178 Pa. St. 310. But it is equally well settled that as to purchasers and creditors the deed will control: *Ebbert's Appeal*, 70 Pa. St. 73; *Appeal of Second Nat. Bank*, 83 Pa. St. 203; *Geddes' Appeal*, 84 Pa. St. 482; for the parties will be presumed to have put their title on record in accordance with the fact, and those who deal with them have a right to act upon this presumption. When it comes to a question of distribution of the proceeds of a sale of land so held, the individual creditor of a cotenant will have priority over the firm, claiming by virtue of its title and in contradiction of the deed. The plaintiff in this case is responsible for the manner in which the deed was taken and recorded. He gave his brother credit thereby as half owner of these lands as a tenant in common, and as to one who acted upon his assurance, and extended credit to him, it would be inequitable now to permit the plaintiff to deny his brother's title. It is not as between him and the creditor a question of lien but a question of good conscience. If a loss must be suffered by one of them, upon which of them ought it to fall? Clearly upon that one whose conduct has made the loss possible. After having induced the appellant to trust his brother by representing him to be a half owner in these lands, he ought to be held estopped from now denying his brother's title, or asserting it to ⁴²⁹ be less than, or different from, what the deed represented it as being.

This ground of decision fully justifies the decree made by the court below, and we prefer to place our affirmance of that decree upon this distinct ground.

The assignments of error are overruled and the decree affirmed.

PARTNERSHIP—REAL ESTATE—TENANTS IN COMMON—Prima facie the ownership of lands standing in the name of the partners is vested in them as tenants in common. This presumption may be rebutted by evidence, whether parol or not, that in the intention of the parties it was purchased for, and used as, partnership property: *Goldthwaite v. Janney*, 102 Ala. 431; 48 Am. St. Rep. 56, and extended note on partnership real estate. In the absence of proof of its purchase with partnership funds for firm purposes, realty standing in the names of several persons is deemed to be held by

them as joint tenants or as tenants in common: *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883, and note. And if property is shown to belong to two or more persons as cotenants, their respective interests will be presumed to be equal: *Burton v. Kennedy*, 63 Vt. 350; 25 Am. St. Rep. 769.

PARTNERSHIP — REAL ESTATE — PRIORITY BETWEEN CREDITORS — CONCLUSIVENESS OF RECORD TITLE. — As against purchasers and lien creditors dealing with the owners of land on the faith of a recorded title, and without notice that it is different from what it appears of record, parol evidence is inadmissible to show that although the land was conveyed to the grantees as individuals, yet it was held by them as partnership property: *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899, and note. Partners cannot so change the character of real estate originally owned by them as individuals, and not in any way derived from the partnership, as to give priority to firm creditors over separate creditors, simply by making entries in their books and treating it between themselves as partnership property: *National Union Bank v. National Mechanic's Bank*, 80 Md. 371; 45 Am. St. Rep. 350, and note. See monographic note to *Smith v. Smith*, 43 Am. St. Rep. 364-380, on partnership creditors, rights and remedies of. It is very clear that honest creditors, who are led to give credit to the individual partners on the apparent state of the title in them individually, ought not to be met afterward by a change of the face in the deed, by which it takes a partnership aspect contrary to its terms: Extended note to *Goldthwaite v. Janney*, 48 Am. St. Rep. 76.

HAVERFORD LOAN AND BUILDING ASSOCIATION v. FIRE ASSOCIATION.

[180 PENNSYLVANIA STATE, 522.]

SUBROGATION—COTENANCY.—If one tenant removes a mortgage or other encumbrance from the common property, he is entitled to subrogation to such lien to secure contribution from his cotenants.

SUBROGATION—MORTGAGE.—A person who has loaned money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for that purpose employs it himself in paying the debt and discharging the encumbrance on land given for its security, he is not to be regarded as a volunteer. After such agreement with the debtor, he is not a stranger in relation to the debt, but may, in equity, be entitled to the benefit of the security, which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid.

SUBROGATION—MORTGAGES.—If the holder of a junior mortgage discharges the lien of a senior encumbrance upon the property, he thereby becomes entitled to all the benefits of the security represented by the lien so discharged.

SUBROGATION—MORTGAGES.—If money has been loaned upon a defective mortgage for the purpose of discharging a prior valid encumbrance, and has actually been so applied, the mortgagee may be subrogated to the rights of the prior encumbrancer whom he has thus satisfied, there being no intervening encumbrances.

SUBROGATION—MORTGAGES.—If a husband, supposing that, under the will of his wife, he is the sole owner of land, mort-

gages it to a third person, who, also supposing the mortgagor to be the sole owner, applies part of the loan, at his request, to the payment of a prior mortgage, and it subsequently transpires that such mortgagor owns only an undivided fifth of the land as tenant in common, he is nevertheless entitled to contribution from his cotenants for having relieved the common estate of an encumbrance, and, upon his death, the second mortgagee succeeds to his rights by subrogation, if no other interests have intervened, and in a suit in equity by such mortgagee against the first mortgagee and the cotenants for relief he is entitled to have the satisfaction of the first mortgage canceled, and such mortgage declared a lien on the common property for his use, and to have his second mortgage declared a junior lien upon the undivided estate of his mortgagor.

W. C. Stoever and J. G. Johnson, for the appellant.

525 MITCHELL, J. Thomas Dougherty, supposing that under the will of Frances Dougherty he was the owner of the entire premises, mortgaged them to the appellant for two thousand two hundred dollars, and the appellant, also supposing him to be owner, loaned him the money, but, at his request, applied part of it to the payment of a prior mortgage to the fire association, one of defendants. It is now conceded that by the true construction of the will of Frances Dougherty, Thomas was not the owner of the whole, but only of an undivided fifth as tenant in common with his four children. Under these circumstances, it is entirely clear that Dougherty, having relieved the common estate of an encumbrance, was entitled to contribution from his cotenants, and might have enforced his claim by subrogation to the rights of the mortgagee under the discharged mortgage. It is also laid down generally in the text-books that he acquired a lien against the shares of his cotenants. The ⁵²⁶ most accurate and painstaking of recent writers states the rule thus: "If one tenant removes a mortgage, tax lien, or other encumbrance upon the property, he may be regarded as subrogated to such lien to secure contribution from his cotenants, or as having an equitable lien upon their interest of the same character as that removed": Jones on Real Property and Conveyancing, sec. 1853. See also 4 Am. & Eng. Ency. of Law, tit. Joint Tenants, 7. As to the existence of a lien by the mere force of the claim for contribution or reimbursement the law of this state is not so clear. Our reports are rather notably bare of authorities on the subject. No Pennsylvania cases are cited by the learned counsel for appellant, nor have I been able to find any exactly in point. In *Huston v. Springer*, 2 Rawle, 97, and *Gregg v. Patterson*, 9 Watts & S. 197, the reasoning of the court seems to tend against a general lien, though what was decided in the former was, that a lien for repairs could not be enforced against a subsequent purchaser for value of the other

res, and in the latter case it was held that a tenant in common who had paid the whole purchase money and entered, supposing title to be in severalty, might retain exclusive possession unreimbursed his over payment. We do not need, however, to decide at present the abstract question of the existence of a lien or its precise character and limits, as all our cases agree that there is the right of contribution and that it is enforceable by subrogation. An instructive case is *Watson's Appeal*, 90 Pa. St. 426, where two tenants in common made a mortgage to secure certain bonds; the mortgagee assigned the bonds and then purchased the interest of one of the tenants, in the land, covenanting to hold him harmless from the bonds; subsequently the mortgagee reacquired the bonds, assigned them again, and finally paid them. It was held that he was a cotenant of the other mortgagor, and entitled to all the securities and remedies given by the mortgage, to enforce contribution from his cotenant. "On the conveyance by Wonderly of his interest in the land to Nichols, the latter became a tenant in common with Potter. . . . The covenant of Nichols obligated him to protect Wonderly from all liability on the mortgage and bonds, but not to protect or relieve Potter therefrom. It follows, when Nichols paid and took up the bonds which he and Potter were jointly obligated to pay, he thereby acquired a right to collect ⁵³⁷ the one-half thereof out of the estate of Potter. He was not driven to an action to enforce this right; but was entitled to all the securities and all the remedies given by the mortgage," citing *Wright v. Grover etc. Co.*, 82 Pa. St. 80, and thereby assimilating the rights of tenants in common to the rights of cosureties, as to whom it was said in the last case: "An actual assignment is unnecessary. The right of substitution is the substantial thing; the actual substitution is unimportant. The right of substitution being shown and the surety having paid the debt, he succeeds by operation of law to the rights of the creditor."

It being thus clear that Dougherty had the right to be subrogated to the mortgage of the fire association to the extent of his claim for contribution against his cotenants, the next question, Did the appellant succeed to his right? is more difficult, but the equity is so strong that, in the absence of any intervening interests, we think it should prevail. Appellant was not a mere volunteer. It paid at the request of Dougherty, the debtor. If it had paid with its own money, on such request, there could have been no doubt of its right to subrogation. It paid with money which was his, but which became his only by virtue of a loan from ap-

pellant on the faith of the security he offered, which was his interest in the land. The fact that such interest was less than both parties believed should not in equity prevent the operation of the pledge to the full extent of such interest as he actually had. That this is giving effect to the intention of the parties does not admit of doubt, nor that a formal subrogation would have been made had it been supposed to be needed. No one is injured. The fire association has received its money, and has no longer any interest in the mortgage, and the other defendants, the cotenants, are merely left where they originally were, without deriving an unjust advantage from an accident.

The cases relied upon by the referees below are not in conflict with the present view. In *Webster's etc. Appeal*, 86 Pa. St. 409, all that was decided was that the judgment confessed to secure one creditor against a liability which had been subsequently extinguished could not be assigned as an existing security to another creditor for a different debt, to the prejudice of intervening judgments. It is true that Woodward, J., says ⁵²⁸ that with the payment of the first note "all the uses of the judgment would have been served," and that when it was renewed without Banker's indorsement the judgment given to secure him was dead, but this was said with reference to the rights of other creditors, for later in the same paragraph he says: "If the rights of Adams and Baur were alone involved, there would be no objection to their agreement that it [the judgment] should retain or regain its original efficacy." In *McCleary's Appeal*, 20 Week Not. Cas. 547, and *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818, the instruments in favor of which subrogation was sought were frauds upon the debtor, and he had had no part in the satisfaction of the prior encumbrances. Both cases were decided on the principle that subrogation is not decreed in favor of a mere volunteer. In the present case, the appellant was not a volunteer, but paid the first mortgage on the express direction of the debtor, and with the intention of both parties that the appellant should be secured by the land. "A person who has lent money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employs it himself in paying the debt and discharging the encumbrance on land given for its security, he is not to be regarded as a volunteer. He is not after such an agreement with the debtor a stranger in relation to the debt, but may in equity be entitled to the benefit of the security which he has sat-

isfied with the expectation of receiving a new mortgage or lien upon the land for the money paid": Dixon on Subrogation, 165. "When the holder of a junior mortgage discharges the lien of a senior encumbrance upon the property, he thereby becomes entitled to all the benefits of the security represented by the lien so discharged": Beach on Modern Equity Jurisprudence, sec. 304. "When, on the foreclosure of a second mortgage, it appears that the loan by the second mortgagee was made on an agreement with the mortgagor that it should be applied to extinguish the first mortgage, and that part of the loan was actually so applied, the second mortgagee is entitled to a decree subrogating him to the rights of the first mortgagee on payment of the balance due on the mortgage": Beach on Modern Equity Jurisdiction, sec. 806. "Where money has been loaned upon a defective mortgage for the purpose of discharging a prior valid encumbrance, and has ⁵²⁹ actually been so applied, the mortgagee may be subrogated to the rights of the prior encumbrancer whom he has thus satisfied, there being no intervening encumbrances": Sheldon on Subrogation, sec. 8. The present case comes clearly within these rules.

Decree reversed, bill reinstated, and it is now ordered and decreed that the satisfaction of the mortgage of seventeen hundred dollars, now reduced to sixteen hundred dollars, to the Fire Association be canceled, and that the said mortgage shall be held a valid lien to the use of the appellant upon the whole premises, and further that the second mortgage of two thousand two hundred dollars with interest be a valid junior lien upon the undivided estate of Thomas Dougherty in the said premises. Costs to be paid by the appellees other than the Fire Association.

COTENANCY—SUBROGATION—PAYMENT OF MORTGAGE BY ONE COTENANT.—If a burden exists against the property of two or more persons, whether tenants in severalty or in common, which one of them discharges for the purpose of protecting his interest, he is in equity entitled, for the purpose of indemnity, to be subrogated to the lien or claim which he has discharged, and to have it revived and enforced by declaring it to be still existing against the property, and directing that the property, or so much thereof as may be necessary, be sold for the purpose of repaying the advancements: Extended note to Flack v. Gosnell, 35 Am. St. Rep. 419; Ramberg v. Wahlstrom, 140 Ill. 182; 83 Am. St. Rep. 27, and note.

MORTGAGES—SUBROGATION.—Mortgagees discharging a pre-existing lien on the mortgaged premises are entitled to be subrogated hereto, if they acted in good faith, although the mortgage proved to be void for want of capacity on the part of the mortgagors to execute it: Spaulding v. Harvey, 129 Ind. 106; 28 Am. St. Rep. 176, and note. See, also, note to Baker v. Baker, 89 Am. St. Rep. 782.

MORTGAGES—SUBROGATION—EFFECT OF MISTAKE OF LAW OR OF FACT.—One who lends money for the express purpose of taking up and discharging liens upon real property, and who discharges those liens at the request of the debtor, expecting that his securities will of record take the place of that which he has discharged, is not a volunteer, stranger, nor intermeddler, and therefore, if justice requires it, may be subrogated to the lien thus discharged and allowed to assert it, as where he discharges liens in the belief that none other exist against the property, and afterward learns of liens subordinate to those discharged, which are attempted to be asserted against him as having priority to the lien taken by him upon the same property to secure his advances. Nor will the fact that the lien of which he was ignorant was of record defeat his claim for relief: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566, and note. See, also, *Kleimann v. Gieselmann*, 114 Mo. 437; 35 Am. St. Rep. 761, and note. If one not an intermeddler or volunteer causes a mortgage to be satisfied and discharged in ignorance of the existence of a judgment lien, under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake and give the party who made it the benefit of the equitable right of subrogation, where no superior equities are interfered with: *Heisler v. Aultman*, 54 Minn. 454; 45 Am. St. Rep. 486, and note; *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949, and note.

LAWALL v. GROMAN.

[180 PENNSYLVANIA STATE, 532.]

ATTORNEY AND CLIENT—RELATIONSHIP AND EVIDENCE TO ESTABLISH.—The payment of a fee is the most usual and weighty item of evidence to establish the relationship of client and attorney, but it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material, nor is it even indispensable that the compensation should be assumed by the client, but, ordinarily, it is so from the nature of the employment, which, in the vast majority of cases, involves the guarding or enforcement of the client's interest against an adverse one and is, therefore, exclusive.

ATTORNEY AND CLIENT.—ADVERSE INTERESTS, to be amicably adjusted, may be represented by the same counsel, though the cases in which this may be done are exceptional and never entirely free from danger of conflicting duties. Thus, the same attorney may represent both borrower and lender, upon mortgage or similar security, upon a mutual understanding between the parties, although the former only is expected to pay the fees.

ATTORNEY AND CLIENT—EVIDENCE OF RELATIONSHIP.—The fact that the attorney for a mortgagor also acts for the mortgagee in keeping the mortgage and placing it on record and in agreeing to search the title and record in reference to liens is sufficient to establish the relationship of attorney and client between them.

ATTORNEY AND CLIENT — LIABILITY FOR NEGLIGENCE.—If the attorney for a mortgagor who pays the fees, undertakes, on behalf of the mortgagee, to see that the mortgage is a first lien on the property, he is bound to perform that duty with ordinary

and reasonable skill and care in his profession, and is liable for negligence in that respect.

ATTORNEY AND CLIENT—LIABILITY FOR NEGLIGENCE.—If an attorney for a mortgagee is guilty of negligence in examining the title to ascertain that the mortgage is a first lien on the property, as he has agreed to do, the mortgagee, without waiting for the mortgage to be foreclosed, is entitled to at once recover from such attorney the difference between the value of the security contracted for and that actually received. The cause of action is the breach of duty, not the damages, which are only an incident.

ATTORNEY AND CLIENT—EVIDENCE OF NEGLIGENCE—DECLARATIONS.—In an action by a mortgagee against an attorney to recover for the latter's negligence, declarations made by the mortgagor are not admissible in evidence, in the absence of proof of fraud and collusion between him and such attorney.

AGENCY—EVIDENCE OF.—Although agency cannot be proved by declarations of an alleged agent, yet he is a competent witness to prove the agency, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject.

Trespass against the defendant to recover damages caused by his negligence as an attorney at law. In 1894, O. T. Roberts was the owner of certain property on which he desired to borrow one thousand dollars. Plaintiff was willing to loan that sum upon the property as a first mortgage or lien, and employed the defendant, who was also Roberts' attorney, to examine the title, draw the mortgage, and place it as a first lien upon the property. Defendant then falsely or negligently informed the plaintiff that said mortgage would be a first lien upon the property, and, relying upon such representation, plaintiff paid said money to Roberts, who paid the said attorney his fees for the whole transaction. Plaintiff discovered in August, 1895, for the first time, that the lien of said mortgage was not the first but a third lien upon said property. Plaintiff then brought this action, suffered a compulsory nonsuit, and appealed.

J. S. Biery and W. H. Glace, for the appellant.

M. C. Henninger and M. C. L. Kline, for the appellee.

537 MITCHELL, J. At the close of the plaintiff's testimony defendant moved for a nonsuit on three grounds: 1. There was no evidence of the relation of attorney and client; 2. There was no evidence of negligence, fraud, or collusion; and 3. There was no evidence of any damages sustained by the plaintiff. The court entered a nonsuit, and in refusing to take it off dwelt principally upon the failure to establish the relation of attorney and client between the parties, but we must, of course, assume that all three of the grounds were considered.

The payment of a fee is the most usual and weighty item of

⁵³⁸ evidence to establish the relationship of client and attorney, but it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material. Nor is it even indispensable that the compensation should be assumed by the client. Ordinarily, it is so from the nature of the employment which in the vast majority of cases involves the guarding or enforcement of the client's interest against an adverse one, and is therefore exclusive. But even adverse interests, if to be amicably adjusted, may be represented by the same counsel, though the cases in which this can be done are exceptional and never entirely free from danger of conflicting duties. In matters of the present kind, it is not uncommon, in many places, including some at least of the counties of this state, for the same counsel to represent both borrower and lender, upon mortgage or similar security, although the former only is expected to pay the fees. In *Scholes v. Brook*, 63 L. T., N. S., 837, plaintiff had invested money on mortgage relying on the opinion of "valuers," and, the property proving inadequate, she sued the valuers for negligence. Romer, J., said: "No doubt in this case, as is common, the costs of Brook and Dansfield's valuation were intended to be paid by the mortgagor, just as the costs of the solicitors employed by the mortgagee were expected to be paid by the mortgagor in the sense that they would be paid out of the money advanced; but that does not determine the relation between the parties. I am satisfied on the evidence that, as between Brook and Dansfield on the one hand and the plaintiff on the other, it was understood by both that Brook and Dansfield were advising the plaintiff, and that the plaintiff was going to act in her capacity as mortgagee, on the footing and faith of their valuation and of their being her advisors. . . . It was contemplated, according to what, as I said before, was a usual custom, that the costs of the valuation, if the proposed loan was effected, should be borne ultimately by the mortgagor; but to my mind it is clear that Brook and Dansfield were asked to make the valuation, to their knowledge as valuers, on behalf of the mortgagee, not the mortgagor." On appeal this was affirmed by the lords justices: *Scholes v. Brook*, 64 L. T., ⁵³⁹ N. S., 674. So in *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172, the custom was recognized, it being said: "The burden cast upon the mortgagor of paying for the services of the attorney selected by Bithell [the mortgagee]

to guard his interests was simply a condition of the loan, and did not alter the status of such attorney or diminish the duty or responsibility which he owed to his employer."

In the present case, it is undeniable that the defendant was acting for Roberts, the borrower, from whom he received his compensation, and to whom alone, upon the manifest understanding of all parties, he was to look for it. But that fact does not of itself prevent the relation of attorney and client between plaintiff and defendant, if such was the mutual understanding. There was no evidence of custom in that respect, and the court below might not be able to say as matter of law, certainly we cannot, that such was in fact the custom. But, outside of the existence of any general rule, there was evidence from which the jury might have inferred that such was the understanding of these parties in this particular case.

The defendant unquestionably acted to some extent for and in behalf of the plaintiff. After the money was paid over, he kept the mortgage which was then the property of plaintiff, and he put it on record. In so doing he was clearly acting for plaintiff, and if he had negligently delayed recording until a subsequent judgment or other encumbrance slipped in ahead of it, there can be no question that he would have been liable for the negligent performance even of a duty voluntarily assumed. But there was evidence that he did more for plaintiff than put the mortgage on record. Lawall testified that he told defendant "to search the title and the records in reference to liens," and that "he said he would," and more to the same effect. The presumption is, that this was done in behalf of plaintiff. To Roberts, the borrower, the priority of other encumbrances was of no concern with regard to this loan, except as bearing on plaintiff's willingness to advance the money, but to plaintiff it was a material fact as part of the inducement or consideration for risking the investment.

We are of opinion, therefore, that there was sufficient evidence to submit to the jury on the existence of the relation of attorney and client in the case.

⁵⁴⁰ But the nonsuit was also erroneous for another reason. Independent of the relation of attorney and client, there was evidence, already noticed, that defendant undertook certain duties for the plaintiff. The learned judge rightly says that collusion or fraud could not be found on the evidence in the case, but this does not exclude liability arising from negligence. The principle settled in *Coggs v. Barnard*, 1 *Ld. Raym.* 909, 1 *Smith's*

Lead. Cas. Eq. 199, that one who undertakes to do, even without reward, is responsible for misfeasance, though not for nonfeasance, has been generally adopted. If, therefore, defendant, knowing that plaintiff was relying on him in his professional capacity to see that her mortgage was the first lien, although Roberts was to pay the fees, undertook to perform that duty, he was bound to do it with ordinary and reasonable skill and care in his profession, and would be liable for negligence in that respect.

The argument for the third ground of nonsuit, that it has not yet been shown that plaintiff has suffered any damage, would not be without force if the question were new, inasmuch as she took the mortgage as security only, and the mortgagor when called upon may pay the debt, or the mortgage being sued out the property may bring enough to cover it. But the law is settled the other way. Plaintiff is entitled to the security she contracted for, and may recover the difference in value between that and what she actually got. The cause of action is the breach of duty, not the damages, which are only an incident. *Miller v. Wilson*, 24 Pa. St. 114, was very similar to the present case. The plaintiff had judgments which were a lien on certain real estate, and agreed with a purchaser of the latter to accept his bond secured by mortgage on the land. Defendant was employed as attorney to carry out the agreement, and in that capacity satisfied plaintiff's judgments, but neglected to have the mortgage recorded until other judgments were entered ahead of it. In meeting the point now made, Chief Justice Black said: "The argument is, that plaintiff has not as yet suffered any actual loss from the defendant's violation of duty; and that she can recover from Miller [defendant] only in case Carson [mortgagor] make default; because the mortgage being but a security for the bond, there is nothing due on the former until the condition of the latter is broken. But we hold it for clear law that defendant . . . subjected himself to an immediate ⁵⁴¹ action, in which the plaintiff may recover compensation for all she has lost, and all she is likely to lose through his misconduct."

The cases have usually arisen on the statute of limitations, and it has been uniformly held that the right of action is complete so that the statute begins to run from the breach, although the damage may not be known or may not in fact occur until afterward. In *Moore v. Juvenal*, 92 Pa. St. 484, it is said by the present chief justice: "Where the declaration alleges a breach of duty and a special consequential damage, the breach of duty and not the consequential damage is the cause of action, and the stat-

ute runs from the date of the former, and not from the time the special damage is revealed or becomes definite": See, also, *Lilly v. Boyd*, 72 Ga. 88; citing our own case of *Rhines v. Evans*, 66 Pa. St. 192; 5 Am. Rep. 864.

On the question of damages, the plaintiff's case was weak. The statement avers that the property is "not worth more than twelve hundred dollars." The witness Yeager thought it would be "cheap at ten or twelve hundred dollars," and Dr. Fegley, the owner of the first and second liens, testified that the property had "rather increased during the last two years." That is about all there is on the subject. But, although it is meager, we cannot say that it is not enough to go to the jury. If they should find the security worthless, and the court, in view of the fact that the verdict must necessarily be based largely on opinion on that point, should have any doubt on the subject, its powers are sufficient to prevent injustice to the defendant. In *Green v. Dixon*, 1 Jur. 137, a similar action against an attorney for taking an insufficient security, Lord Abinger having indicated his opinion that plaintiff had made out a cause of action, a verdict was rendered for plaintiff for the amount advanced, he undertaking to convey the security taken to anyone appointed by the defendant. The equity powers of courts even in suits at law in Pennsylvania are ample to protect the defendant in the same or equivalent manner.

The offer contained in the third assignment was clearly incompetent. There was no evidence, as the learned judge said, of collusion or fraud, and nothing to make the declarations of Roberts evidence against defendant.

The fourth assignment, however, must be sustained. The ⁵⁴² authority of Edgar Lawall from his sister to pay over the money was a fact to which he could testify. Though agency cannot be proved by declarations of the alleged agent, yet he is a competent witness to prove it, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject.

Judgment reversed and procedendo awarded.

ATTORNEY AND CLIENT—WHEN RELATIONSHIP EXISTS—ADVERSE INTERESTS.—It is a general rule that, unless with the free and intelligent consent of his principal, given after full knowledge of all the facts and circumstances, the agent cannot, in the same transaction, act both for the principal and the adverse party: *Extended note to Potter's Appeal*, 7 Am. St. Rep. 280; *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338; 48 Am. St. Rep. 558; *Wassel v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245. So, in the latter case, where the plaintiff's attorney, employed to collect a note, was ap-

pointed by the defendant with full knowledge of the fact, his attorney in fact to confess judgment on said note, it was held that the exercise of that power by the attorney was consistent with fair dealing. But in *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172, it was held that the fact that he who selects an attorney to make an examination of title for the purpose of a contemplated loan, requires the borrower to furnish an abstract of title, and to pay the attorney for his services does not constitute him the attorney of the borrower, nor make him any the less the attorney of the lender by whom he was selected.

ATTORNEY AND CLIENT—ATTORNEY'S LIABILITY FOR NEGLIGENCE.—Attorneys are held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and others who hold themselves out to the world as possessing skill and qualifications in their respective trades and professions: *Citizens' Loan Fund etc. Assn. v. Friedley*, 123 Ind. 143; 18 Am. St. Rep. 320, and note. An attorney is liable for gross ignorance or gross negligence in the performance of his professional duties: *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262. See, also, note to *Babbitt v. Bumpus*, 16 Am. St. Rep. 592. But it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that the rule is, that if he acts with a proper degree of skill, and with reasonable care, and to the best of his knowledge, he will not be held responsible: Extended note to *Peabody Building etc. Assn. v. Houseman*, 33 Am. Rep. 762.

AGENCY—EVIDENCE TO PROVE.—Agency cannot be shown by the statements of the supposed agent: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401, and note; *Pepper v. Cairns*, 133 Pa. St. 114; 19 Am. St. Rep. 625, and note; *Omaha etc. Co. v. Tabor*, 18 Colo. 41; 16 Am. St. Rep. 185, and note.

FRANCIS v. FRANCIS.

[180 PENNSYLVANIA STATE, 644.]

EVIDENCE—DEATH—PRESUMPTION.—A presumption of death is raised by the absence of a person from his domicile unheard of for seven years. Absence in this connection means that a person is not at the place of his domicile, and that his actual residence is unknown. Removal alone is not enough.

EVIDENCE—PRESUMPTION OF DEATH.—If a person removes from his domicile to establish a home for himself in another state or country, at a place well known, this is a change of residence only, and absence from the former domicile does not raise a presumption of death. If alive at his last domicile when last heard from, the presumption is that life continues.

W. S. Hulslander and A. A. Vosberg, for the appellant.

J. F. Scragg and G. W. Beale, for the appellee.

646 WILLIAMS, J. This was an issue *devisavit vel non*. The contestants denied the validity of the will, alleging that Rachel Francis, the testator, was a single woman when it was

made in 1884, and that it was revoked by her subsequent marriage in 1886. She had been married to Thomas Watkins in 1870, who, prior to 1876, had left his home in Scranton and gone with a colony to settle in Patagonia. The colony was established. Watkins, as a member of it, was heard from in 1876. He was at that time residing with the other colonists and engaged in labor with them. Since that time he has not been heard from, and the contestants invoke the presumption of his death; and it is upon this presumption that the contestants rely to establish the fact that the testatrix was single at the date of her will in 1884. Do the foregoing facts raise the presumption of the death of Watkins? A presumption of death is raised by the absence of a person from his domicile unheard of for seven years. Absence, in this connection, means that a person is not at the place of his domicile, and that his actual residence is unknown. It is for ⁶⁴⁷ this reason that his existence is doubtful, and that after seven years of such absence his death is presumed. But removal alone is not enough. The further fact that he has disappeared from his domicile and from the knowledge of those with whom he would naturally communicate, so that his whereabouts have been unknown for seven years or upward, is necessary in order to raise the presumption. But where a person removes from his domicile in this state to establish a home for himself in another state or country, at a place well known, this is a change of residence, and absence from the last domicile is that upon which the presumption must be built. If alive when last heard from at his new domicile, the presumption is, that life continues: 1 Am. & Eng. Ency. of Law, 37. See, also, Whiteside's Appeal, 23 Pa. St. 114; Holmes v. Johnson, 42 Pa. St. 159. The learned judge of the court below instructed the jury correctly upon this subject. The jury found in favor of the proponent upon both the questions submitted to them. This was done under proper instructions, and we see no reason whatever for disturbing the verdict. The assignments of error are not sustained.

The judgment is affirmed.

EVIDENCE—PRESUMPTION OF DEATH—WHEN ARISES.—A person who suddenly and mysteriously disappears, and is not seen nor heard of, or known to be living, for seven years thereafter, is presumed to be dead; but the presumption of death does not arise until the expiration of that time, unless it is shown that, in the mean time, he has come in contact with some specific peril of such nature as to quicken the operation of time: Mutual Benefit Co's Petition, 174 Pa. St. 1; 52 Am. St. Rep. 814, and note. This presumption does not arise with reference to children incapable, by reason of

their tender years, of "absenting" themselves from the state, or of concealing themselves within it: *Manley v. Pattison*, 73 Miss. 417; 55 Am. St. Rep. 543, and note. Presumption of death arises from the absence of a person from his domicile without being heard from for seven years: *Bardin v. Bardin*, 4 S. Dak. 305; 48 Am. St. Rep. 791.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

GEORGE v. AMERICAN GINNING COMPANY.

[46 SOUTH CAROLINA, 1.]

CORPORATIONS—PROCESS—SERVICE OF ON OFFICER OF CORPORATION.—If an officer of a corporation, acting as attorney in fact for a third person to sue such corporation, commences such action by suing out an attachment against such corporation for his principal, he becomes, pro hac vice, such principal, and service of process upon him as an officer of the corporation is in fact service upon the plaintiff in the action.

CORPORATIONS—OFFICER AS LITIGANT AGAINST HIS CORPORATION.—If an officer of a corporation undertakes, as attorney in fact for a third person, to begin an action against it, he necessarily abandons, for the time and occasion at least, his position as an officer or agent of the corporation.

CORPORATIONS—SERVICE OF PROCESS UPON.—An officer or agent of a foreign corporation cannot commence an action against such corporation by serving himself with the process or summons necessary to commence such action.

Elliott & Elliott, for the appellant.

T. Talbird, for the appellee.

* **McIVER, C. J.** These two cases were heard together, but while the principles upon which they depend are similar, the facts are not identical in the two cases, and hence it will be more convenient to consider them separately.

In the first-named case, the plaintiff, who resides in the city of New York, by a formally executed power constituted William C. Brown, a resident of this state, her attorney in fact to commence this action, and to take all necessary steps to obtain a warrant of attachment against the property of the defendant company, which is a foreign corporation, doing business in the town of Beaufort, South Carolina. In pursuance of this power, the said W. C. Brown, on the 30th day of July, 1895, procured a

summons and complaint to be issued in the name of the plaintiff against the defendant company, on a certain note alleged to have been executed by the defendant company in favor of the plaintiff; and on the same day sued out a warrant of attachment, which was levied upon the property of the defendant company, upon the ground that it was a foreign corporation, the power of attorney having been filed before the warrant of attachment was issued. The sheriff returned that he had "served on the above-named, the American Ginning Company, the summons and complaint in the action, by delivering copies thereof to W. C. Brown, treasurer, personally, and leaving the same with him." On the 11th of September, 1895, Messrs. Elliott & Elliott, signing themselves "defendant's attorneys for the purposes of this motion only," served a notice on Mr. Talbird, as plaintiff's attorney, in which it was expressly stated that they appeared only for the purposes of this motion; that they would move before his honor, Judge Buchanan, at a specified time and place, "to set aside the service of the summons and complaint in this action upon ³ the grounds: 1. Because the affidavit upon which the attachment was issued was sworn to before the plaintiff's attorney, and the justification of the sureties on the undertaking was made before him; 2. That the service of the summons was irregular, in that it was made on the attorney in fact of the plaintiff, who acted for plaintiff in procuring the issue of the writ of attachment as manager of the defendant corporation." It was admitted at the hearing of this motion "that William C. Brown, upon whom the summons and complaint were served, was the same William C. Brown who was the attorney in fact of the plaintiff." The motion was refused by Judge Buchanan, and he, on the same day, rendered judgment by default against the defendant company.

From this judgment, as well as from the refusal of the motion to set aside the service of the summons and complaint and to discharge the attachment, defendant appeals upon the following grounds: "Because the service of the summons upon William C. Brown, as an officer of the defendant corporation, he being at the same time the attorney in fact of the plaintiff for the commencement and prosecution of the action, was not a sufficient service of the summons upon the corporation."

If, as distinctly appears in the "case," William C. Brown was acting as attorney in fact of the plaintiff, in commencing this action and suing out the warrant of attachment, he was *pro hac vice* the plaintiff, and, therefore, the service upon him was practically the same as if the papers had been served upon the plain-

tiff in her own proper person; for, under the express terms of the power of attorney set out in the "case," he, in commencing this action, was acting in the "name, place, and stead" of the plaintiff, and for her, and in her name, he signed, sealed, acknowledged, and delivered "any and all necessary instruments, undertakings, and other writings," for the purpose of attaching the property of the defendant company. The fact that he was the treasurer of the defendant corporation, cannot affect the question, for when he undertook, as the ⁴ attorney in fact, of the plaintiff, to commence this action, he necessarily abandoned, for the time and occasion at least, his position as an officer or agent of the defendant company, for the two positions then became entirely inconsistent and incompatible, involving different and conflicting rights and duties.

The question then resolves itself into an inquiry whether a person can legally commence an action against a foreign corporation, of which he happens to be an officer or agent, by serving himself with the process or summons necessary to commence such action. So far as we are informed, there is no authority in this state upon the point; and we do not think any is needed to show that such a proposition, so utterly at variance with any proper conception of the due and orderly administration of justice, cannot for a moment be entertained. To concede such a proposition would open the door to the grossest fraud, which would be a reproach to the administration of justice. Of course, we do not mean to intimate that any fraud was intended in this particular case; but we cannot assent to a proposition which, if established, would afford such an easy mode of perpetrating frauds. Counsel for appellant has, however, cited us to two cases from other states which seem to support fully the view which we have adopted: *Buck v. Ashuelot Mfg. Co.*, 4 Allen, 357; *Rehm v. German etc. Sav. Inst.*, 125 Ind. 135.

We think, therefore, that the circuit judge erred in refusing the motion to set aside the service of the summons and complaint in this action, and, consequently, that he erred in refusing to vacate the attachment, as well as in rendering judgment for the plaintiff.

In the second case above stated, the plaintiff, W. C. Brown, undertook to commence an action against the defendant company to recover the amount due on two notes which he claimed to hold against said company, by having himself, as treasurer of said company, personally served with copies of the summons and complaint, and on the same day procuring ⁵ a warrant of attachment to be issued, which was levied upon the property of

said company. A similar notice of motion was made in a similar manner to set aside the service of the summons and complaint, and to vacate the attachment. Judge Buchanan granted an order refusing to set aside the service and complaint, but granted the motion to discharge the attachment, and on the same day rendered judgment by default in favor of the plaintiff against the defendant.

From this judgment, as well as from so much of the order as refused the motion to set aside the service of the summons and complaint, defendant appeals, upon the ground that the service upon said Brown, as an officer of the defendant corporation, he being the plaintiff in the action, was not a sufficient service upon said corporation.

It does not appear from the "case," as prepared for argument here, upon what ground the circuit judge granted the motion to vacate the attachment, and, at the same time, refused the motion to set aside the service of the summons and complaint; but as there is no appeal from so much of the order as vacated the attachment, we need not consider that matter further. For the reasons given in considering the appeal in the first case, we think that the circuit judge erred in refusing the motion to set aside the service of the summons and complaint in this case; and, that being so, it follows that he erred in rendering judgment against a party who had not been properly made a party by legal service of a summons.

The judgment of this court is, that in the case first above stated, the order of the circuit judge refusing the motion to set aside the service of the summons and complaint, and to vacate the attachment and rendering judgment therein, be reversed; and in the second case above stated, the judgment of this court is, that so much of the order of the circuit judge as refused the motion to set aside the service of the summons and complaint, as well as the judgment rendered in the second case, be reversed.

CORPORATIONS — SERVICE OF PROCESS IN ACTIONS AGAINST—AGENTS REPRESENTING ADVERSE INTERESTS.— Being served with summons implies that the defendant has been served with summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where judgment is taken: *White v. Johnson*, 27 Or. 282; 50 Am. St. Rep. 726. A judgment by default, where defendant was not served, or did not appear, is erroneous, the proceedings being *coram non iudice*: *Ditch v. Edwards*, 1 Scam. 127; 26 Am. Dec. 414; *Shaefer v. Gates*, 2 B. Mon. 453; 38 Am. Dec. 164. See extended note to *White v. Johnson*, 50 Am. St. Rep. 737-742. Corporations being artificial persons, statutes have provided that process shall be served upon them through their agents, and, in order to bind a corporation, the service must be upon the identical agent provided by a statute: *Great West Min. Co. v.*

Woodmas etc. Min. Co., 12 Colo. 46; 13 Am. St. Rep. 204, and note; Aldrich v. Anchor Coal etc. Co., 24 Or. 32; 41 Am. St. Rep. 831, and note; First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530; 56 Am. St. Rep. 878. But it is an undisputed rule of law that unless with the free and intelligent consent of his principal, given after full knowledge of all the facts and circumstances, the agent cannot, in the same transaction, act for both the principal and the adverse party: Extended note to Potter's Appeal, 7 Am. St. Rep. 280; Boston v. Simmons, 150 Mass. 461; 15 Am. St. Rep. 230. So, it is not a sufficient service of a writ against a corporation to serve the same upon the plaintiff as president of the corporation; and a default, which has been entered in an action in which a writ was thus served will be stricken off by the court, of its own motion, whenever the facts are brought to its attention: Buck v. Ashuelot Mfg. Co., 4 Allen, 357.

CLARKE v. CLARKE.

[46 SOUTH CAROLINA, 230.]

WILLS.—EVIDENCE AS TO THE INTENTION of a testator separate and apart from that conveyed by the language used in the will is not admissible for the purpose of interpreting the will.

WILLS—INTERPRETATION—CONVERSION OF REALTY INTO PERSONALTY.—If a testator uses such words as "invest" and "pay over" in his will, thus conveying the idea that his entire estate, both real and personal, is to be distributed as personalty his executor is authorized to convert the real estate into personalty, though no such direct authority is contained in the will.

WILLS — INTERPRETATION — "DEVISE." — Although the technical meaning of the term "devise" in a will is usually to pass realty as realty, yet this technical meaning is not allowed to prevail when such use of the word is negatived by other words in the will clearly indicating a different and contrary intention.

W. H. Lyles, for the appellant.

Verner & Weston and Bachman & Youmans, for the appellee.

235 POPE, J. On the twenty-ninth day of June, 1895, the plaintiff above named commenced his action in the court of common pleas for Richland county against the defendant, wherein he prayed the judgment of the court, for its direction to him in regard to the true construction of the last will and testament, and codicil thereto; of his deceased wife, Mrs. Julia H. Clarke, especially the fifth clause **236** thereof, and as to his powers and duties as said executor and trustee under said will, and for such other relief as is consistent with his case as made. The answer of the defendant, who was an infant of tender years, by her guardian ad litem, duly appointed by the court of common pleas for Richland county, in effect submitted her rights to the protection of the court. The facts of the case are about as follows: Henry P. Clarke, the plaintiff, while domiciled in the state of South Carolina, intermarried with Julia Hurd, in the state of

New York, in the year 1886, and the married couple immediately returned to the state of South Carolina, which before the marriage had been adopted as the domicile of the husband, and that state became the domicile of the marriage. In 1891 a daughter, the defendant, Nancy B. Clarke, was born. In 1893 another daughter, Julia Clarke, was born. In 1894 the wife, Julia H. Clarke, died. In May, 1894, the daughter, Julia Clarke, died. For some years after the said marriage the plaintiff and his wife lived on their plantation near Eastover, in Richland county, in this state, and during their residence at this place, and while on a visit to relatives at the north, the wife, Mrs. Julia H. Clarke, made the following will:

"I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, state of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament, and hereby revoke all other wills by me at any time heretofore made: First. I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named. Second. I direct that a portion of my estate, sufficient to produce \$1,000 annually, shall be safely invested by my executor, and the said \$1,000 be paid annually to my father, S. H. Hurd, now in New York city, in quarterly payments, during his natural life. Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Conn., the sum of \$10,000. Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of ²³⁷ \$5,000. Fifth. The rest, residue and remainder of my estate, real and personal, of whatsoever description and wherever situated, I give, devise, and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay over the whole sum to her; but, if she shall marry before that age, with the consent and approval of her father, or, in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five. In case I shall leave surviving me one or more children besides my daughter, Nancy, then I direct that the said rest, residue, and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing per capita, and the shares of my said children to be held in trust as above provided in the case of Nancy as being the only one. And I give, devise, and bequeath the said rest, residue, and remainder as aforesaid

to each, and to their heirs and each of them forever. I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bond be required of him under either appointment."

On the eleventh day of November, 1893, at her residence near the city of Columbia, in Richland county, and state of South Carolina, the said Mrs. Julia H. Clarke made a codicil to her said last will and testament, wherein she fully ratified and confirmed said last will and testament, except that she revoked the third item or clause thereof, and in lieu of the provision therein contained in favor of Mrs. Laura Sherwood, of Bridgeport, Connecticut, directed her executor to safely invest such portion of her estate as would yield \$500 per annum, and pay the said \$500 annually, in quarterly payments, to the said Mrs. Laura Sherwood during her natural life. And she also provided that such parts ²⁸⁸ of her estate as had been invested by her executor to yield the annual payment of \$1,000 to her father, S. H. Hurd, and of \$500 to Mrs. Laura Sherwood, after the death of each one respectively, should revert to her estate, and be disposed of as under the fifth item or clause of her said last will and testament.

The will and codicil were duly established in the court of probate for Richland county, in the state of South Carolina. The plaintiff qualified as the executor. All of the personal estate of the testatrix in the state of South Carolina was \$825. Her real estate in the latter state was valued at about \$20,000. Her debts amounted to about \$30,000. The amount necessary to be invested to raise the annual sums to the said S. H. Hurd and the said Mrs. Laura Sherwood was about \$22,000, and to pay the legacy of Miss Agnes C. Patterson was \$5,000, making an aggregate of about \$57,000. But the testatrix was entitled to the one-sixth part of the estate of her grandfather, the late P. T. Barnum, of Bridgeport, Connecticut, consisting of real and personal estate, in a part of which the widow of the late P. T. Barnum had a life estate. The estate of the late P. T. Barnum was located in three states—Connecticut, New York, and Kansas. Under the statute law of Kansas, whatever lands descended to the infant, Julia Clarke, through her mother, the testatrix, on her death vested in her father, the plaintiff. Under the statutes of New York, such share descended to the father for his life, with remainder to the infant defendant, Nancy B. Clarke. While in Connecticut such estate of the infant, Julia Clarke, would vest absolutely in the defendant, Nancy B. Clarke. While to the contrary, if, under the provisions of the will of Mrs. Julia

H. Clarke, deceased, her whole estate in the states of South Carolina, Connecticut, Kansas, and New York, the rest, residue, and remainder of testatrix's estate, after the payment of debts and legacies, would devolve in equal portions upon the plaintiff, Henry P. Clarke, and the defendant, Nancy B. Clarke—for, of course, the state of South Carolina being ²³⁹ the state of domicile of both Mrs. Julia H. Clarke, the testatrix, as well as that of her infant deceased daughter, Julia Clarke, the personal estate of said infant daughter, Julia Clarke, would be equally divided between her father, the plaintiff, and the defendant, her sister. The plaintiff filling both the office of executor and that of trustee for his infant daughter, the defendant, was naturally strongly moved by the responsibility thus devolved upon him, and a little more than a year after his wife's death exhibited his complaint in the court of common pleas for Richland county, in this state, which was the court of the domicile of all parties, wherein he seeks the aid of that court in the proper discharge of the duties of his two offices of executor and trustee. The hearing came on before Judge D. A. Townsend upon the pleadings and some testimony. The first question submitted to the judge was the competency of certain testimony offered by the plaintiff; the testimony objected to was that of the plaintiff himself, which was: "Mrs. Clarke's intention was to convert what she would receive under the will [the will of her grandfather, P. T. Barnum], into money and invest it in South Carolina. Her reasons for this were, that in the north and west she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the south. In the south she would save expenses and commissions of agents, and could manage or supervise the management personally, besides receiving higher rates of interest. In the event of any of the beneficiaries under the will dying intestate, Mrs. Clarke believed that the property of such beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates." The circuit judge ruled that this testimony was admissible. Such ruling is excepted to, and forms part of the appeal here taken.

The circuit judge made his decree, which will be reported. The defendant appeals, also, from that decree. All ²⁴⁰ the exceptions will be reported. Was the circuit judge in error in admitting the testimony excepted to?

The object of this testimony was to show that Mrs. Clarke had a certain intention guiding and controlling her in framing the disposition of her property by this will. We have always under-

stood the rule of law, as enforced by the courts of this state, regulating the competency of testimony of this character to be that anything that will show the surroundings of a testator—his family, their names, age, or sex, his property, its name, value, or character, his use of words, if in any way peculiar, or to explain any ambiguous expressions occurring in the will—is admissible. We have never known that testimony as to an intention, separate and apart from that conveyed by the language used in the will, could be held competent. As was well said by the late Chancellor Job Johnstone, in *Rosborough v. Hemphill*, 5 Rich. Eq. 107: "It is conceived that if the effect or purpose of parol evidence is to introduce into a will matter which it does not contain, so as to constitute it a part of the will; to give to the will, in itself considered, operative elements, language, or provisions which were not in it before, then such evidence is incompetent in a court whose sole function is to construe wills. . . . Such evidence is very different from that which is offered for the purpose of affording a light by which what is in the will may be read, understood, and applied, which is always proper." It seems to us that so much of the testimony offered which relates to the purpose in life of Mrs. Clarke in withdrawing her property from the north and west and locating the same in South Carolina is incompetent, because there are no words manifesting any such purpose, as written in her will itself; it would be, in effect, adding to the will to allow such testimony, and all will admit that this cannot be done in this way. And we are equally clear as to the last part of this testimony, relating to what the testator thought would occur if any one of the beneficiaries should die intestate before a final distribution of her bounty could be made, for there ²⁴¹ occurs no language in the will that points to any such contingency. This would certainly be adding a new provision to the will. These exceptions must be sustained, but in so doing we do not help the appellant very materially, for the circuit judge distinctly states in his decree that he does not base his decision upon this testimony, although he admitted it as competent; and now we approach the true battleground.

The second, third, fourth, and fifth grounds raise the issue that the provisions of the will as written, when properly construed, develop the conclusion that the testatrix intended that her real property, wheresoever situated, and of whatsoever description, should become personalty. That such result obtains from the language used in wills when properly construed, in some cases, must be admitted. The courts of the mother country so hold. The courts of this country—both federal and state

—so hold. In what cases will such a conclusion be proper? We answer, in all those cases where the provisions of the will itself manifest that such was the testator's intention, if such intention be legal. This intent of the testator, when manifested by the language used in the will, must be, if legal, carried into execution, for equity looks at the intent rather than the form, and one of its maxims is, that equity treats that as done which, in good conscience, ought to be done—so declares, in substance, Mr. Pomeroy, in volume 1, page 413, of his work on Equity Jurisprudence. We do not hold that a direction by the testator that his lands be sold should appear in the will in order that realty shall become personalty, and we do not know that we can more clearly express our views on this phase of the question than by quoting the language of Mr. Justice F. H. Wardlaw, used in announcing the opinion of this court in the case of *Farmer v. Spell*, 11 Rich. Eq. 547, 548, which was as follows: "Equitable conversion of realty into personalty is effected, in strictness, only where a sale of the land is ordered, and disposition of the proceeds is made; ²⁴² *but if the intention to dispose of the subject as personalty can be ascertained from the face of the will, it may not be indispensable that a sale should be explicitly directed as a means of conversion*" (italics ours). "Chancellor Dargan says, with sufficient precision, in *Perry v. Logan*, 5 Rich. Eq. 202: 'Wherever it is apparent from the words of the will that the testator meant that his real estate in that form should not pass into the possession of the objects of his testamentary bounty, but should be converted into money, and as money come to those for whom he designs the benefaction, this will be considered in equity as a bequest of personalty. Under such circumstances, it will be treated in all respects as if the conversion had been made by the testator in his lifetime.' So, too, cases might be within the principle of conversion as to some incidents, when no alteration of the form of the estate was contemplated." We might multiply at great length quotations from other cases to the same effect, but we have always felt when our own state decisions recognize fully a principle of law as applied to our own affairs, that should be sufficient. Now, let us turn to the circumstances of this particular case. It is established that South Carolina was the domicile of this testatrix, and that her husband and two children surviving her, as the objects of her bounty, were also domiciled there; that her last will fully discloses that each of the three was to be made equal, one with the other, in the distribution of her estate. The testatrix must be presumed to have known that, under the laws of this state, it was in her power,

by a last will, to divide her whole estate, real and personal, as she might elect to do; and further, that, under our laws, in the event of the death of either husband or child, or children, the estate of the one so dying intestate would be shared equally by the two survivors, whether the estate was realty or personalty. But it must also be assumed that she knew the laws regulating intestate estates in the states of Connecticut, Kansas, and New York, where some of her estate, real and personal, was located. Further, it must be ²⁴³ assumed that the testatrix knew of the extent of her estate wherever located, for the will of her grandfather, P. T. Barnum, disclosed the same and her interest therein. We do not think that the fact of her indebtedness to others and her legacies to others, aggregating \$65,000, while her personal estate in South Carolina was only \$825, operates to any extent to work the conversion of her realty into personalty, so far as the provisions of her will touching these matters is concerned.

How are we to regard the provisions of the fifth item or clause of the will? Do these provisions evince an intention of the testatrix to convert her realty into personalty? When the language at the beginning of this item is considered, it will be seen that she masses, so to speak, her realty and personalty, in the terms "the rest, residue, and remainder of my estate," that is, all that should be left after the payment of her debts and legacies; and this "rest, residue, and remainder" she gives, devises, and bequeaths equally to her husband, for himself, and to him in trust for her daughter, Nancy, if she should be the only child left by her; but in the event there is another child, then she gives, devises, and bequeaths one-third of such rest, residue, and remainder to her husband, absolutely, for himself, and the other two-thirds to him, in trust, one-third for Nancy and one-third for Julia. The use by the testatrix of the term "devise" is of some signification, for usually such a term occurs in the testamentary disposition of an estate in realty, as such; and if there were no other words in the text of this will, negating this idea of the use of the word "devise" being intended to convey her realty, as such, to these beneficiaries, this would end the matter. However, the use of a word of a technical significance in a will is not allowed, of itself, to fasten down the intent of a testatrix, if other words, phrases, expressions, and sentences or provisions of her will show that her use of this technical word was not intended by her to do more than to show that she meant her realty to pass, commingled with the personalty, ²⁴⁴ under the terms the rest, residue, and remainder of her estate. to these three ben-

eficiaries. It has been decided in this state, in the two cases, Moore v. Davidson, 22 S. C. 94, and Jaudon v. Ducker, 27 S. C. 295, that when a testator used the words "the rest, residue, and remainder of his estate, he considered the estate as a whole, without regard to nice distinction between the realty and personalty of which it was composed. This he had the right to do."

In the case at bar, it will be observed that no positive direction is included in the will for a sale of any of the lands belonging to testatrix for the payment of debts, legacies, or for distribution. The absence of such direction explicitly need occasion no difficulty in this case, for the executor was directed by the terms of the will to pay the debts and legacies, and this he could only do by an application of the property of his testatrix, when sold, to those purposes, and in the execution of this power, after the personal property of his testatrix was had, the lands could be sold; for it must be remembered, it is only "the rest, residue, and remainder of realty and personalty," after the payments of debts and legacies, that is given to the beneficiaries provided in the fifth item of the will. Of course, in the absence of explicit authority in the will to the executor to make sales of property to pay debts and legacies, such executor would have to apply to the court for such leave for those purposes. What else is there in this will that will aid us in reaching the intention of the testatrix? It will be seen in the fifth item or clause that the testatrix, when she comes to speak of the duty of the plaintiff as to the one-half of the rest, residue, and remainder of her whole estate, real and personal, he shall receive in trust for his infant daughter, Nancy B. Clarke, declares that "he shall hold such one-half until she, Nancy, becomes twenty-five years of age, and then to pay the whole sum over to her; but if she shall marry before that age, with the consent and approval of her father, or, in case of his death, with the consent and approval of her then guardian, then I direct that one-half of ²⁴⁵ her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five." Around these words revolve this contention. What was Mrs. Clarke's intention, as herein expressed, as to how she meant any share in her realty should be held by Nancy and Julia through their trustee? Was it to be as realty or personalty? Certainly the trustee was to hold two-thirds of the estate, which he received for his two daughters, for them. The will does not say he shall "turn over," but shall "pay over." What does "pay over" mean, when connected with the words "the whole sum," in the one instance, and one-half of her share on her marriage, and the other one-half of her share on attaining the age of twenty-five

years? Surely it must mean that the sum of money from the commingled "rest, residue, and remainder of her whole estate, real and personal," when the same shall be converted into money, shall be paid. If it be so, will not equity construe that Mrs. Clarke, by the language used by her in her last will, has directed that her realty be converted into money, and paid two-thirds thereof to the plaintiff as trustee for his two daughters, and having so directed in her said last will and testament, the court of equity, in the promotion of right, will now consider as done what ought to be done? We think this is the true intention of this testatrix.

The exceptions above enumerated to the decree must be overruled.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

WILLS—EXTRINSIC EVIDENCE TO SHOW INTENTION.—Extrinsic evidence is admissible to explain what a testator has written, but not to show what he intended to write. A court cannot make a new devise for him, but the one he made himself must be given effect in the light of surrounding circumstances. But, in searching for the intention of the testator, it must be borne in mind that the intention sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will: Extended note to *Chappell v. Missionary Society etc.*, 50 Am. St. Rep. 281; *Schlottman v. Hoffman*, 73 Miss. 188; 55 Am. St. Rep. 527, and note; *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64.

WILLS—DOCTRINE OF EQUITABLE CONVERSION—WHEN APPLIED.—A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but, when it plainly appears from the will that it was the testator's intention that this power should be exercised, and that effect cannot be given to material provisions without its exercise, an equitable conversion of the property is as effectually accomplished by the will as if it contained a positive direction to sell: *Fahnestock v. Fahnestock*, 152 Pa. St. 56; 34 Am. St. Rep. 623, and note. See, also, *Ducker v. Burnham*, 146 Ill. 9; 37 Am. St. Rep. 135; extended note to *Ford v. Ford*, 5 Am. St. Rep. 141-147.

WILLS—INTERPRETATION—USE OF WORDS HAVING A TECHNICAL MEANING.—Where a testator employs words and phrases to express his intention in the disposition of his property by will that have a well-known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall, in some appropriate way, to some extent to be seen in the will, have qualified or used them in a different sense: *Leathers v. Gray*, 101 N. C. 162; 9 Am. St. Rep. 30. Repugnant words, in whatever portion of a will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or transposed, or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested: *Dickison v. Dickison*, 138 Ill. 541; 32 Am. St. Rep. 163; *Scott v. Nelson*, 3 Port. 452; 29 Am. Dec. 266; *Sims v. Conger*, 89 Miss. 231; 77 Am. Dec. 671.

SMYTHE v. IRICK.

[46 SOUTH CAROLINA, 299.]

WILLS—ATTESTATION.—If a will is duly executed, and contains, in the appropriate place, the names of the three persons selected by the testatrix as witnesses thereto, the fact that the name of one of such witnesses was not written with her own hand, but with the hand of another, at her request, and in her presence, and in the presence of the other witnesses, and the testatrix, does not vitiate her attestation nor render the will void.

A. M. Lee, for the appellant.

W. M. Fitch, J. W. Magrath, and S. Dibble, for the appellee.

311 McIVER, C. J. The only question in this case is whether the will of Ellen A. Crawford, offered for probate in due form of law, was duly attested. The facts in the case are, in the main, undisputed, and are sufficiently set forth in the decree of the judge of probate, in which he held that the will was duly attested, and admitted the will to probate. From this decree the parties who, it seems, would have been entitled to the estate in case there was no will, appealed to the court of common pleas, and the appeal was heard by his honor, Judge Buchanan, who rendered judgment reversing the decree of the judge of probate, and from that judgment J. Adger Smythe, named as executor in the will, appeals to this court upon the several grounds set out in the record, which, with the judgment of Judge Buchanan, should be incorporated in the report of this case.

312 The only question in the case is, whether the fact that one of the persons whose names appear as subscribing witnesses to the will did not, in fact, write her own name, but requested her daughter, one of the other subscribing witnesses, to write it for her, rendered the attestation by that witness void and of no effect. The undisputed fact is, that R. S. Forsythe, whose name appears as one of the subscribing witnesses to the will, appeared before the judge of probate on the fourth day of February, 1892, when the will was offered, by the executor, for probate in common form, and subscribed her name to the usual affidavit in such cases, in which, amongst other things, the deponent stated "that she was present and did see the said instrument of writing duly executed by the said Ellen Ann Crawford, . . . and that R. S. Forsythe (the deponent) and M. G. Forsythe and S. W. Forsythe, in the presence of each other and of the said Ellen Ann Crawford, and at her request, signed their names as witnesses to the due execution of the same." For while one of the grounds of appeal from the decree of the judge of probate imputes error to

him "in considering any proof or evidence offered at the proof of the will in common form," it appears from the "case" that when the testimony as to this matter was offered, no objection was interposed; and, indeed, as we understand the decree of the judge of probate, he does not base his conclusion upon the fact that the witness, R. E. Forsythe, made the affidavit above referred to, but merely states that fact as a part of the history of the case. On the contrary, his conclusion is based upon the conceded facts that the name of R. E. Forsythe, as one of the subscribing witnesses to the will, was written by her daughter, in her presence and at her request, in the presence and at the suggestion of the testatrix, which he held was a sufficient signing by the said R. E. Forsythe. In this conclusion we fully concur. There can be no question that a will may be duly attested by a witness who, being unable to write his name, makes his mark. This is held even in England: *Harrison v. Harrison*, 8 Ves. 185, and ³¹³ *Addy v. Greix*, 8 Ves. 504, which cases have been recognized in this state several times; *Adams v. Chaplin*, 1 Hill (S. C.), 266; *Ray v. Hill*, 3 Strob. 303; 49 Am. Dec. 647. Indeed, this proposition does not seem to be contested by counsel in this case. But they contend that, in order to give efficiency to an attestation by a marksman, the witness must do some manual or physical act, tending to show his participation in such attestation—as, for example, touching the end of the penstock or penholder, while another guides the pen, in making the mark. It seems to us, that attributing to this useless ceremony of the witness touching with his finger the end of the penholder while another guides the pen, the efficiency claimed for it, would be investing a useless form with much more importance than it deserves. What possible security this empty ceremony will afford against fraud, it is impossible to conceive; for the essential fact, as it is claimed, of the touching of the end of the penholder, must, necessarily, be proved by parol evidence, in order to show the participation of the marksman witness in the act of signing; and why may not the fact that the name of the witness was written by another, in his presence, and at his request, be proved by the same kind of evidence? The one affords the same, if not better, protection against fraud than the other. The testimony in this case leaves no doubt of the fact that the names of the three persons selected by the testatrix as witnesses of her will all appear on that paper in the appropriate place; and the fact that the name of one of those witnesses was not written with her own hand, but with the hand of another, at her request and in her presence, seems to us quite as good an attestation as if the

mark of such witness had been made by another, she going through the useless ceremony of touching the end of the penholder with her finger while the other guided the pen in making the mark.

If the name of a person is signed to a note, receipt, or deed by another, in his presence and at his request, the law would regard it as the act of the person whose name is thus ³¹⁴ signed. Why? because, though the physical act of signing is done by another, yet such act having been done in the presence and at the request of the person whose name is there written, it is regarded as his act, *qui facit per alium facit per se*. While one partner cannot bind his copartners ordinarily by deed, yet if he signs the name of the copartnership to a deed in the presence of his copartners, and with their assent, they are bound: *Stroman v. Varn*, 19 S. C. 307. Analogy, therefore, would lead us to the same conclusion as reasoning from the nature of the case has done.

There being no direct authority in this state, so far as we are informed, upon the precise point which we are called upon to decide, we naturally seek for light from the authorities elsewhere. But those authorities seem to be conflicting, and we must follow those which appear to us to be based upon the better reasoning. Some of the cases which have been cited attach great, and, as we think, undue, importance to the participation by the witness in the mere physical act of signing or making the mark, while other cases, with good reason, as we think, attach but little importance to that circumstance. In *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102, one of the attesting witnesses wrote the names of the other two witnesses, in their presence and at their request, and the court held the attestation good. The court, in delivering its opinion, after saying that it had been settled that a witness may attest a will by making his mark, proceeded as follows: "The validity of such an attestation depends upon the signing of the name of the witness, by his authority and in his presence, and not upon the fact of his making a mark or doing some manual act in connection with the signature. The making of a mark would furnish little, if any, means of verifying the signature; and the doing of some manual act in connection with the signature would furnish no additional safeguard, appearing on the body of the instrument, against those frauds which it was the object of the statute (29 Car. 2) to prevent."

³¹⁵ The case of *Upchurch v. Upchurch*, 16 B. Mon. 102, is to the same effect. So, also, in the case of *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565, in which we find this language: "One object of the statute (which the court had previously said, 'in

copied substantially from that of 29 Car. 2') in requiring an attestation of a will, is to insure identity and to prevent the fraudulent substitution of another document. Another object is to surround the testator with witnesses to judge of his capacity: 2 Greenleaf on Evidence, sec. 691; Upchurch v. Upchurch, 16 B. Mon. 102. And all those purposes are as readily attained in the case where the name of the attesting witness is written by the agent at the request of the principal, as where the latter makes his mark or holds a pen guided by another hand." The same doctrine was held in a comparatively recent case in New York, In re Strong's Will, 16 N. Y. Supp. 104, 2 Con. Surr. (N. Y.) 574, decided in 1891, where the cases of Jesse v. Parker, 6 Gratt. 57, 52 Am. Dec. 102, and Upchurch v. Upchurch, 16 B. Mon. 102, were recognized and followed. It is contended, however, that the doctrine laid down in the cases above cited only applies where the witness, whose name is written by another, is unable to write, and does not apply to the present case, where the testimony shows that the witness was able to write. We can see no reason whatever for such a limitation of the doctrine, especially where it appears that the witness was at the time temporarily incapacitated from writing. Indeed, in the case last cited (In re Strong's Will, 16 N. Y. Supp. 104, 2 Con. Surr. (N. Y.) 574), the doctrine was applied where the witness was only temporarily incapacitated from writing "by reason of a felon on her hand." In a California case (In re Guilfoyle's Will, 96 Cal. 598), which we find reported in 22 L. R. Ann. 370, with full and instructive notes, we find the following language, which is very pertinent and to the point: "Persons who know how to write may become physically incapable of writing their names by reason of rheumatism, paralysis of the hands, and other causes, besides general physical debility, though of sound mind, and it seems unreasonable that the legislature intended to exclude 316 all such persons from the privilege of subscribing a will or other instrument by a mark. The language of the code is, 'when the person cannot write.' This fairly includes all persons who are unable to write from any cause, even though they know how to write."

In this case, the judge of probate finds, as a matter of fact (and there is no exception to this finding), "that Mrs. Forsythe was aged and very nervous, and wrote with such difficulty that her almost universal custom was to have her daughter, Miss Forsythe, sign all papers for her, and to do all her writing, and for this reason, and in accordance with this habit, she requested her daughter to sign her name to the will as a witness on this occa-

sion." Accordingly, the daughter did sign her name, in her presence, and in the presence of the testatrix and the other subscribing witness, Mrs. Forsythe, as the testimony shows, leaning over her at the time, and thus, practically, participating in the physical act of signing, if that were necessary. The fact that Mrs. Forsythe was able to sign her own name to the affidavit which she made for proof of the will in common form cannot affect the question, for the obvious reason that such affidavit was made about eight years after the execution of the will, long after she had been relieved from the causes which produced the extreme nervousness from which she was suffering at the time the will was executed. The circuit judge seems to have fallen into an error in supposing that the cases upon which we rely were based upon statutes differing from ours. An examination of those cases will show that the statutes there considered were substantially the same as ours, so far as the question here involved is concerned. So, too, his remark as to signing by proxy is misleading, for that implies that the agent or proxy signs in the absence of the principal; while here the conceded fact is, that the name of Mrs. Forsythe was written by her daughter in her presence and at her request.

The judgment of this court is, that the judgment of the ³¹⁷ circuit court be reversed, and that the decree of the judge of probate be affirmed.

WILLS—ATTESTATION—SIGNING BY ATTESTING WITNESSES.—A signature by a witness to a will, who does not write his name, make his mark thereon, or touch the pen in the hands of the other subscribing witness who signs his name for him in his presence and at his request, and in the presence and at the request of the testator, is not sufficient to attest a will devising real estate: *McFarland v. Bush*, 94 Tenn. 538; 45 Am. St. Rep. 760; *Simmons v. Leonard*, 91 Tenn. 183; 30 Am. St. Rep. 875, and note. See contra, *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102.

SOUTH CAROLINA STEAMBOAT COMPANY v. WILMINGTON, COLUMBIA & AUGUSTA RAILROAD COMPANY.

[46 SOUTH CAROLINA, 327.]

NUISANCE—REMEDY FOR.—In general, the remedy for a nuisance on a highway is by indictment. If, however, by such a nuisance a party suffer special damage, an action in his favor lies. A damage, to be special, within the meaning of the rule, must result directly from the nuisance, and not as a secondary consequence thereof, and must differ in kind, and not merely in extent or degree, from that which the general public sustains.

NUISANCE IN OBSTRUCTING NAVIGABLE STREAM—SPECIAL DAMAGE FROM TO PLAINTIFF, WHEN NOT SHOWN.—A complaint alleging that the plaintiff has, for a number of years, been carrying on the business of common carrier, and, as such, running a line of steamers on a designated navigable river of the state and between various points thereon, and that he in such business has built and maintained a number of steamers used exclusively therein, and has built up a large and valuable business, and that the defendant has erected and maintained a bridge which obstructs the free use of the river by plaintiff and others similarly situated, does not show any such special and peculiar damage to the plaintiff as entitles him to maintain a private action for such obstruction, nor does the additional allegation that the defendant had promised to keep the channel in the river open by opening a draw in the bridge, and thereby permitting free navigation at particular times, entitle the plaintiff to maintain the action.

The plaintiff by its complaint alleged that it and the defendant were both corporations; that the plaintiff had, for a number of years, carried on business as a common carrier by running a line of steamers upon the Pee Dee river for the purpose of transporting passengers and merchandise; that it had built up a large and valuable business of great importance to it, and that it was of great importance to it that the navigation of the river by its steamers should not be interrupted; that such river was a navigable stream; that the defendant was also a common carrier, but was engaged in the business of operating a railroad; that such railroad crossed the Pee Dee river; that to enable it to cross, the defendant had erected and maintained a bridge, and had placed therein a draw, which could be opened from time to time for the passage of steamers; that the defendant in 1892 undertook to make certain repairs to its bridge in doing which it was found necessary either to close the draw of the bridge or else to leave it open so that passage could be made through the bridge on certain days; that before entering upon the repairs the defendant notified plaintiff that it would arrange to open such draw, and thereby remove all obstructions to navigation on the regular days used by the plaintiff for passing up and down the river; that relying upon this assurance, the plaintiff allowed its boat then above the bridge to come down the river; that upon the return of such boat loaded with freight for points above the bridge on the regular day, the plaintiff found the draw closed, and that, in violation of the defendant's promise and of the laws of the state, the bridge was unlawfully and illegally kept closed by the defendant from the 14th of September to the 12th of October, 1892; that thereby plaintiff was prevented from making its trips upon schedule time, that its business was broken in upon and seriously injured; that during the time that the bridge was so closed the defendant continued

its use of the same for the passage of teams, and thereby was enabled to transfer to itself a large portion of the business of the plaintiff; and finally that the plaintiff, by reason of these wrongful acts of the defendant, had been damaged to the sum of five thousand dollars. The defendant demurred to the complaint on the ground that the allegations therein did not show any direct damage to plaintiff that was special to it and not common to the public, and that it appeared from the complaint that the obstruction was temporary and only for the purpose of making necessary repairs. The demurrer was overruled, the cause tried and a verdict obtained in favor of the plaintiff for the sum of three thousand dollars. The defendant appealed.

W. J. Montgomery, J. T. Barron, C. A. Woods, and Johnson & Johnson, for the appellants.

Smythe & Lee and Sellers & Sellers, contra.

⁸³² McIVER, C. J. The plaintiff brings this action to recover damages, alleged to have been sustained by it by reason of the obstruction, by the defendant company, ⁸³³ of the navigation of the Pee Dee River, alleged to be a navigable stream. Inasmuch as the primal, and, as we think, controlling, question, arises upon a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, it will be necessary for the reporter to embody in his report of the case a copy of the complaint which is set out in the "case."

The first specification of deficiency in the complaint is thus stated: "The complaint does not allege any special or particular and direct injury to the plaintiff from the alleged obstruction to navigation on the Pee Dee river for which an action will lie." The Pee Dee river, being a navigable stream is a public highway. The constitution of 1868, which was of force at the time the alleged cause of action in this case arose, and at the time the action was commenced, and at the time it was tried in the circuit court, in section 40, of article 1, expressly declares: "All navigable waters shall forever remain public highways"; and the same declaration is repeated in section 1 of article 6. The same declaration is made in the present constitution, in section 28 of article 1, and again in section 1 of article 14. There can be no doubt that an obstruction of any highway is a public nuisance, which, ordinarily, can only be redressed by indictment. As is said by Harper, J., in delivering the opinion of the court, in the leading case of *Carey v. Brooks*, 1 Hill (S. C.) 367: "In general, the remedy for a nuisance on a highway

by indictment; and the case put (Coke on Littleton, 56), where that is said to be the proper remedy, is like the present: 'If a ditch he made over thwart the highway, so that he cannot go.' In Bacon's Abridgment, title Nuisance, D, it is said that common nuisances against the public are only punishable by indictment. 'But if, by such nuisances, the party suffer a particular damage, as if, by stopping up a highway with logs, etc., his horse throws him, by which he is wounded or hurt, an action lies.' It is added however, 'but if a highway is stopped that a man is delayed in his journey a little while, and, by reason thereof, he is damnified ³³⁴ or some important affair neglected, this is not such special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct and not consequential—as, for instance, the loss of his horse or some corporal hurt in falling into a trench on the highway,' etc., referring to Carth. 194." And Harper, J., adds: "This seems to be the settled law, founded on the inconvenience of allowing a separate action to every individual who suffers an inconvenience common to many." These remarks of that distinguished jurist were made in a case where the plaintiff had a raft of timber floating in the water above the obstruction complained of, which he had contracted under a penalty, to deliver by a certain day in Hamburg, and the plaintiff had employed hands to clear out the channel of the stream, at an expense of one hundred and twenty-five dollars, and had been delayed in delivering the timber about one month by reason of the act of the defendant in obstructing the stream; and yet it was held that the plaintiff could not recover, because the damage complained of was not such as would justify the maintenance of a civil action. That case (Carey v. Brooks, 1 Hill (S. C.) 367), was distinctly recognized and followed in the comparatively recent case of Steamboat Co. v. Railroad Co., 30 S. C. 539, 14 Am. St. Rep. 923, where it was said that the true rule on the subject is: "That the injury must be particular—as several of the cases express it, 'special or peculiar'—must result directly from the obstruction, and not as a secondary consequence thereof, and must differ in kind, and not merely in extent or degree, from that which the general public sustains." A good illustration of this exception to the general rule may be found in the case of Crouch v. Charleston etc. Ry. Co., 21 S. C. 495, where a steamer, the "Silver Star," in attempting to pass through the draw of a bridge, erected by the railway company across a navigable stream, of insufficient width, struck against the timbers of the bridge and was injured.

This being the rule, the next inquiry is, whether there is any

allegation in this complaint which brings this case ³³⁵ within the exception to the general rule, that the only remedy for a nuisance in obstructing a public highway is by indictment, and not by civil action. We do not think there is any such allegation. There is no allegation of any special or particular damages peculiar to the plaintiff and differing in kind from that to which all others, in common with the plaintiff, were exposed. All others, in common with the plaintiff, had a legal right to navigate this river, and any obstruction of that right violated their rights in the same way as the rights of plaintiff are alleged to have been violated. Even granting that the rights of plaintiff are alleged to have been violated to a greater degree than those of the general public, by reason of interference with the regular schedules which the plaintiff had established, and by reason of plaintiff being prevented from complying with its engagements to receive and deliver freight at points on the river above the obstruction, all other persons who chose to navigate that river were exposed to the very same kind of injury; and there is no allegation in the complaint that the plaintiff was the only person or corporation engaged in navigating that river, even if such an allegation would be of any avail; for the law secured to every person the right to the free navigation of that river whenever he chose to exercise such right. If the fact that the plaintiff, in *Carey v. Brooks*, 1 Hill (S. C.) 367, was subject to a penalty for not delivering his timber according to his contract, did not bring that case within the exception to the rule, it seems to us impossible to find anything in the complaint which would bring this case within such exception.

Great stress is laid upon the allegations contained in the tenth paragraph of the complaint as to the arrangement there set forth between plaintiff and defendant, whereby, as alleged, the defendant agreed to leave open the draw in the bridge on the day of the regular trips of the boats of the plaintiff company, and the alleged violation of that promise or arrangement by the defendant company. But, in the first place, the present ³³⁶ action is not the proper mode of obtaining redress for the breach of a contract, and, in the second place, and what is more to the point, the damages resulting from the breach of such contract would not result directly from the obstruction complained of, and, therefore, would not bring this case within the exception to the general rule. Assuming all the allegations of the complaint to be true, as we must do under the demurrer, we do not think that the plaintiff has stated such facts as are necessary to the maintenance of a civil action for damages sustained by the obstruction of a public highway. It follows, therefore, that the circuit judge

erred in overruling the demurrer. This being decisive of the case, all of the other questions presented become merely speculative, and hence need not be considered.

The judgment of this court is, that the judgment of the circuit court overruling the demurrer be reversed.

THE CHIEF JUSTICE DISSENTED upon the ground that the violation of the defendant's promise alleged in the complaint created a cause of action in favor of the plaintiff, and that therefore the demurrer of the defendant was properly overruled.

NUISANCE—PUBLIC—PRIVATE ACTION FOR DAMAGES ON ACCOUNT OF.—A private action for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Interference with a common right does not, of itself, afford a cause of action by an individual, but special or particular damage consequent on the interference does: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623; 52 Am. St. Rep. 860. See extended note to *Mississippi Mills Co. v. Smith*, 80 Am. St. Rep. 554, and *Wylie v. Elwood*, 134 Ill. 281; 23 Am. St. Rep. 673.

NUISANCE—PRIVATE ACTION FOR—SPECIAL DAMAGES—WHAT CONSTITUTES.—One having a contract to haul a large amount of dirt from one side of a railroad to another sustains special damages from the unauthorized obstruction of a highway by the railroad company, if, by reason of such obstruction, his most convenient way for hauling the dirt is blocked, and his work retarded and his profits very much lessened by being thus compelled to haul the dirt over a longer route: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623; 52 Am. St. Rep. 860, and note. One cannot maintain an action for obstructing a public street, when his only special damage is, that in driving to and from his garden he is compelled to take a more inconvenient and circuitous route: *Zettel v. West Bend*, 79 Wis. 316; 24 Am. St. Rep. 715; *Steamboat Co. v. Railroad Co.*, 80 S. C. 539; 14 Am. St. Rep. 923.

Navigable Waters, Remedies for Obstruction of.*

Indictment or Information.—An unlawful obstruction placed in a navigable stream is a common or public nuisance, and is always remediable by indictment against the party or parties who have caused the obstruction to be placed in the stream: *County of Yolo v. Sacramento*, 36 Cal. 198; *Walker v. Shepardson*, 2 Wis. 384; 60 Am. Dec. 423; *People v. Vanderbilt*, 26 N. Y. 287; *Commonwealth v. Church*, 1 Pa. St. 105; 44 Am. Dec. 112; *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464; *Allegheny v. Zimmerman*, 95 Pa. St. 287; 40 Am. Rep. 649; *Sigler v. State*, 7 Baxt. 493; *Veazie v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Me. 256; 81 Am. Dec. 569; *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573; *Rex v. Russell*, 6 Barn. & C. 56; *Rex v. Ward*, 4 Ad. & E. 384; *Rex v. Grosvenor*, 2 Stark. 571; *Rex v. Tindall*, 6 Ad. & E. 143; *Regina v. Betts*, 16 Q. B. 1022; *Regina v. Randall*, Car. & M. 496; *Steamboat Co. v. Railroad Co.*, 80 S. C. 539; 14 Am. St. Rep. 923. Whether an obstruction to a navigable stream

*REFERENCE TO MONOGRAPHIC NOTE.

Navigable waters, remedies to vindicate right to use of: *Davis v. Winslow*, 81 Am. Dec. 566, 567.

is a public nuisance or not is a question which can only be determined by indictment, or by a bill in equity, to be prosecuted in either case at the instance of the public authorities: *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464. "The authorities, ancient and modern, are all consistent and point in one direction. Highways, whether on land or water, are designed for the accommodation of the public for travel or transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in judgment of law. They cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of valuable property even, so as to obstruct their use as public highways. All such obstructions, in the eye of the law, are deemed unreasonable. If, therefore, any person obstruct a stream, which is by law a public highway, by casting therein waste material, filth, or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, he does it at his peril; it is a public nuisance, for which he would be liable to an indictment and to an action at law by any individual who should be especially damaged thereby": *Veazle v. Dwinel*, 50 Me. 479-490.

In cases where the remedy by indictment appears to be inadequate, that is to say, if there appears to be imminent danger of irreparable mischief to the public right of navigation before the tardiness of the law can afford relief, equity may interpose and abate the nuisance upon a bill for an injunction filed by the attorney general: *Yolo County v. Sacramento County*, 36 Cal. 193; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Mayor etc. v. Alexandria Canal Co.*, 12 Pet. 91; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Attorney General v. Cohees Co.*, 6 Paige, 133; 29 Am. Dec. 755; *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361; *Attorney General v. New Jersey R. R. Co.*, 3 N. J. Eq. 136; *Thompson v. Patterson etc. R. R.*, 9 N. J. Eq. 526; *Allen v. Board of Chosen Freeholders*, 13 N. J. Eq. 68; *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 1; *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 631. The above cases show that this is the proper remedy when the rights of the public are threatened by the erection of a bridge in such manner as to totally or unnecessarily obstruct navigation, and the same rule applies to the erection of wharves or other structures unnecessarily interfering with the right to use a river as a highway. In such an action to remove an erection in a river on the ground that it is an injury to the public interests or the common right of navigation, it must clearly appear that a nuisance in fact exists: *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 1; *Harlem etc. R. R. Co. v. Paschall*, 5 Del. Ch. 435. The attorney general has the right, when the property of the state or the interests of the public are directly affected, to file an information at law or a bill in equity for their protection, without a relator: *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 631. Thus any unauthorized obstruction or interference with navigable streams by a private individual is a public nuisance, which may be enjoined upon application of the attorney general in the name of the people of the state: *People v. Gold Run etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80. When such nuisance causes both a public and a private injury, a suit is

equity may be brought by information and bill: Attorney General v. Lonsdale, L. R. 7 Eq. 377; Attorney General v. Forbes, 2 Mylne & C. 123.

Injunction by Private Party.—In cases of public nuisance by obstructing a navigable stream, a bill in equity, asking relief by way of prevention, can be maintained by a private person only on the ground of real or apprehended special damage, peculiar to himself, and distinct from that done to the public at large: Allen v. Board of Chosen Freeholders, 13 N. J. Eq. 68. But a private person may apply to a court of chancery on his own behalf alone to prevent or remove an obstruction to a navigable river which is specially and immediately injurious to him, although it is a public nuisance and affects the public as such: Works v. Junction R. R., 5 McLean, 425; Walker v. Allen, 72 Ala. 456; Mayor v. Alexandria Canal Co., 12 Pet. 91; Musser v. Hershey, 42 Iowa, 356; People v. St. Louis, 5 Gilm. 351; 48 Am. Dec. 839; Mississippi etc. R. R. Co. v. Ward, 2 Black, 485; State v. Wheeling etc. Bridge Co., 13 How. 518; Potter v. Menasha, 30 Wis. 492; Woodruff v. North Bloomfield etc. Min. Co., 8 Saw. 628. It is necessary for the plaintiff in such a bill to show that he has sustained and is still sustaining individual injury by the nuisance: Mississippi etc. R. R. Co. v. Ward, 2 Black, 485. And an obstruction will not be enjoined at the suit of a private person unless it clearly appears that the threatened structure will constitute a nuisance per se: St. Louis v. Knapp, 2 McCrary, 516. Equity will interfere by injunction to prevent threatened injury, when acts which create a public nuisance are about to be committed, causing also an inevitable private and special injury to the complainant, and the bill for such relief indicates how special injury will be accomplished from the erection of a public nuisance, as well as shows that special damages will be sustained by the complainant, where it charges that the defendant is placing obstructions in the bed of a navigable river in front of the complainant's lots and dock, thereby blocking up and obstructing the channel of the stream: Walker v. Shepardson, 2 Wis. 384; 60 Am. Dec. 423. A private person owning a tannery, flourmill, sawmill, stores, and warehouses, a wharf, and waterfront upon a navigable river and stock in a plank road leading from a town to the waterfront from which trade is carried on with other ports by means of vessels, and in which he participates, may enjoin a railway company from obstructing the navigation of the bay into which that river empties, when such obstruction will materially injure trade: Works v. Junction R. R., 5 McLean, 425. The landings and warehouses of an individual on the banks of a navigable river used in connection therewith are such private property as may be irreparably injured by the destruction of such navigability by building a bridge across the river. Hence, such individual may maintain suit for an injunction to restrain the erection of such bridge: Hickok v. Hine, 23 Ohio St. 523; 13 Am. Rep. 255. If persons without authority undertake the building of a bridge or drive piles in the bed of the stream, thus permanently interfering with and depriving another of the lawful use and enjoyment of his property, and create what, in strict legal sense, would be deemed to be a public nuisance, the party thus suffering di-

rect and special damage, is entitled to have such erection enjoined: *Potter v. Menasha*, 30 Wis. 492-494. The same rule applies to any sort of obstruction placed in a navigable stream with the effect last noted above: *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 339; *Musser v. Hershey*, 42 Iowa, 356. The driving of piles into the bed of a river extending a wharf so as to occupy three feet of a breadth of about sixty feet available for navigation may work such special private injury as to be subject to injunction: *Attorney General v. Terry*, L. R. 9 Ch. App. 423. Miners discharging their waste earth and other debris into a stream whence it flows into the main river, where the debris becomes mingled into one indistinguishable mass, passes on, and is deposited along the course of the river in the valley below, burying valuable lands, obstructing navigation, and creating a public and private nuisance, may be enjoined by an individual specially injured thereby: *Woodruff v. North Bloomfield etc. Min. Co.*, 8 Saw. 628. The driving of piles, building wharves, or bridges, or other obstruction in a navigable river must be of such nature as to materially obstruct navigation and create a purpresture, or a public and private nuisance, as well as inflict substantial special damage upon an individual before he is entitled to an injunction to prevent or abate it: *Harlan etc. Co. v. Paschall*, 5 Del. Ch. 435; *Allen v. Board of Chosen Freeholders*, 13 N. J. Eq. 68; *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 485.

If an erection placed in a navigable river obstructs it, and causes or will cause private and special damage to each of several persons, they have a common right to prevent its erection, and may join as complainants in a bill in equity for that purpose, or to abate it after it is erected: *Barnes v. Racine*, 4 Wis. 454; *Grant v. Schmidt*, 22 Minn. 1.

Private Action for Damages.—The obstruction of a navigable river is a public nuisance, and the general rule is, that individuals are not entitled to private redress against a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of suits in favor of private persons; but an individual who has sustained any particular, special, and direct injury over and above that sustained by the public generally as the direct result of such obstruction may also sustain a civil action to recover damages: *Steamboat Co. v. Railroad Co.*, 30 S. C. 539; 14 Am. St. Rep. 923; *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; 73 Am. Dec. 778; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Veazle v. Dwinel*, 50 Me. 479; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; 18 Am. Rep. 184; *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203; *Gifford v. McArthur*, 55 Mich. 535; *St. Louis etc. Ry. v. Meese*, 44 Ark. 414; *Heerman v. Beef Slough etc. Co.*, 8 Biss. 334; *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464; *Shaw v. Crawford*, 10 Johns. 236. It is only when an individual sustains a special injury, differing in kind, and not merely in degree or extent, from that sustained by the general public, that he may recover damages in a private suit: *Swanson v. Mississippi etc. River Boom Co.*, 42 Minn. 532. And in an action by a private individual to recover dam-

ages for obstructing a navigable stream, he must not only allege, but must also prove, a special and peculiar damage to his property, differing in kind from that sustained by the general public and resulting directly from the obstruction complained of: *Steamboat Co. v. Railroad Co.*, 30 S. C. 539; 14 Am. St. Rep. 923; *Dutton v. Strong*, 1 Black, 23; *Memphis etc. R. R. Co. v. Hicks*, 5 Sneed, 426; *Hall v. Kitson*, 4 Chand. 20; *Paker v. Boston*, 12 Pick. 184; 22 Am. Dec. 421; *Powers v. Irish*, 23 Mich. 429. But it is not indispensable to a recovery that the injury shall be proved precisely as laid. Thus, where the verdict was based upon the expenses incurred by a boat in making a trip, rendered fruitless by the obstruction, and the declaration based the damages upon the fact that the boat company were, by reason of the obstruction, deprived of the profits which they would otherwise have made by the use of such boat in the carrying trade along the stream, it was held that such variance could not affect the verdict: *Memphis etc. R. R. Co. v. Hicks*, 5 Sneed, 426. A complaint showing that obstructions, describing them and their effect, have been placed by defendant in a public navigable river, and alleging that plaintiff, "for many years last past, and during all the time hereinafter mentioned, has been the owner of a large sawmill on said river," that the said "obstructions in said stream are especially injurious to plaintiff, and that the only way in which it can carry on its business at its said mill is by floating logs down said stream to furnish stock for running the same, that the logs of plaintiff are continually delayed by said obstructions, and its mill is frequently compelled to be idle for want of logs at times when it could readily have a full stock of logs in its pond adjacent to said mill were they not kept back by said acts of the defendant, and, that by reason of said wrongful acts of defendant and the maintenance of said obstructions by him in said stream, plaintiff has been damaged in a certain amount," naming it, states facts showing injuries to plaintiff peculiar to itself for which it may recover damages: *A. C. Conn Co. v. Little Suamico Lumber etc. Co.*, 55 Wis. 580. A complaint which alleges that defendant has placed obstructions in a river navigable in fact in front of plaintiff's lot and dock, thereby blocking up and obstructing the channel of the stream, shows special damage to plaintiff, distinct from the public injury, and also indicates the manner in which the injury to plaintiff is accomplished: *Walker v. Shepardson*, 2 Wis. 384; 60 Am. Dec. 423. If, by the charter of a railroad company, it is authorized to build a bridge over a navigable stream, with the proviso that the navigation of the stream shall not thereby be obstructed, a temporary obstruction, such as the necessary framework and scaffolding used in the erection of the bridge, is an obstruction within the meaning of the charter, for which the company is liable to any one especially damaged thereby: *Memphis etc. R. R. Co. v. Hicks*, 5 Sneed, 426. A boom company is liable in damages for needlessly or willfully obstructing a navigable stream to the hindrance and consequent special injury of a person driving his own logs: *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203; *Shaw v. Crawford*, 10 Johns. 236. An action lies at the suit of anyone especially injured by the needless obstructing a navigable stream by keeping logs therein

longer than is necessary to float them: *Gifford v. McArthur*, 55 Mich. 535. If a millowner above casts his slabs, edgings, and other waste into a navigable stream to sink or float, without direction or control, and such action injuriously affects the use of the stream by occupants below, the latter can maintain a private suit therefor: *Veazie v. Dwinel*, 50 Me. 479; *Dwinel v. Veazie*, 44 Me. 167; 69 Am. Dec. 94; *Gerrish v. Brown*, 51 Me. 256; 86 Am. Dec. 569. The owner of land bordering on a stream, whether navigable or not, may maintain an action against a town laying out a highway and bridge across the stream, to recover any special damage caused to his land by the bridge being so built, or subsequently altered, as to obstruct the course of the stream more than it otherwise would be obstructed: *Lawrence v. Fairhaven*, 5 Gray, 110. The owner of a wharf upon a tidewater creek cannot maintain an action for an illegal obstruction to the creek, this being a common damage to all who use it, but for an obstruction adjoining his wharf, which prevents vessels from lying at it in the accustomed manner, he can maintain an action, as this is a damage particular and peculiar to himself: *Brayton v. Fall River*, 113 Mass. 218; 18 Am. Rep. 470; *French v. Connecticut River etc. Co.*, 145 Mass. 261. In *Enos v. Hamilton*, 27 Wis. 256, the plaintiff had a tannery in the village of New London, in Wisconsin, on the Wolf river, and procured the bark necessary to carry on his business at a point on said river about sixty miles above said village, and this was the only place where he could obtain such bark. Said river between the points mentioned was a navigable stream, and the defendant obstructed that part of the river so that plaintiff could not obtain such bark, and his business was injured. It was held that plaintiff had thus sustained peculiar and special damage, for which he could maintain a private action. An owner of a vessel or navigator of a navigable stream, whose vessel is detained or lost by the erection of a bridge, dam, or other structure in such stream, whether by authority or not, in such manner as to obstruct navigation, suffers such special damage as will entitle him to recover, provided he is free from fault himself, and, although such obstruction is a public nuisance, he can recover in a private action upon proof of special injury and damage: *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; 78 Am. Dec. 778; *Porter v. Allen*, 8 Ind. 1; 65 Am. Dec. 750; *Hogg v. Zanesville Canal etc. Co.*, 5 Ohio, 410; *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Jolly v. Terre Haute Draw Bridge Co.*, 6 McLean, 237; *Little Rock etc. R. R. Co. v. Brooks*, 39 Ark. 403; 43 Am. Rep. 277; *Plumer v. Alexander*, 12 Pa. St. 81; *Dudley v. Kennedy*, 63 Me. 465; *Philadelphia v. Collins*, 68 Pa. St. 106; *Powers v. Irish*, 23 Mich. 429. If the vessel is merely detained by the obstruction, the measure of damages is the value of the time while the vessel is detained: *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; 78 Am. Dec. 778; but if the vessel is injured or lost by reason of such obstruction without fault on the part of the navigator, the measure of recovery is the value of the injury, or of the vessel and such part of the cargo as is lost: *Porter v. Allen*, 8 Ind. 1; 65 Am. Dec. 750; *Hogg v. Zanesville Canal etc. Co.*, 5 Ohio, 410; *Jolly v. Terre Haute Draw Bridge Co.*, 6 McLean, 236.

Certainly, the decisions in some of the cases cited in this paragraph are not reconcilable with that in the principal case, in so far as it holds that carriers engaged in pursuing their business by vessels upon navigable streams are not entitled to maintain an action to recover damages resulting to them from unlawful obstructions placed therein. Their case presents one of unusual hardship, from the fact that the damages resulting to them must ordinarily be greater in amount than those suffered by other persons interested in the use and navigability of the stream. There can, in our judgment, however, be no doubt that the decision in the principal case is correct, and that it could not have been otherwise without denying the general principle, conceded, so far as we are aware, by all the authorities, that one cannot recover in a private action damages resulting to him from a public nuisance, unless his injury was different in kind from that suffered by the public generally. The same question was recently presented to the supreme court of Washington in the case of *Jones v. St. Paul etc. Ry. Co.*, 16 Wash. 25. The complaint alleged that the defendant, in constructing its bridge across the Snohomish river, so placed its piers that float wood brought down by a freshet lodged against them, and thereby entirely prevented the navigation of the river; that by reason thereof the plaintiff, who was the owner of a steamboat navigating the river, had been unable to take his boat down the river, and was compelled to keep it tied up for the period of twelve days, whereby he suffered damages in the sum of one thousand dollars. The complaint was demurred to, and, the demurrer being overruled by the trial court, judgment was subsequently entered against the defendant, from which it appealed. On this appeal the judgment of the trial court was reversed, the appellate court saying: "If the defendant was charged with having done anything that was unlawful, it was that it had obstructed the navigation of the river. That the obstruction of a navigable river or any other highway, when unlawful, constitutes a public nuisance is beyond question. To this effect are all the cases. That the general rule is that a public nuisance must be proceeded against in the name of the public by indictment or information is conceded. It is also conceded that for a public nuisance an action will not lie at the instance of a private party, unless he is specially injured thereby. If the injury which he suffers therefrom is that which is common to the entire public, he cannot maintain an action therefor." As against the claim by the respondent that the allegations of his complaint showed that he had been specially damaged, the court answered that the damage was by reason of his inability to navigate the river, that the entire public was as completely deprived of that right as was the plaintiff. Therefore, the damage which he suffered was the same as that suffered by the general public, and that the fact that his steamboat was so situated that the injury flowing from the prevention of navigation was different from that which others might have suffered did not make the injury special to him. That "the difference in the degree of the injury is not that which determines whether or not it is special. Damages are special only when of a different nature from those suffered by the

general public. This being so, the complaint failed to allege facts sufficient to show that the plaintiff was specially damaged by the obstruction. It is true he was prevented from going up and down the river with his steamboat, but such was the effect of the obstruction upon everyone desiring to navigate the stream, and his injury is in common with that of every such person, though its degree, owing to the peculiar business in which he was engaged, might have been different."

It is the duty of owners of a bridge across a navigable stream to use reasonable diligence to prevent such accumulations of drifts about the bridge piers as may endanger navigation. If they fail to exercise such diligence, they are liable for special damages resulting to vessels navigating the river and free from negligence in their management: *St. Louis etc. Ry. v. Meese*, 44 Ark. 414.

Under the rule that the special damage for which a private action will lie must be different in kind from that sustained by the community at large, it has been held that no action lies for damages for the obstruction of a navigable stream by bridging it so that the owner of land and a wharf above the bridge is prevented from reaching the wharf from the sea in vessels, although his wharf is the only one above the bridge used for business purposes, and he is compelled to abandon the use of the wharf and transport his goods by land: *Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1. The court said: "The act of the defendant for which the plaintiff seeks compensation is the building of a bridge across a navigable stream and arm of the sea. The direct injury alleged is to the navigation of the stream, to which the plaintiff is entitled only in common with the whole public, and the remedy for that injury is by indictment and not by private action. The fact that the plaintiff alone navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate": *Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1. The owner of a dock and wharf, who dredges out a channel from his dock over flats belonging to other persons, and lying between high and low water mark, cannot recover damages from a city for an injury to the channel by the discharge of sewage from a common sewer, whereby the channel is partly filled and the owner of the dock put to additional expense in getting vessels to his wharf. "If the filling up of the channel by which the access to the wharf was rendered more difficult or expensive, and the wharf less valuable, could be the subject of prosecution in any form, the injury did not differ in kind from that suffered by other persons owning lands bounding on the harbor or navigating over the flats, and the remedy must be sought by indictment for an injury to the public right of navigation, and not by private suit: *Breed v. Lynn*, 126 Mass. 867. But if sew-

ers constructed by a city cause a navigable stream to be filled up directly in front of and adjoining plaintiff's wharf, so that his vessels cannot lie at the wharf on account of the diminished depth of the water, it has been held that the injury was different in kind, and not merely in degree, from that sustained by the general public, and that the plaintiff was entitled to recover damages in a private suit: *Brayton v. Fall River*, 113 Mass. 218; 18 Am. Rep. 470; *Haskell v. New Bedford*, 108 Mass. 208; *Franklin Wharf Co. v. Portland*, 67 Me. 46; 24 Am. Rep. 1. The Massachusetts supreme court makes this distinction, that whenever the obstruction immediately adjoins or is against the front of plaintiff's premises, it is to him a private nuisance, for which he may maintain an action for damages, or which may be restrained by injunction, but, when it is at a distance from his land, and the only injury he sustains consists of inconvenience or loss of access thereto, without direct or clearly defined damage, other than the general depreciation in the value of property common in a greater or less degree to all the riparian owners similarly situated, and preventable by abatement of the nuisance, a private owner cannot maintain a private action to recover damages: *Brayton v. Fall River*, 113 Mass. 218; 18 Am. Rep. 470; *Haskell v. New Bedford*, 108 Mass. 208; *Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1; *Harvard College v. Stearnes*, 15 Gray, 1; *Breed v. Lynn*, 128 Mass. 367.

The right of navigation is a public and not a private right, and a riparian owner cannot maintain an action to recover for an unlawful obstruction which prevents his use of this public right. To entitle him to maintain a private action, the obstruction must constitute an invasion or violation of some private right, as distinguished from the public right of navigation: *Swanson v. Mississippi etc. Boom Co.*, 42 Minn. 532. A person cannot, by the use of a navigable dock, gain such right of way as will enable him to recover damages for obstructing it by building a railroad across it: *Thayer v. New Bedford R. R. Co.*, 125 Mass. 258.

SAMPLE v. LONDON AND LANCASHIRE FIRE INSURANCE COMPANY.

[46 SOUTH CAROLINA, 491.]

INSURANCE—CONSTRUCTION OF CONTRACT—LIMITATIONS ON TIME FOR BRINGING ACTION.—A condition in a fire insurance policy requiring an action for a loss thereunder to be brought within twelve months next after the fire must be construed in connection with other conditions providing that the loss shall not become payable until sixty days after notice and proof of loss, and that no suit shall be maintained on the policy until after full compliance by the insured with all of its requirements. Under such a policy, the insured has a right to bring suit to recover for a loss at any time within twelve months after the accrual of the right of action, regardless of the time of the fire and loss.

INSURANCE—LIMITATION OF TIME FOR BRINGING SUIT.—A contract of fire insurance, stipulating as to the time within which suit may be brought after loss, is not affected by a subsequent statute relating to the time for commencing actions on policies of insurance.

Shepherd Brothers, for the appellant.

J. W. Thurmond, for the appellee.

⁴⁹² JONES, J. On the sixth day of April, 1891, the defendant company issued to the plaintiff, Mrs. Sample, a fire insurance policy on her dwelling-house in Edgefield county. The policy contained a provision that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." The requirements to be complied with included the filing of proofs of loss within sixty days after the fire. The policy also provided that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required." The property insured was destroyed by fire on the twenty-third day of April, 1891. Due proof of loss was received by the company on the fourteenth day of June, 1891. "On Monday after the third Sabbath in August," following, the adjuster of the defendant company offered to pay the plaintiff ten or fifteen dollars in settlement of her claim under the policy, which she declined, wherefore the adjuster "refused to pay the loss." Suit on the policy was commenced July 5, 1892, more than twelve months after the fire, but within twelve months after the accrual of the right of action under the policy. This cause was first tried at Edgefield, before Judge Hudson and a jury, November, 1893, and he directed a verdict in favor of the defendant company, ruling that the action could not be maintained, the plaintiff having admitted at the trial "that it was stipulated in the policy that no liability should attach to the insurance company under its policy so issued unless action was brought within ⁴⁹³ twelve months after the date of the fire, and that the fire occurred in April, 1891, and the action was commenced on the 5th of July, 1892." On appeal, this court ordered a new trial, holding that the circuit court erred in directing a verdict. The cause came on again for trial March, 1895, and resulted in a verdict for the plaintiff for three hundred and six dollars and eighty cents, for which judgment was duly entered. At the close of the testimony in behalf of the plaintiff, the defendant's counsel moved for a nonsuit, on the ground "that the suit was not brought within twelve months next after the fire." The motion for nonsuit was overruled, and defendant now excepts thereto.

The presiding judge charged the jury: "That all the conditions of the policy must be considered together as one contract, and that one year does not mean one year from the fire, but one year (twelve months) from the time that plaintiff had the right to bring this action." Defendant excepts to the charge as error. The presiding judge further charged the jury, "that even if the insurance company had the right to stand upon that limitation [and that if] strictly considered, it meant one year from the date of the fire, yet if an adjuster was sent down, who entered into negotiations with the plaintiff looking to a settlement of that loss, long after that time, to wit, some time the latter part of August, then it amounts to waiver, by conduct of the right of the insurance company to stand strictly upon its contract," to which charge the defendant excepts.

The decisive point of the controversy in this case is, whether the twelve months' limitation for suit, under the policy, commences to run from the time of the fire or at the expiration of sixty days after the filing of the proof of loss. On this point there is great conflict of authorities, and an attempt to reconcile them is hopeless. After very careful examination and consideration of the question, in the light of the many decided cases from the courts bearing thereon, this court concurs with the circuit court in its construction of the policy of insurance, ⁴⁹⁴ and holds that the action, having been begun within twelve months from the expiration of the sixty days after the filing of the proofs of loss with the company, is sustainable as within the time contemplated by the parties to the contract. Standing alone, the stipulation that "suit shall not be sustainable unless commenced within twelve months next after the fire," is clear, definite, and unambiguous, but it is coupled with the further provision that suit should not be sustainable "until after full compliance with all the foregoing requirements." These requirements are numerous, and, when technical compliance is insisted upon by the company, considerable time may be consumed in meeting them. Then there is the further stipulation that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proofs of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. By this provision the company is exempt from suit for sixty days in any event, and for as much longer time as may be required to make satisfactory proof of loss and secure an award from appraisers if required. No award was required in this case, but, under the policy, it may have been. Time would necessarily be consumed in securing the

appointment, action, and award of appraisers. Proofs of loss may be delivered to the company within the sixty days required by the policy, but there may be delay in making the proofs conform strictly with the many requirements of the policy, and the proofs may not be satisfactory to the company until after much correspondence and amendment. Plans and specifications, in the case of a building destroyed, must be furnished, if required. The insured, if required, must furnish a certificate of the magistrate or notary public living nearest the place of the fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify. It is quite possible, without fault of the insured, and when the doctrines ⁴⁹⁵ of waiver and estoppel cannot be invoked against the insurer in an honest effort to make satisfactory proofs of an honest loss, that twelve months may expire before full compliance by the insured with all the requirements of the policy. Under an iron-bound rule of construction, that suit on such a policy must be brought within twelve months after the fire, the claim might be barred before it accrued. Such a construction, therefore, leads to absurdity. There is inconsistency between the clause of the policy compelling the insured to sue within a given time, and the clauses exempting the insurer from suit for an indefinite period within that time. Ordinarily, the right to sue within a certain time means that the right may be asserted on any day of that time. Both parties must have intended that the insured should have a reasonable time in which to assert his right after the accrual of his right, and that time was fixed at twelve months. If the question had arisen under a statute of limitation, the rule undoubtedly would be, that the time commenced to run on the accrual of the cause of action. It seems that it is not an unreasonable construction to say that the parties of this contract, by the special limitation therein agreed upon, meant to allow the stipulated time after the accrual of the right of action. It is a well-settled rule of construction of contracts of insurance that their provisions should be strictly construed against the insurer, and liberally construed in favor of the insured. In *Kratzenstine v. Western Assur. Co.*, 116 N. Y. 54, the court said: "Where an insurance contract is so drawn that it is manifestly ambiguous, so that reasonable and intelligent men, on reading it, would honestly differ as to its meaning, the doubt should be resolved against the company, because it prepared and executed the agreement, and is responsible for the language used and the uncertainty thereby created." Mr. Justice Harlan, in *Moular v. Amer-*

ican etc. Ins. Co., 111 U. S. 335, said: "The doubt as to the intention of the parties must, according to the settled doctrines of the law of insurance, recognized in all adjudged cases, be resolved against the ⁴⁹⁶ party whose language it becomes necessary to interpret." Unquestionably, it is true that "reasonable and intelligent men" not only may differ, but have differed, as to the true construction of such a policy. Numerous and learned courts, construing such a policy, have held that the limitation commences to run from the time of the fire: See *Virginia Fire etc. Ins. Co. v. Wells*, 83 Va. 736; *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; 33 Am. Rep. 47; *Chamber v. Atlas Ins. Co.*, 51 Conn. 17; 50 Am. Rep. 1; *Tasker v. Kenton Ins. Co.*, 58 N. H. 469; *Farmers' etc. Ins. Co. v. Barr*, 94 Pa. St. 345; also, *Universal etc. Ins. Co. v. Weiss*, 106 Pa. St. 20; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170; *King v. Watertown etc. Ins. Co.*, 47 Hun, 1; *Schroder v. Keystone Ins. Co.*, 2 Phila. 286; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 14; *Glass v. Walker*, 66 Mo. 32; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; also, *State Ins. Co. v. Stofels*, 48 Kan. 205; *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870; *Fullam v. New York Union Ins. Co.*, 7 Gray, 61; 66 Am. Dec. 462. This is a formidable array of authorities supporting appellant's contention. But, on the other hand, supporting the view of this court, there is equal, if not greater authority. Indeed, the court, in *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 16, following *Glass v. Walker*, 66 Mo. 32, and in *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151, cases greatly relied upon by appellant, concedes that the weight of authority is in support of the view announced by this court. In *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151, the court said: "It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action has accrued, although more than the limited time has elapsed since the loss occurred." Wood on Insurance, section 469, states as follows: "When a policy stipulates that no action shall be brought unless commenced within a certain time after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of loss have been received, the limitation does not ⁴⁹⁷ attach until after the period in which the company has in which to pay the loss has expired." In May on Insurance, section 479, it is stated that "generally the limitation will be construed to run from the time when the loss be-

comes due and payable rather than from the time when the loss actually occurs. . . . Where the loss is not payable until sixty days after proof of loss, and no action can be begun until an award has fixed the amount of the damages, nor after six months from the loss, the limitation of suit does not begin to run from loss, but from the time the right of action accrued": See, also, Bacon on Benefit Societies, 446. So that the text-writers sustain our view. A distinction is attempted to be made in some cases to the effect that if the policy provides that suit must be commenced within twelve months "after the fire," the time begins to run from the time of the fire; whereas, if the policy provides that the suit must be commenced within twelve months "after the loss occurs" or "after the loss or damage accrues," the time begins to run from the accrual of the right of action. But this distinction does not seem to be a sound one, since the loss or damage insured against by a fire insurance policy must occur or accrue, if at all, at the time of the fire. The loss or damage must necessarily precede the proofs of loss. So far as we have ascertained, the federal courts hold the rule of construction to be as herein announced: See *Spare v. Home Mut. Ins. Co.*, 9 Saw. 145; 17 Fed. Rep. 568; *Vette v. Clinton Fire Ins. Co.*, 30 Fed. Rep. 668; *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352; *Steele v. Phoenix Ins. Co.*, 51 Fed. Rep. 715, overruling 47 Fed. Rep. 863. The following cases from state courts support the same view: *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407; also, *Barber v. Fire etc. Ins. Co.*, 16 W. Va. 658; 37 Am. Rep. 800; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; also, *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704; *Quinn v. Capital Ins. Co.*, 71 Iowa, 615; *Matt v. Iowa Mut. Aid Assn.*, 81 Iowa, 135; 25 Am. St. Rep. 483; *Mayor v. Hamilton etc. Ins. Co.*, 39 N. Y. 45; 100 Am. Dec. 400; *Hay v. Starr Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Sun Ins. Co. v. Jones*, 54 Ark. 376; *Case v. Sun* ⁴⁹⁸ *Ins. Co.*, 83 Cal. 473; *Fireman's Fund Ins. Co. v. Buckstaff*, 38 Neb. 150; 41 Am. St. Rep. 727; *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459; *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135. Construing, therefore, the policy as a whole, and placing on clauses capable of two constructions the interpretation most favorable to the insured, we are constrained to hold that the parties to this contract of insurance contemplated that the insured should have twelve months in which to sue after the accrual of the right of action. The action was brought in time, and there was no error in

the refusal of the motion for nonsuit, and in the charge of the circuit judge on this point.

Having reached this conclusion, it is unnecessary to consider whether there was error in the charge of the trial judge in the matter of waiver, since, if the action was brought in time under the terms of the policy, there was no need and no room for the application of the doctrine of waiver; and, if there was any error in the charge on this point, it was entirely harmless.

Nor need we pass upon the question raised by respondent to sustain the judgment below, viz., that the act entitled "An act relating to the time for commencing actions on policies of insurance in this state," approved December 16, 1891, allows six years in which to bring actions on policies, notwithstanding stipulations therein to the contrary. It will be noted that the contract of insurance under consideration was made April, 1891, and the loss thereunder was sustained April, 1891, before the passage of this act. At the time when this contract was made, it was unquestionably lawful for the parties to stipulate when suits should be brought: Wood on Insurance, sec. 460; May on Insurance, sec. 478; Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386.

The judgment of the circuit court is affirmed.

INSURANCE — CONSTRUCTION OF CONTRACT — LIMITATIONS AS TO TIME OF BRINGING ACTIONS UPON.—When an insurance policy requires notice and proof of loss to be furnished within thirty days, and action to be commenced within six months after the loss, and provides that the company will pay the loss within ninety days after notice and proofs of loss have been received at the company's home office, the statute of limitations begins to run against the cause of action only from the expiration of the ninety days, and the suit may be commenced at any time within six months thereafter: German Ins. Co. v. Fairbank, 32 Neb. 750; 29 Am. St. Rep. 459; Fireman's Fund Ins. Co. v. Buckstaff, 38 Neb. 150; 41 Am. St. Rep. 727, and note. For the holding that the limitation begins at the date of the fire and not when the liability is fixed, see Hart v. Citizens' Ins. Co., 86 Wis. 77; 39 Am. St. Rep. 877; State Ins. Co. v. Meesman, 2 Wash. 459; 26 Am. St. Rep. 870, and note.

STATUTES — RETROSPECTIVE—INTERPRETATION.—A fundamental canon of construction is, that a statute shall always be interpreted so as to operate prospectively and not retrospectively, unless the language is so clear as to preclude all question as to the intent of the legislature: Lane's Appeal, 57 Conn. 182; 14 Am. St. Rep. 94, and note; Richardson v. Cook, 37 Vt. 599; 88 Am. Dec. 622; Williams v. Johnson, 30 Md. 500; 96 Am. Dec. 613; note to Kennebec Purchase v. Laboree, 11 Am. Dec. 98.

CASES
IN THE
SUPREME COURT
OF
UTAH.

LOWE v. SALT LAKE CITY.

[18 UTAH, 91.]

REAL PROPERTY—SAFETY OF PREMISES — NEGLIGENCE—LIABILITY OF OWNER.—The owner or occupant of premises is liable in damages to persons coming thereon, using due care, at his invitation or inducement, express or implied, on business to be transacted with, or permitted by, him, for an injury caused by the unsafe condition of such premises, known to him, and not to them, and which, through negligence, he suffered to exist without notice to them.

REAL PROPERTY—SAFETY OF PREMISES — NEGLIGENCE—DUTY AND LIABILITY OF CITY AS OWNER.—If a city rents a portion of its city hall to the legislature, for legislative purposes, and a legislator, being rightfully on the premises and without knowledge of their dangerous condition, attempts to cross the back yard of the city hall, in a dark night, for the purpose of urinating, but strays from the path leading from the hall to an outhouse, and is injured by falling into an unprotected hatchway, the city, knowing the dangerous condition of the premises, and not having given notice thereof, is liable for the injury, because of its negligence in failing to have the yard lighted, and in leaving the hatchway unguarded.

REAL PROPERTY—SAFETY OF PREMISES—CONTRIBUTORY NEGLIGENCE — RECOVERY NOTWITHSTANDING TECHNICAL TRESPASS.—If a person who has been injured, through the negligence of an owner or occupant, while committing a trespass, shows that he did not know that he was trespassing, or that the trespass was purely technical, and only such as he might reasonably suppose the owner or occupant would permit without objection, such trespass will not prevent a recovery. It may be a circumstance tending to show a want of proper care, but is not, of itself, sufficient to convict the injured party of contributory negligence.

TRIAL—PRACTICE AS TO NONSUIT, AND ALLOWANCE THEREOF.—Upon a motion for a nonsuit, it is the duty of the court to assume as true all facts which could be properly found by a jury from the evidence, and to give the plaintiff the benefit of every fair and legitimate inference and intendment which can arise from the evidence; and, unless it appears, after this is done, that the plaintiff has failed to prove his case, a nonsuit should not be granted.

NEGLIGENCE—WHEN A QUESTION OF LAW, AND WHEN OF FACT.—Before the question of negligence becomes one of law for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusions from them. If the facts proved are such that reasonable men may fairly differ as to whether or not there was negligence, the question is one for the jury to consider.

INSTRUCTIONS—REQUISITE OF EXCEPTION AVAILABLE ON APPEAL.—An exception to a charge given by the court to the jury is unavailing on appeal, where any portion of the charge is correct, unless the exception is strictly confined to the objectionable matter, and the judge's attention called thereto, at the time of the delivery of the charge, so as to afford him an opportunity to make a correction.

Action by William Lowe against Salt Lake City for damages sustained by reason of plaintiff's falling into a hatchway while crossing the back yard of the city hall at night. There was a judgment for the plaintiff, and the defendant appealed.

E. D. Hoge and W. G. Van Horne, for the appellant.

Miner & Hiles, for the respondent.

⁹⁴ **BARTCH, J.** This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff because of the negligence of the defendant. It is admitted in the record that the defendant rented a portion of the city hall to the legislature, as a legislative chamber, for the purpose of holding its session in 1889 therein, and received rent for the same, and that the legislature was rightfully there. The material facts shown by the evidence are, in substance, that the defendant was the owner and occupant of the premises in question, at the time in question; that the plaintiff was a member of the legislature, and was rightfully on the premises, ⁹⁵ attending a session thereof, on the night of the 10th of March, 1890, when the accident happened; that there was an outhouse in the rear of the premises, back of the city jail; that said outhouse, at the time of the accident, was in a very filthy condition, unfit for use, and was locked up, and the key kept in some office in said hall, but the plaintiff did not look for it; that plank steps led from the hallway of the city hall building to the ground in the jail yard; that there was a light in the hallway, but none in the jail yard, although it was the duty of the city jailer to light one on the northwest corner of the jail, and, because of his failure to do so, it was dark in said yard; that the hatchway was ten to fourteen feet west of said steps, was connected with the building, was about five feet deep, four feet wide, and extended south from the main building about twelve feet, having cap-stones on top of the edges, which were on a level with the ground, and was

entirely unprotected by railing, cover, or otherwise; that on the night in question it was dark, and the plaintiff had occasion to go into said yard to urinate; that he went out by said steps, turned west, fell into said hatchway, and was seriously injured. There is no evidence to show that the defendant notified the plaintiff of the existence of the hatchway, or that the plaintiff knew of its existence before the accident. The jury returned a verdict in favor of the plaintiff in the sum of five hundred dollars. A motion for a new trial having been overruled, and judgment on the verdict entered, the defendant appealed from both the order overruling its motion for a new trial and from the judgment.

Counsel for the appellant, in their brief, concede that the respondent had the right to pass from the city hall building into the rear yard, but limit said right to a path leading from the hall to the outhouse, and insist that when he turned away from the path he became a trespasser ⁹⁶ and therefore could not recover. There is, however, nothing in the pleadings or evidence which shows such a limitation of the respondent's right to use said yard. It is admitted that the legislature was rightfully holding its sessions in the building, having rented it for that purpose from the defendant, and the respondent was a member of the legislature, and in the performance of his public duties, at the time of the accident. The yard was appurtenant to the hall, and in the absence of any restrictions, the members of the legislature had a right to make a proper use thereof; and, from the circumstances surrounding this case, we cannot say that the respondent was attempting to make an unlawful use of it, and was a trespasser. Nor can we say that he was at the time of the accident where he had no legal right to be, as is contended by counsel. The authorities cited in support of this contention are not applicable to the facts and circumstances of this case. We think that the leaving of the hatchway in an unguarded and unprotected condition by the defendant, as shown by the evidence, and the failure to have any light in the yard by which its condition could be seen, was such negligence as rendered it liable for any injury which was caused thereby. While the owner or occupant of premises is not an insurer of them against accidents from their condition, still, so far as he is able to do so by the exercise of ordinary care and vigilance, he is bound to keep them in such a condition that persons who are rightfully using them will not be injured by any insecurity or insufficiency for the purpose to which they are put. If such owner or occupant fails in his duty in these regards, he becomes a wrongdoer and as such will be liable for any injury which results as a natural consequence from

his misconduct, and which might reasonably have been anticipated as likely to occur as a natural and probable result thereof: 2 Shearman and Redfield on Negligence, sec. 702; ⁹⁷ Ryder v. Kinsey, 62 Minn. 85; 54 Am. St. Rep. 623; Ransier v. Minneapolis etc. Ry. Co., 32 Minn. 331; Mullen v. St. John, 57 N. Y. 567; 15 Am. Rep. 530. So the law is well settled that the owner or occupant of premises is liable in damages to persons coming thereon, using due care, at his invitation or inducement, express or implied, on business to be transacted with or permitted by him, for an injury caused by the unsafe condition of such premises, known to him, and not to them, and which, through negligence, he suffered to exist without notice to them: Bennett v. Railroad Co., 102 U. S. 577; Carleton v. Franconia etc. Steel Co., 99 Mass. 216; Davis v. Central Congregational Soc., 129 Mass. 367; 37 Am. Rep. 368; Beck v. Carter, 68 N. Y. 283; 23 Am. Rep. 175; Nickerson v. Tirrell, 127 Mass. 236; Hayward v. Merrill, 94 Ill. 349; 34 Am. Rep. 229. In the case at bar, the defendant, by invitation, and leasing of the premises, induced the respondent to come upon them for a legitimate purpose, knowing their dangerous condition, without giving him notice thereof. It was therefore liable to him for the injury, in the absence of contributory negligence on his part.

Even if the contention of counsel for the appellant, that at the time the respondent received the injury he was a trespasser, and was where he had no legal right to be, were conceded, that fact alone would not defeat his action, as matter of law, especially if he was not guilty of negligence which contributed to the injury. If a person who has been injured, through the negligence of the defendant, while committing a trespass, shows that he did not know that he was trespassing, or that the trespass was purely technical, and only such as he might reasonably suppose the defendant would permit without objection, and that in fact it did not cause any appreciable annoyance or injury to the defendant, then his recovery will not be prevented by reason of such trespass. Nor although it may be a circumstance tending to show want of proper care, will it, in itself, be sufficient to convict ⁹⁸ him of contributory negligence. In such case, after the presence of such person is known to the defendant, he is bound to exercise ordinary care to avoid injury to him: Shearman and Redfield on Negligence, secs. 97, 98; Marble v. Ross, 124 Mass. 44; Daley v. Norwich etc. R. R. Co., 26 Conn. 591; 68 Am. Dec. 413; Brown v. Lynn, 31 Pa. St. 510; 72 Am. Dec. 768.

We think the error assigned on the admission of evidence is not well taken. Nor do we think the court erred in refusing to

grant the motion for a nonsuit. It is clear that the evidence of the plaintiff was of such a character that the court could not say that the defendant was not guilty of negligence which caused the injury. When a motion for nonsuit is interposed, it becomes the duty of the court to assume as true all facts which could be properly found by a jury from the evidence, and then, after giving the plaintiff the benefit of every fair and legitimate inference and intendment which can arise from the evidence, in order that the court may grant the motion it must appear that the plaintiff still has failed to prove his case. Before the question of negligence becomes one of law, for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusions from them. If the facts proven are such that reasonable men may fairly differ as to whether or not there was negligence, the question is one for the jury to consider: *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408; *Delaware etc. R. R. Co. v. Converse*, 139 U. S. 469; *Wines v. Rio Grande etc. Ry. Co.*, 9 Utah, 228; *Wallace v. Suburban Ry. Co.*, 26 Or. 174; *Smith v. Rio Grande etc. Ry. Co.*, 9 Utah, 141. In this case the admission in the pleadings, and the testimony of the plaintiff, tend to establish the facts above set forth. Assuming them to be true, in accordance with the principles stated, they clearly present such a question of negligence that reasonable men might differ in their conclusions drawn from ⁹⁹ them. The determination of the question was therefore one for the jury, and the court properly denied the motion for a nonsuit.

The remaining error assigned relates to the instructions of the court to the jury. No exception was taken to the charge at the time of its rendition, nor is there any shown by the transcript. The first time that any exception appears is in the abstract, and then only to large portions of the charge, without reference to the particular matter which is the subject of complaint. Under the circumstances, the error here assigned presents no question for review on appeal. An exception, to be of avail in an appellate court, should, in a case where any portion of the charge is correct, be strictly confined to the objectionable matter, and the judge's attention called thereto, at the time of the delivery of the charge, so that an opportunity may be afforded him to make a correction. The writer of this opinion cited numerous authorities on this subject in his dissenting opinion in the case of *People v. Berlin*, 10 Utah, 39, 41, and on this question the case of *People v. Hart*, 10 Utah, 204, wherein said dissenting opinion was referred to and adopted as a correct statement of the law on this point, is reaffirmed. The majority opinion in *People v. Berlin*,

10 Utah, 39, so far as it is in conflict herein, is disapproved: See, also, Marks v. Tompkins, 7 Utah, 425.

We think there is no reversible error in the record of this case. The judgment is affirmed.

Zane, C. J., concurs.

REAL PROPERTY—SAFETY OF PREMISES—DUTY AND LIABILITY OF OWNER.—The owner of property must keep it in a reasonably safe condition for the use of those who come upon it at his invitation, and is liable for injuries occasioned by his neglect to do so: Notes to Beehler v. Daniels, 49 Am. St. Rep. 793; Baddeley v. Shea, 55 Am. St. Rep. 62; Davis v. Central etc. Soc., 120 Mass. 367; 37 Am. Rep. 368; Hayward v. Miller, 94 Ill. 349; 34 Am. Rep. 229, and note; Ryder v. Kinsey, 62 Minn. 85; 54 Am. St. Rep. 623; as where injury is caused by a pit or snare on the premises: Beck v. Carter, 68 N. Y. 283; 23 Am. Rep. 175; monographic note to McAlpin v. Powell, 26 Am. Rep. 562, discussing the liability of the owner of dangerous premises for injury to one lawfully thereon. That the plaintiff was a technical trespasser at the time does not defeat his action for injuries through another's negligence, unless his trespass contributed materially to the injury received: Daley v. Norwich etc. R. R. Co., 26 Conn. 591; 68 Am. Dec. 413, and note.

TRIAL—ALLOWANCE OF NONSUIT—PRACTICE.—A nonsuit should not be granted if there is substantial evidence produced by the plaintiff in support of his case which should be weighed by the jury: Note to Gardner v. Waycross etc. R. R. Co., 54 Am. St. Rep. 437.

NEGLIGENCE—WHEN A QUESTION OF LAW, AND WHEN OF FACT.—If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question of negligence is one for the jury; otherwise, it is for the court: Ryder v. Kinsey, 62 Minn. 85; 54 Am. St. Rep. 623; Consolidated Traction Co. v. Scott, 58 N. J. L. 682; 55 Am. St. Rep. 620.

APPELLATE PRACTICE.—EXCEPTIONS ON APPEAL must be specific, pointed, and explicit, and, if indefinite, cannot be considered: Atkins v. Field, 89 Me. 281; 56 Am. St. Rep. 424; and this applies to exceptions to instructions: Tousey v. Roberts, 114 N. Y. 312; 11 Am. St. Rep. 655; Newby v. Harrell, 99 N. C. 149; 6 Am. St. Rep. 503.

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[13 UTAH, 129.]

JOINT LIABILITY—CONTRIBUTION AMONG JOINT TORT FEASORS—WHEN NOT ALLOWABLE.—It is a maxim that there shall be no contribution among wrongdoers, but this rule has many exceptions and applies only to cases where the tort is a known and meditated wrong. No right of action can be based upon a violation of the law, and if a wrongdoer knows that his act is illegal, or if the circumstances are such as to render ignorance of its illegality inexcusable, then he will be left by the law where his wrongful action has placed him. When the act is known to be a violation of law, or is apparently of that nature, the wrongdoer will not be allowed to appeal to the law for indemnity.

JOINT LIABILITY—CONTRIBUTION AMONG JOINT TORT FEASORS—WHEN ALLOWABLE.—If one charged with be-

ing a joint tortfeasor was innocent of any illegal purpose, ignorant of the nature of his act, which was apparently honest and proper, and he apparently acted in good faith, with an honest purpose, in what appeared to be right, and, from the nature of the case, could not be presumed to know that he was doing an illegal act, and the tort was one arising from construction or inference of law, and not arising from a known meditated wrong, he may then have contribution.

JOINT LIABILITY — CONTRIBUTION AMONG JOINT TORT FEASORS—WHERE ALLOWABLE—FORCIBLE ENTRY AND DETAINER.—If a party claiming property in good faith seeks to obtain possession thereof by legal process, as by an action of forcible entry and detainer, in a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting the claimant's rights; and if it is decided that such claim is invalid, or that the court has no jurisdiction, the law will imply an indemnity to such agent, who believes as his principal does, for any damages he was made to pay on account of such acts done in pursuance of his principal's directions, within the scope of his instructions and employment.

JOINT LIABILITY — CONTRIBUTION AMONG JOINT TORT FEASORS—WHEN ALLOWABLE — ILLUSTRATION—FORCIBLE ENTRY AND DETAINER.—If a naked trustee, or agent, enters a suit of forcible entry and detainer at the request, and for the benefit, of the cestui que trust, and obtains a judgment in a court having no jurisdiction in the case; but such trustee, or agent, is afterward sued jointly with the principal for damages arising out of the illegal proceedings, and judgment is rendered against both the principal and the trustee, or agent, which the latter pays, such innocent trustee, or agent, may have contribution from the principal, the other joint tortfeasor, as the tort is one arising from a construction or inference of law, and not from a known meditated wrong.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORTS OF WIFE.—While the statutes of the state of Utah have not expressly repealed the common-law rule that the husband is liable for the torts of his wife, they have made such modifications of his rights and her disabilities as wholly to remove the reason for the liability. It is assumed that she is fully capable of controlling her own actions, and can, and will, act independently of her husband, and she must, therefore, respond alone for her torts.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORT OF WIFE BEFORE MARRIAGE.—A husband is not liable for the torts of his wife, committed before he married her, and while she was the wife of another man.

LIMITATIONS OF ACTIONS.—IN AN ACTION FOR INDEMNITY AGAINST ACTUAL DAMAGES, the party indemnified has no cause of action until he is damaged. Hence, the statute of limitations does not commence to run until the judgment rendered against him for damages is paid.

Action for contribution, brought by Culmer against R. G. Wilson and Belle Wilson, to recover damages paid by the plaintiff as a joint tortfeasor. The plaintiff, being a naked trustee for Belle Tompkins, who afterward became Mrs. Wilson, had, at her instigation, brought an action of forcible entry and detainer before a United States commissioner, who had no jurisdic-

tion of the case. Judgment was rendered, and the defendant in that case, Anna Marks, then sued Culmer and Mr. and Mrs. Tompkins, jointly, for trespass committed by them in the execution of the unlawful judgment of the commissioner. Plaintiff paid the damages awarded against him, and then brought this action for contribution, at which time Mrs. Tompkins, having been divorced from her former husband, was the wife of R. G. Wilson. The defendants demurred, and, from a judgment sustaining the demurrer, the plaintiff appealed.

Sutherland & Murphy, for the appellant.

C. S. Varian, for the respondents.

¹³⁵ MINER, J. The complaint in this case shows that the plaintiff held title to certain real estate in Juab county, merely as trustee for the use and benefit of the defendant Belle Wilson, who was then the wife of Harvey K. Tompkins; that plaintiff had no beneficial interest therein, and that in September, 1887, he conveyed the property to said Belle Wilson; that the plaintiff simply held the title for her in trust on account of the intemperate habits of her then husband; that prior to said conveyance to her, in 1887, the said Belle Wilson informed the plaintiff that one Anna Marks was wrongfully entering upon said property, by attempting to take possession of a portion of the same, and erect a house thereon, and that said acts were ¹³⁶ an interference with her rights in said property, and requested plaintiff to consult an attorney, and cause such proceedings to be taken as would prevent said Anna Marks from maintaining her tortious possession of said property; that plaintiff gave full credit to such statements and instructions, and, in pursuance to said Belle Wilson's request, he, fully believing in the merits of her claim, consulted an attorney, and followed the instructions and advice of said attorney, and filed a complaint prepared by said attorney, with a commissioner appointed by the supreme court, and having jurisdiction of a justice of the peace, residing and holding his office at Provo City, Utah county, to commence an action in the name of Belle Tompkins (now Belle Wilson) against said Anna Marks, for forcible entry and detainer of the premises; that at such time the jurisdiction of a supreme court commissioner was not defined by law; that said plaintiff fully believed that said commissioner had jurisdiction to try said action; that, acting in concert with said attorney, and under his directions, and under the directions of the said Belle Wilson, he assisted in the prosecution of said suit to a judgment for a restitution of the premises, and a writ of restitution was issued by said commissioner, and placed in the

hands of a constable at Eureka, Juab county, for execution; that all the acts of said plaintiff were simply to advance the interests of said defendant Belle Wilson, fully believing she had suffered wrongs from said Anna Marks, and that said proceedings were proper and lawful to protect her rights; that said writ was executed at the request of said Belle Wilson in December, 1887, but that plaintiff was not present at the execution of the same; that, under said writ, Anna Marks was ejected, and Belle Wilson restored to possession; that on February 27, 1888, said Anna Marks and Wolf Marks, her husband, brought an action in the district ¹³⁷ court against Belle Wilson, this plaintiff, and others, claiming damages for a trespass in being unlawfully ejected under said writ, and on April 30, 1892, judgment was duly rendered in said action, against said Belle Wilson, this plaintiff, and others, for the sum of three thousand five hundred dollars damages, and two hundred and five dollars and ninety cents costs of suit, which judgment was afterward affirmed by the supreme court; that on said trial it was held that said commissioner had no jurisdiction to try the case; that on October 1, 1891, said Belle Wilson, formerly Belle Tompkins, intermarried with said defendant R. G. Wilson, and, in December following, she conveyed to said R. G. Wilson said real estate and all other property belonging to her; that on July 1, 1893, execution was issued on said judgment, of which plaintiff had notice, and plaintiff paid said judgment and costs, amounting to four thousand and fifty-two dollars and sixty-five cents, and took an assignment of said judgment; that plaintiff's participation with Belle Wilson in said action in said alleged trespass complained of was as her agent and servant, and in her interest and for her benefit; that all his acts were done in the firm belief that said Belle Wilson had the right which she asserted, and that the acts done by plaintiff were legal acts, to enable said Belle Wilson to enjoy her own property, and therefore claims that defendants are bound to indemnify said plaintiff against all legal consequences of said action, and, among others, against the said judgment, and therefore are now legally bound to refund him the amount paid to satisfy the said judgment, etc. To this complaint, the defendant R. G. Wilson demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The defendant Belle Wilson demurred on the grounds that the same is ambiguous, unintelligible, and uncertain, in this: No agreement or understanding for indemnity is alleged. It is not alleged that plaintiff paid the judgment by request of defendant ¹³⁸ or of necessity. It does not appear that plaintiff committed a tort, jointly with this defend-

ant and others, for which judgment was recovered against plaintiff et al., which judgment he was bound to pay. It does not appear but plaintiff participated with the other persons mentioned as tort feors, and was liable for his acts, independently of his acts for this defendant. It appears upon the face of the amended complaint that the alleged cause of action is barred under section 196 of the Code of Civil Procedure. The demurrers were severally sustained, and the complaint was dismissed. Plaintiff elected not to amend. From this order and judgment, this appeal is taken. The appellant relies for reversal of the judgment on the point that the complaint states facts sufficient to constitute a cause of action, and that the same was not subject to either of the objections stated in the several demurrers filed. The facts stated in the complaint are admitted by the demurrer. The questions presented by this appeal are admitted to be: 1. Does the plaintiff state a case for indemnity within the recognized exceptions to the rule refusing indemnity between joint tort feors? (No question as to the right of partial contribution is made.) 2. Is the husband, under our law, liable for the torts of a woman committed before marriage, and while she was the wife of another man?

The question presented by the first proposition must be treated in the light of the admitted facts, which are that the plaintiff had no personal interest whatever in the proceeding which was instituted to recover possession of the property against Anna Mark except as agent for Belle Wilson. He was informed by Belle Wilson, and believed in good faith, that Anna Marks was intruding and trespassing upon the property in question, and erecting a building thereon, in violation of her right. He was requested by Belle Wilson to consult an attorney, and ¹⁸⁹ cause such proceedings to be taken as would prevent Anna Marks from maintaining her tortious possession of the property. He gave full credit to Belle Wilson's statements as to the wrong being done her; and in pursuance of, and in obedience to, her request, and in reliance upon the merits of her claim, he consulted an attorney, and followed that attorney's directions and advice, and commenced a suit before a supreme court commissioner, whose jurisdiction at the time was not defined by law; but he fully believed that said commissioner had jurisdiction to try the case, and judgment was recovered and execution issued and enforced, in his absence, at Belle Wilson's request. Plaintiff simply sought to advance the interests of Belle Wilson, believing in good faith that she had suffered wrong, and that the said proceedings were proper and lawful to protect her rights. His actions and doings in the prem-

ises were as the agent and servant, in her interest and for her benefit, believing she had the rights which she asserted, and that the acts done were legal acts, to enable her to enjoy her own property. In the light of these admitted facts, should Belle Wilson's demurrer be sustained?

"It is a general rule that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrong, the law will not relieve him. But to this rule there are many exceptions, which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet, as between themselves, some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of ¹⁴⁰ others": Cooley on Torts, 144; Butterfield v. Mountain etc. Cold-Storage Co., 11 Utah, 195. Where the act is not known to be unlawful, and where the parties employing the officer are acting in good faith, in the assertion of what they believe to be their right under the law, an agreement to indemnify the officer will be valid, even though it should subsequently appear that they were not justified in doing the acts against the consequences of which the indemnity was given: Mechem on Public Offices, sec. 889. Judge Cooley, in his work on Torts, page 145, says: "There are some exceptions to the general rule, which rest upon reasons as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet, as between themselves, some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete." In Bailey v. Bussing, 28 Conn. 459, the court said, of the maxim that there is no contribution among wrongdoers, that "it is too much broken in upon at this day to be called with propriety a 'rule of law,' so many are the exceptions to it, as in the case of master and servant, principal and agent, partners, joint operators, carriers, and the like." "This rule," said Judge Story, "is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not when the party is acting under the supposition of the innocence and propriety of the act, and the tort is one of construction and inference of law": Story on Partnership, sec. 220. In Nelson v. Cook, 17 Ill. 448, the court say: "Where one is employed or directed to do or commit a known crime, misde-

meanor, trespass, or wrong, and the employé or agent knows it to be such, an express promise of indemnity is void, being against the peace and policy of the law; yet where the question of title to the property ¹⁴¹ is one of doubt, controversy, or uncertainty, and the act to be done is not an apparent wrong, and the person or agent employed or directed to do the act does not know that it is a wrong or trespass, in such case he may sue and recover indemnity from his employer upon an implied assumption, to save himself harmless for the act." Judge Cooley, in his excellent work on Torts, page 146, says: "If the question of law or fact is in doubt, it is not incompetent for the party suing out process to take upon himself the responsibility, and when he does so, and agrees to indemnify the officer, the agreement may be enforced. This, he says, is upon the same ground that though, as to the party injured, both may be technically in the wrong, it is not so as between the parties themselves." Again, in section 148, this learned writer says: "If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him." The reason given in many books for denying contribution among trespassers is, that no right of action can be based upon a violation of the law. When the act is known to be such, or is apparently of that nature, a guilty trespasser places himself without the pale of the law, and a guilty trespasser cannot be allowed to appeal to the law for indemnity. If, however, he be innocent of any illegal purpose, ignorant of the nature of the act, which was apparently honest and proper, and he apparently acted in good faith, with an honest purpose in what appeared to be right, and from the nature of the case could not be presumed to know that he was doing an illegal act, and the tort is one arising from construction or inference of law, and not arising from a known meditated wrong, the rule above stated will be changed with the reason, and he may then have contribution. Where a party makes a bona fide claim to property, ¹⁴² as in this case, and seeks to obtain possession by legal process from a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting those bona fide rights; and if it is decided that such claim is invalid, or that the court has no jurisdiction in the eye of the law growing out of the mere relation of the perpetration of the wrong, the maxim of the law that there is no contribution among wrongdoers is not applied, and the law will imply an indemnity to such agent who believes as his principal does, for any damages he was made to pay on account of such acts done in pursuance of his principal's di-

rections, within the scope of his instructions and employment: Cooley on Torts, 145-149; Bailey v. Bussing, 28 Conn. 459; Story on Partnership, sec. 220; Nelson v. Cook, 17 Ill. 418; Betts v. Gibbins, 2 Ad. & E. 57; Gower v. Emery, 18 Me. 83; Mechem on Public Offices, sec. 890; Coventry v. Barton, 17 Johns. 142; 8 Am. Dec. 376; Acheson v. Miller, 2 Ohio St. 203; 59 Am. Dec. 663; Merrill v. St. Louis, 12 Mo. App. 467.

The effect of Belle Wilson's instructions was to employ an attorney, commence the suit, and to follow his advice. The proceedings were those advised and conducted by the attorney employed, and the plaintiff believed the proceedings were regular, and that the commissioner had jurisdiction. Under the facts, the plaintiff was not guilty of an intentional tort, nor of committing a known and meditated wrong. In the case of Marks v. Culmer, 6 Utah, 429, the court said: "In People v. Hills, 5 Utah, 410, this court said: 'We entertain no doubt that the commissioner is acting in good faith, as there has been diversity of opinion in the profession and among commissioners as to the construction of the statute under consideration.' This applies equally to the parties and attorneys. This was the first authoritative decision of the question."

¹⁴³ The respondent contends that the judgment obtained by Anna Marks is conclusive of the liability of each of the defendants, and that they committed the wrong intending to commit it, or did it under circumstances fairly charging them with intending the consequences that followed. In that we cannot agree. The judgment in Marks v. Culmer, 6 Utah, 429, is only conclusive that all the defendants therein, including the plaintiff, were liable to the injured party. Any other holding would preclude contribution or indemnity in cases of this character. There would be no value to an exception to the general rule that there is no contribution or indemnity between wrongdoers, if the judgment against wrongdoers in favor of the injured party was conclusive that the wrong was intended, and therefore must be a known and meditated tort. Nearly all the cases where indemnity has been allowed were cases in which a judgment had been rendered and paid. We think the admitted facts bring the plaintiff within the exception to the general rule.

For the reasons given, we think the court erred in sustaining the demurrer of Belle Wilson.

The next question is, as to whether the husband, under our law, is liable for the torts of a woman committed before marriage, and while she is the wife of another man. When the action for damages was commenced by Anna Marks against Belle Wilson,

this plaintiff, and others, for the damages recovered, Belle Wilson was the wife of Harvey K. Tompkins, but was divorced from him in 1889, before judgment was rendered in that case; and it does not appear from the complaint whether or not he was made a party defendant with his wife in that action, wherein judgment was rendered April 30, 1892, although, if we consult the decision in that case, we find that Harvey K. Tompkins was a defendant, and charged as an active party therein. Belle Wilson intermarried with defendant ¹⁴⁴ R. G. Wilson, October 1, 1891, and soon thereafter conveyed to him the property in question, but R. G. Wilson was not made a defendant in that suit; but plaintiff seeks to charge said defendant R. G. Wilson with the payment of a judgment rendered against his wife for a tort committed by her with others, not only before marriage, but while she was the wife of another man, named Harvey K. Tompkins, and claims that while Tompkins, the former husband, was liable for such while his marital relation existed, on the divorce being granted dissolving that marriage, Tompkins was discharged from that liability, and from that time it became and was the liability of the wife until her marriage with defendant Wilson, and that on that event his liability attached, and that this rule is not changed by statute in this state. It is true that at common law the husband was answerable for the wife's debts before marriage, but, if they were not recovered during coverture, he was discharged. As his liability originated in the marriage, so it ceased with it. The reason assigned for this liability is, that the husband is entitled to rents, profits, and issues of the wife's real estate during coverture, and to the absolute dominion and control over her personal property in possession. The wife, by entering into the marriage relation, was, at common law, entirely deprived of the use and disposal of her property, and could acquire none by her industry. Her time and personal labor belonged to her husband. Under the common law he could inflict punishment on her, for he was answerable for her misconduct, and the law left him with this power of restraint and correction, the same as he could correct his children or his apprentices. At common law, the husband had almost absolute control over the person of the wife, as well as her property, and he became the arbiter of her fortune. She was in a condition of complete dependence. She could not contract in her own name, was bound to ¹⁴⁵ obey him, and her legal existence was merged into that of her husband; so that they were termed and considered one in law. As a consequence, he was made liable for her debts contracted before marriage, and for her torts and frauds committed during coverture. If they were done in

his presence or by his procurement, he alone was liable; otherwise, both must be jointly guilty: *Bryan v. Doolittle*, 38 Ga. 255; 2 Kent's Commentaries, 143-149; Schouler on Domestic Relations, 56, 75; *Handy v. Foley*, 121 Mass. 259; 23 Am. Rep. 270.

But our statutes have changed this relation and liability. Section 2528 of the Compiled Laws of 1888 reads as follows: "All property owned by either spouse before marriage, and that acquired afterward by purchase, gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is the separate property of that spouse by whom the same is so owned or acquired; and separate property owned or acquired as specified above may be held, managed, controlled, transferred, and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage." Section 2529 reads as follows: "Either spouse may sue or be sued, plead and be impleaded, or defend and be defended at law." Section 3428 provides that all compensation due the wife for her personal services is exempt from execution against her husband. Section 3172 provides that "when a married woman is a party her husband must be joined with her; except, when the action concerns her separate property, or her right or claim to the homestead property, she may sue or be sued alone. When the action is between herself and her husband, she may sue or be sued alone. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone." These statutes have relieved married ¹⁴⁶ women from common-law disabilities, and given them independent power to deal with, hold, and enjoy all their property; to make contracts, contract property, to sue and be sued, defend and be defended, and in all respects places her in the same position with reference to contracts, property, and liability, on the same footing with other persons; and when a failure to perform a duty under a contract is in itself a tort, it may be treated as such against a married woman. The same would be true of any breach of duty imposed upon a married woman as owner of property which she owns and controls, the same as if unmarried. The common-law rule, it will be remembered, which made the husband liable for the wife's torts, proceeded upon the ground that as the husband succeeded jure mariti to the entire estate of the wife, real and personal, and to the right of her earnings, so that she could not respond in damages for any wrong which she might commit, it was but right that he should respond for her, so long as the coverture continued. Such being the reason of the rule, if a statute intervenes

giving the wife, during coverture, the sole control of all property owned by her before marriage, and that acquired afterward by purchase, gift, bequest, with the rents, issues, and profits thereof, and the same is the separate property of the wife, and the same may be held, managed, controlled, and transferred, and in any manner disposed of, by her, without any limitation or restriction by reason of marriage, with the right to use and possess the same, thus taking away entirely the reason of the common-law rule, it would seem, on principle, that the rule itself ought to cease, though the statute makes no mention of the husband's liability for the wife's torts, or her rights to her own personal services.

Judge Cooley, in his work on Torts, section 118, says: ¹⁴⁷ "In Illinois, it has been decided that, under the new statutes, the husband is not liable for a slander of the wife in which he did not participate, though the statutes on the subject which were supposed to have changed the common law were silent as regards the torts, and only purported to secure to the woman her property, earnings, and the full control and enjoyment thereof. This is, perhaps, a sound conclusion. Certainly, the reasons on which the new legislation proceeds are such as to leave the wife to respond alone for her torts, for they assume that she is fully capable of controlling her own actions, and can and will act independent of her husband." A similar rule is laid down in Kansas: *Norris v. Corkill*, 32 Kan. 409; 49 Am. Rep. 489. So in Michigan, unless her acts are in some way connected with her husband's authority, or owing to his fault: *Ricci v. Mueller*, 41 Mich. 214. In Pennsylvania, the husband is not liable, under the act of 1887, for the wife's individual tort: *Kurklence v. Vocht* (Pa. Sup., May 19, 1888), 13 Atl. Rep. 198. In Illinois, Michigan, and Iowa the statutes in relation to the rights of married women have been held to entitle the wife to recover, for her own use, a damage suffered for a personal tort. In *Martin v. Robson*, 65 Ill. 132, 16 Am. Rep. 578, the court said: "The intention of the legislature to abrogate the common-law rule to a great degree, that husband and wife were one person, and to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common-law rule that the husband is liable for the torts of the wife, they have made such modifications of his rights and her disabilities as wholly to remove the reason for the liability." A liability which has for its consideration rights conferred should no longer exist when the consideration has failed. If the relations of husband and wife have been ¹⁴⁸ so changed as to deprive him of all right

to her property, and to the control of her person and her time, every principle of right would be violated to hold him still responsible for her conduct. If she is emancipated, she should be no longer enslaved.

If we could look into the record and decision of this court, we should find that Harvey K. Tompkins was made a joint tortfeasor defendant with his wife, Belle Tompkins, and that a judgment was rendered against him, together with the other defendants, for the tort complained of. This judgment is still standing against him, as an active participant in the tort, notwithstanding the divorce afterward obtained by his wife; and if he is released from that part of the judgment which attaches to him solely as the husband of Belle, and which is transferred to R. G. Wilson, as his successor to his marital rights with her, then we have two husbands, one succeeding the other, held liable for the torts of the wife. The first husband is held because he jointly committed the tort. The second falls heir to that part of the marital damages thrown off and left him by his wife's divorce before satisfaction rendered. We are aware of some confusion in the authorities as to the right of the husband to his wife's personal services, unless the statute expressly confers the right; but when the statute gives her full control and management of all her property acquired, before and after marriage, with the rents, issues, and profits thereof, together with the right to transfer, manage, and dispose of the same, without any limitation or restriction by reason of marriage, and the right to sue and be sued, to defend and be defended, the same as any other individual, and exempts compensation due her for her person's services from an execution against her husband, then these rights necessarily carry with them the right to such of her time, services, and ¹⁴⁹ earnings as would be necessary to properly attend to, control, and manage property rights and personal interests thus taken from the control of her husband, and conferred upon her by law. What beneficial interest would she acquire by the statute if she is prohibited from using her time in controlling and managing these interests conferred by it? Plainly, but little. It can hardly be contended that the legislature, in enacting these statutes, intended to bestow a right upon her with one hand, and to withdraw that right from her as with the other.

Under the law and the facts in this case, we hold that the defendant R. G. Wilson is not liable for the torts of his wife, committed before he married her, and while she was the wife of another man. We are of the opinion that the demurrer of defendant R. G. Wilson was rightfully sustained: Comp. Laws

1888, secs. 2528, 2529, 3172; *Norris v. Corkill*, 32 Kan. 409; 49 Am. Rep. 489; *Merrill v. St. Louis*, 12 Mo. App. 466; 2 Bacon's Abridgment, 61; *Martin v. Robson*, 65 Ill. 129; 16 Am. Rep. 578; *Cooley on Torts*, 118; 2 *Bishop on Married Women*, sec. 24, and note; *Marks v. Culmer*, 6 Utah, 419; *Warr v. Honeck*, 8 Utah, 61; *Ricci v. Mueller*, 41 Mich. 214.

In *Belle Wilson's* demurrer is stated, as the last ground of demurrer, "that the action is barred by subdivision 1 of section 196 of the Code of Civil Procedure" (general section 3145), which limits the right of action to two years. The judgment was rendered April 30, 1892. Plaintiff paid it July 1, 1893, and brought this action June 15, 1894. This was an action for indemnity against actual damages, and the party indemnified had no cause of action until he was damaged, and the statute of limitations commences to run from the time the judgment was paid: *Oaks v. Scheifferly*, 74 Cal. 478; *Wicker v. Hoppock*, 6 Wall. 96.

The order and judgment of the trial court sustaining ¹⁵⁰ the demurrer of R. G. Wilson is affirmed, and the order and judgment sustaining the demurrer of defendant Belle Wilson is set aside and vacated, with instructions to the court below to enter such order accordingly. Plaintiff is entitled to recover costs against Belle Wilson, and R. G. Wilson is entitled to recover costs against the plaintiff.

Zane, C. J., and Bartch, J., concur.

JOINT LIABILITY — ALLOWANCE OF CONTRIBUTION AMONG JOINT TORT FEASORS.—Wrongdoers cannot have redress or contribution against each other upon being held liable for the unlawful act, but this rule is confined to cases where the person claiming redress knew, or must be presumed to have known, that the act was unlawful: *Jacobs v. Pollard*, 10 Cush. 287; 57 Am. Dec. 105; *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663; *Johnson v. Torpy*, 85 Neb. 604; 87 Am. St. Rep. 447, and note. The general principle that contribution or indemnity will not be awarded as between joint wrongdoers is limited to intentional meditated wrongs, and has no just application when the parties are acting in good faith, in ignorance of facts rendering their conduct tortious, and such ignorance is not superinduced by their own fault or negligence: *Vandiver v. Pollak*, 107 Ala. 547; 54 Am. St. Rep. 118, and note. Compare *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461; 80 Am. St. Rep. 685.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORTS OF WIFE.—A husband is liable for the torts of his wife committed by her alone and not in his presence: *Flesh v. Lindsay*, 115 Mo. 1; 37 Am. St. Rep. 374, and note, showing that a wife is liable for a tort committed by her, unless the husband was present and directed the doing of it, when he alone is liable, and citing authorities, upon the liability of both husband and wife, for her torts, under modern statutes. A husband is liable for his wife's torts committed before marriage: *Hubble v. Fogartie*, 8 Rich. 418; 45 Am. Dec. 775.

HALL v. OGDEN CITY STREET RAILWAY COMPANY.

[13 UTAH, 243.]

RAILROADS—STREET RAILWAYS—ORDINANCE AS EVIDENCE OF SPEED ALLOWED.—In an action against a street railway company for injuries caused by its alleged negligence, a city ordinance, if not invalid, or inapplicable to the case, ought to be admitted in evidence to show the rate of speed allowed on street railways in the city.

RAILROADS.—A STREET RAILWAY HAS NO SUPERIOR RIGHT, on a public street, to that of the public at large, except the right to lay its track and operate its cars; and, if it adopts a propelling power, such as electricity, which increases the danger to the public, it must be held to a degree of care proportionate to such increase of danger.

RAILROADS—STREET RAILWAYS—RIGHT OF WAY—AVOIDANCE OF ACCIDENT.—A street-car has the right of way when a person or vehicle is met on the track, but each party, in order to avoid accident, must exercise ordinary care, and such reasonable prudence and precaution as the surrounding circumstances may require.

NEGLIGENCE.—THE EXISTENCE OF NEGLIGENCE MUST DEPEND, in each case, upon the circumstances peculiar to it, and which surrounded the parties at the time of the occurrence on which the controversy is based. What may be considered ordinary care in one case may amount to culpable negligence in another. Thus, an act which would have been viewed with indifference when street-cars were drawn by horses at such a low rate of speed as to be easily controlled might be gross negligence when the car is propelled by electric power at a much higher rate of speed.

RAILROADS—DUTY OF MOTORMAN AT PUBLIC CROSSING—NEGLIGENCE.—It is the duty of a motorman, when he approaches a public crossing, to look and ascertain whether or not the track is clear, to sound the gong as a warning, and to keep his car under control. A failure to do this is negligence on the part of the street railway company.

RAILROADS—STREET RAILWAYS—SPEED IN ABSENCE OF ORDINANCE.—Regardless of any ordinance limiting the rate of speed, a street railway company has no right to run its cars at such a high rate of speed, over a public crossing, or through a frequented street in a city, as will endanger public safety, and put those who are rightfully in the use of the street to extra hazards.

RAILROADS—STREET RAILWAYS—SPEED AS EVIDENCE OF NEGLIGENCE.—While some courts hold that where the speed of a street railway company is greater than that permitted by ordinance it is negligence per se, the better rule appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury.

RAILROADS—STREET RAILWAYS—NEGLIGENCE—COLLISION.—A NONSUIT, in an action to recover damages for injuries occasioned by a collision, in a city, with a street railway car, is improperly granted where it appears that the plaintiff was driving a wagon toward a public crossing on the track; that he looked before he got to the track, but saw no car coming; that he then attempted to cross the track though he did not look for a car just as his horses stepped upon the track, the view being then somewhat obstructed by electric poles; that the car was propelled by an electric motor at the rate of twenty-five to thirty miles an hour; that the brakes were not applied and no attempt made to stop the car; and that no gong was sounded until about the time of the collision.

RAILROADS—STREET RAILWAYS—CARE REQUIRED OF TRAVELERS.—Persons traveling on a public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along, or upon, or across an ordinary steam railroad.

NEGLIGENCE — LIABILITY WHERE INJURY COULD HAVE BEEN AVOIDED.—Although a party, injured by the negligence of another, is negligent himself in the first instance, such negligence will not defeat his right of action where it is shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence; and the question as to whose negligence was the proximate cause of the injury is one of fact for the jury to determine under the circumstances of each particular case.

RAILROADS—LIABILITY OF STREET RAILWAY COMPANY WHERE INJURY COULD HAVE BEEN AVOIDED.—Although a person, with a wagon, drives incautiously upon a street railway track, at a public crossing, the company cannot recklessly run him down, and then shield itself from liability on the ground that such person was negligent in the first instance.

Action for damages for personal injuries. After plaintiff's evidence was introduced, a nonsuit was granted on the ground that the evidence showed that the plaintiff was guilty of contributory negligence, which caused the injuries complained of. The plaintiff's evidence, upon cross-examination, which was taken as the basis of the nonsuit, showed that he looked before he got to the track, but saw no car coming; that he then attempted to cross the track, but did not look, as his team stepped on the track, as the view was then somewhat obstructed by electric poles; that he had made up his mind that there was a clear way; and that he was looking after, and attending to, his team more than anything else while he was crossing the track. Other features of the evidence appear in the opinion. The plaintiff appealed.

Maloney & Perkins and Rhodes & Tait, for the appellant.

Evans & Rogers, for the respondent.

250 BARTCH, J. This suit was brought in consequence of alleged carelessness of the defendant company, which resulted in personal injury to the plaintiff. When the evidence had been introduced, the court granted a motion for a nonsuit, on the ground that the plaintiff was guilty of contributory negligence, and afterward denied a motion for a new trial. These rulings are assigned as error on appeal. At the time of the accident, the defendant was operating a street-car railway in the city of Ogden, and the injury was caused on its line on Washington avenue where it intersects with First street. The plaintiff had delivered a load of hay to one Anderson, and on his return passed through a private alley, just north of First street, over the sidewalk,

which is one rod wide, onto said avenue, which is eight rods wide, and then, turning slightly to the south, continued across the eastern portion of said avenue in a westerly direction, and turned his horses to cross the defendants' track, when the collision occurred. Extending north from First street there is a row of shade trees at the edge of the sidewalk on the avenue, and electric poles about one hundred feet apart, on the middle thereof, and the car track is on the west side of the electric poles. These trees and poles obstruct, from the sidewalk, the view to the north, where the car in question came from, and just after the plaintiff, who was driving slowly, and sitting on the front end of his hay rack on the wagon, had left the sidewalk, he looked to the north and south for a car, without seeing any, but did not look immediately before attempting to cross. When near the track, the electric poles somewhat obstructed the view of the plaintiff to see the car. There is some conflict in the evidence as to how far the car was from the wagon when the gong was sounded. The plaintiff ¹⁵¹ testified that he heard no gong, and had no knowledge of the car's approach until it struck him. The witness Anderson, who was in the best position to see, said the car was not more than from five to eight feet from plaintiff, and two other witnesses that it was not more than fifty or sixty feet from him when the gong sounded. The car at the time was running at the rate of twenty-five to thirty miles per hour, and, no brakes being set, or any effort made to stop, it struck with full force, demolishing the wagon and hay rack, killing one horse and severely and permanently injuring the plaintiff. The wagon and team were dragged about fifty feet after being struck. The accident happened at the crossing on First street, which, however, is not a laid-out street west of the avenue, but it is open, and the public cross through there, it being a short way to Harrisville avenue. The railway track, to the north of the place of the accident, is straight, with no obstruction to the view except the electric poles. The plaintiff knew that the cars were running regularly about every fifteen minutes. The accident happened on the 10th of August, 1893, at 5:30 P. M., it being a calm and clear day. Such is the testimony, in substance, disclosed by the record. The plaintiff also offered in evidence a city ordinance, to show the rate of speed which was allowed on railroads in Ogden City; but this was rejected by the court on the ground that it was incompetent, irrelevant, and immaterial. Counsel for the appellant insist that the court erred in rejecting the ordinance, and we are inclined to sustain their contention. It was admissible, unless for some special reason it was either

invalid or did not apply to this case. No such reason being shown, it ought to have been admitted.

The main question in this case arises on the action of the court in granting the nonsuit. Assuming the evidence to be true—which we must for the purpose of a ²⁵² nonsuit—the question is, Did it present such a case as justified the court in determining, as a matter of law, that the appellant could not recover? To determine this, it becomes important to advert to the relative rights of the public and street railway companies to the use of the streets in a city. When streets in a city or village have been regularly platted and dedicated for public use, all persons have equal rights thereon, so far as public travel is concerned. Originally, such streets were not designed for street railways, but they were confined to the right of public travel in the ordinary modes. Courts, however, have become much more lax in the enforcement of strict technical rules as to the use of streets, through advanced civilization, enlightened public policy, and a desire to subserve the public welfare, and now permit a reasonable portion of the streets to be used for street railways, holding that such is a proper use. Nevertheless, this confers upon a street railway company no superior right to that of the public at large, except the right to lay its track and operate its cars, which must be done with as little inconvenience to ordinary travel as practicable. Nor does its franchise, apart from this, confer upon it any greater or superior right to the use of the street than is enjoyed by any one of the citizens. The right to lay its track and operate its cars includes within it no exclusive right to the use of any particular portion of the street, not even that whereon the track is laid. Nor does it relieve the company from its obligations to exercise due care in the operation of its road, so as to avoid injury to persons traveling upon the street, or in the rightful use of the same, or from liability for accidents, which are the proximate result of the want of proper care, skill, or vigilance on the part of its agents. The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative, and, if ²⁵³ it adopts a propelling power which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger because of such propelling power. This is so because the more dangerous the appliance, the more likely it is for casualties to happen, and consequently, the greater the degree of care which must necessarily be exercised in order to avoid their occurrence. As the company, however, is held to a degree of care commensurate with the circumstances of each particular case, so, likewise, is the citizen, for

he cannot recklessly place himself in the way of danger, and then complain of injury. He is bound equally with the company to the exercise of a proper degree of care, skill, and vigilance. He has no exclusive right to any particular portion of the street, any more than has the railway company. Ordinarily, he may walk or drive upon the track or cross it, but because cars are designed to run only upon the track, he cannot heedlessly obstruct its passage without assuming the risk of injuries for which he may have no redress. The car has the right of way in case of meeting a person or vehicle on the track, but each party, in order to avoid accident, is bound to exercise ordinary care, and such reasonable prudence and precaution as the surrounding circumstances may require. These circumstances necessarily vary in each particular case in their relation to each other, and the conduct of the parties must be considered in the light of their surroundings at the particular time when they were called upon to act. What may be considered ordinary care in one case may, under the circumstances of another, amount to culpable negligence. So an act which would have been viewed with indifference when the street-cars were drawn by horses at such low rate of speed as to be easily controlled might be gross negligence when the car is propelled by electric power at a much higher rate of ²⁵⁴ speed. Mr. Justice Lamar, delivering the opinion of the court in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, said: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence": *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Nickols v. Jones*, 166 Pa. St. 599; *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33; *Lake Roland etc. Ry. Co. v. McKewen*, 80 Md. 593; *Cincinnati etc. Ry. Co. v. Whitcomb*, 66 Fed. Rep. 915. From a consideration of these principles, it is evident that the existence of negligence in each case must depend upon the circumstances peculiar to it, and which surrounded the parties at the time of the occurrence on which the controversy is based. Where negligence does appear, there are generally some prominent facts which show a want of due regard for the safety of others, or an absence of proper care and precaution, so as to avoid the casualty, or incaution or lack

of skill in the use of dangerous instrumentalities in places obviously perilous, or the doing of an act which duty had forbidden, or the omission to do one which duty had commanded to be done. If, in any case, these facts, or any one of them, appear, and in addition thereto it is shown that, in consequence thereof, injury has been inflicted upon a person who was himself in the exercise of ordinary care and reasonable prudence, and not so connected with the author of the injury as to have assumed the hazard, then it is a case of negligence, for which an action will lie.

²⁵⁵ Applying this test to the case at bar, it follows conclusively, from the facts above stated, as shown by the plaintiff's testimony, that the railway company was guilty of negligence on the occasion of the accident. The car was propelled by an electric motor, at the rate of twenty-five to thirty miles an hour, on a public highway in the city of Ogden; but, notwithstanding such high rate of speed, and the fact that the car was approaching a public crossing, no gong was sounded until about the time of the collision; nor were the brakes applied, nor any attempt made to stop the car, nor any proper warning given. Under these conditions and circumstances, how can it be successfully contended that the railroad company was not derelict in its duty? It is apparent from the evidence that, if the car had been run at a reasonable rate of speed, the accident could have been averted; but, even at the speed the car was running, the motorman, by exercise of ordinary care, could have averted it. The track was straight for a long distance north of the crossing in question, and there was nothing to obstruct his view thereon. If he saw the plaintiff in his perilous position in time to stop the car and avoid the injury, he was bound to do so. If he did not see him, then he was equally guilty of negligence, because it was his duty to look and ascertain whether or not the track was clear, when he was approaching a public crossing. So when he was approaching such crossing it was his duty to sound the gong as warning. If, as is contended by counsel for the respondent, the plaintiff was driving alongside the track, with his back toward the car, it was especially the duty of the motorman to give warning, and keep his car under control. He had no right to presume that the plaintiff would not cross the track at such crossing. The contention of counsel for the respondent that it was the duty of the plaintiff to look out to see that the way was clear ²⁵⁶ before crossing the track applies with equal force to the motorman operating the car. Such duty, in law, was imposed on both parties. The plaintiff, having looked for a car after he left the sidewalk,

and having seen none, may have been lulled into a sense of security that there was no danger, and he may not have been as vigilant as he ought to have been, but that did not relieve the defendant from performing his duty when approaching the crossing. "It is the duty of a street railway company to exercise ordinary care and diligence to prevent injury to persons lawfully traveling the street or road occupied by its tracks. It is bound to know that the public may use the entire road or street when not in actual use by its cars, and it must employ reasonable means to prevent injury to those who it knows may rightfully so use the road or street; for this knowledge requires that it shall exercise care and diligence to make it reasonably safe to travel the highway in the ordinary mode": Elliott on Roads and Streets, 585; Buswell on Personal Injuries, sec. 123; Swain v. Fourteenth St. R. R. Co., 93 Cal. 179; Piper v. Chicago etc. R. R. Co., 77 Wis. 247; Baltimore Traction Co. v. Appel, 80 Md. 603; Houston etc. Ry. Co. v. Woodlock (Tex. Civ. App., Jan. 31, 1895), Robinson v. Western Pac. R. R. Co., 48 Cal. 409. The city ordinance which the plaintiff attempted to introduce in evidence limited the rate of speed on railroads in Ogden City to eight miles an hour, but, whether or not the ordinance applied to this case, and regardless of any ordinance limiting the rate of speed, a railroad company has no right to run its cars at such a high rate of speed, over a public crossing, or through a frequented street in a city, as will endanger public safety, and put those who are rightfully in the use of the street to extra hazards: Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; Thompson v. New York Cent. etc. Ry. Co., 110 N. Y. 636; Chicago etc. R. R. Co. v. Perkins, 125 Ill. 127; Louisville etc. Co. v. Commonwealth, 13 Bush, 388; 26 Am. Rep. 205.

²⁵⁷ Some courts hold that where the speed is greater than that permitted by the ordinance, it is negligence per se; but the better rule, and the one sustained by the weight of authority, appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury in determining the question whether or not the railway company was guilty of negligence: Buswell on Personal Injuries, sec. 122; Riley v. Salt Lake Rapid Transit Co., 10 Utah, 428; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; Gulf etc. Ry. Co. v. Breitling (Tex. Sup. Jan. 10, 1890), Denver Tramway Co. v. Reid, 4 Colo. App. 53. The conclusion is irresistible that on the question of negligence of the defendant there was ample evidence to be presented to the jury, but counsel for the respondent insist that the appellant was guilty of such contributory negligence as precludes his recovery. It is urged in support of this

contention that, had the appellant looked to the north before going upon the track, he would have observed the car, and then could have stopped his horses until it had passed, and thus have avoided the injury; and that, having failed in this, he was the author of his own misfortune. It is not clear from the evidence that if he had looked north immediately before going upon the track, he would have observed the car. In fact, it is shown that from his position, just before his horses stepped upon the track, the electric poles formed some obstruction to the view, and it cannot be presumed that he was reckless as to his own safety. It would be more reasonable to infer from the evidence in the record that he felt secure because of the observation he had made when in a position where his view was unobstructed. He was lawfully upon the street, and had a right to cross the track, and, attempting to do so at a public crossing, after he had looked and seen no car, had a right to assume that the railway company ²⁵⁸ would give proper warning of the approach of a car, and not run him down recklessly. Persons traveling on a public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along or upon or across an ordinary steam railroad; and this is so because the people have the right to travel on every portion of the highway, while they have usually no such right on a steam railroad track, and because street-cars can be brought under control much more readily than can the cumbersome railroad trains: Elliott on Roads and Streets, 589, 590; Beach on Contributory Negligence, sec. 89. Even if the appellant drove upon the track incautiously, still the company was bound to the exercise of ordinary care and vigilance to avoid the accident. It could not recklessly and without proper care run its car, and then, when injury resulted to a person, because of its recklessness, escape liability, on the ground that such person was negligent in the first instance. The rule of law is no longer open to doubt that where the injured party was negligent, in the first instance, such negligence will not defeat his action if it be shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence. Both parties have mutual obligations to exercise due care and vigilance to avoid the consequences of their negligence, and the question as to whether negligence was the proximate and direct cause of the accident is one of fact for the jury to determine under the circumstances of each particular case: Shearman and Redfield on Negligence, sec. 99; Everett v. Oregon etc. Ry. Co., 9 Utah, 340; Leak v. Rio Grande etc. Ry. Co., 9 Utah, 246; Grand Trunk Ry. Co. v. Ives,

144 U. S. 408; Inland etc. Coasting Co. v. Tolson, 139 U. S. 551; McClaim v. Brooklyn City R. R. Co., 116 N. Y. 459; Davis v. Mann, 10 Mees. & W. 545; Little v. Superior etc. Ry. Co., 88 Wis. 402; Wines v. Rio Grande etc. Ry. Co., ~~259~~ 9 Utah, 228; Jeffs v. Rio Grande etc. Ry. Co., 9 Utah, 374; Lake Roland Ry. Co. v. McKewen, 80 Md. 593; Beach on Contributory Negligence, sec. 5.

It is evident that the record in this case does not present such a state of facts that all reasonable men must arrive at the same conclusion from a consideration of them, and yet such must be the facts proven before the question of negligence becomes one of law for the court. Nor are there such prominent and decisive facts proven concerning the appellant's conduct on the occasion of the accident as to warrant the court in pronouncing it such contributory negligence that in law he is not entitled to recover. Where the propriety and reasonableness of the acts and conduct of the parties at the time of the accident can be properly or correctly determined only by a consideration of all the circumstances connected with and surrounding the occurrence, it is within the province of the jury to determine whether there was negligence, and, if there was, whose negligence was the proximate cause of the injury. The subject of nonsuit was considered in the case of Lowe v. Salt Lake City, 13 Utah, 91; ante, p. 708. Our views expressed on this subject in that case apply with equal force to this: See, also, Dederichs v. Salt Lake City R. R. Co., 13 Utah, 34.

The other case referred to in the record, which was brought for damages to personal property, and tried before a justice of the peace, was afterward consolidated with this, and the two were then tried together in the district court, and heard together on appeal, both controversies resulting from the same accident, and affecting the same parties. Therefore, our intention is, that this opinion shall apply to both cases. It is manifest that the trial court erred in making the orders in question. This cause must, therefore, be reversed, with costs, and ~~200~~ remanded, with directions to the court below to set aside the erroneous orders, and grant a new trial. It is so ordered.

Zane, C. J., and Miner, J., concur.

RAILWAYS—ORDINANCE AS EVIDENCE OF SPEED ALLOWED.—A city ordinance limiting the speed of trains within the city limits is competent evidence upon the question of negligence: See note to Illinois Cent. R. R. Co. v. Slater, 16 Am. St. Rep. 247.

STREET RAILWAYS—RIGHT OF WAY—AVOIDANCE OF ACCIDENT.—A street railway company has no exclusive right, to the

use of a public street in which its tracks are laid: Note to Richmond Ry. etc. Co. v. Garthright, 58 Am. St. Rep. 846; Gilmore v. Federal Street etc. Ry. Co., 153 Pa. St. 31; 34 Am. St. Rep. 682; Pacific Ry. Co. v. Wade, 91 Cal. 449; 25 Am. St. Rep. 201; monographic note to Western Paving etc. Co. v. Citizens' Street R. R. Co., 25 Am. St. Rep. 475, on the rights, duties, and obligations of street railway corporations with respect to the streets. As against travelers and vehicles a street-car has the right of way, and they should yield promptly on sight or notice of an approaching car, as travelers as well as the street-car company must use reasonable care to avoid collisions, accidents, and injuries: Notes to Thatcher v. Central Traction Co., 45 Am. St. Rep. 649; Benjamin v. Holyoke Street Ry. Co., 39 Am. St. Rep. 449; Johnson v. Reading City Passenger Ry., 40 Am. St. Rep. 756; Gilmore v. Federal Street etc. Ry. Co., 153 Pa. St. 31; 34 Am. St. Rep. 682; Rascher v. East Detroit etc. Ry. Co., 90 Mich. 413; 30 Am. St. Rep. 447, and note. A street railway company may adopt electricity as a motive power, but for the purpose of avoiding accidents to persons or property, it must exercise such care and precaution as a reasonable prudence would suggest: Note to Western Paving etc. Co. v. Citizens' Street R. R. Co., 25 Am. St. Rep. 479, 481.

STREET RAILWAYS—CROSSINGS—SPEED—NEGLIGENCE. It is the duty of a street-car driver to exercise the highest degree of care to avoid any collision or accident, especially at street crossings. He should exercise all the care that prudence may suggest in looking about and listening to assure himself that his track is clear and safe, and for failure to do so his employer is responsible: Thorsen v. La Crosse etc. Ry. Co., 87 Wis. 597; 41 Am. St. Rep. 64, and note. Rapid running of street-cars at crossings is itself evidence of negligence: Evers v. Philadelphia Traction Co., 176 Pa. St. 376; 53 Am. St. Rep. 674. With respect to railroads, generally, it is always proper to submit to the jury the question whether, under the circumstances of a particular case, the running of a train at a high rate of speed was or was not negligent: McDonald v. International etc. Ry. Co., 86 Tex. 1; 40 Am. St. Rep. 803.

STREET RAILWAYS—NONSUIT—NEGLIGENCE—AVOIDABLE INJURY.—Only in rare cases is the court justified in withdrawing the question of contributory negligence from the jury. Proof of contributory negligence must be clear and decisive to warrant a nonsuit on that ground: Note to Pennsylvania R. R. Co. v. Middleton, 51 Am. St. Rep. 604; Promer v. Milwaukee etc. Ry. Co., 90 Wis. 215; 48 Am. St. Rep. 905; People's Bank v. Morgolofski, 75 Md. 432; 32 Am. St. Rep. 403. The duty to look and listen required before crossing the track of a steam railway does not apply with equal force to one in crossing the tracks of a street railway: Consolidated Traction Co. v. Scott, 58 N. J. L. 682; 55 Am. St. Rep. 620; note to McGee v. Consolidated Street Ry. Co., 47 Am. St. Rep. 513. An injured party may recover, though guilty of contributory negligence, if the defendant could, by the exercise of ordinary care, have avoided the injury: Kansas etc. Ry. Co. v. Fitzhugh, 61 Ark. 341; 54 Am. St. Rep. 211; Huber v. La Crosse etc. Ry. Co., 92 Wis. 636; 53 Am. St. Rep. 940; Pickett v. Wilmington etc. R. R. Co., 117 N. C. 616; 53 Am. St. Rep. 611; notes to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 414; Vallin v. Milwaukee etc. R. R. Co., 33 Am. St. Rep. 28; Daniel v. Chesapeake etc. Ry. Co., 32 Am. St. Rep. 893; and this principle applies to street railway companies: Johnson v. Reading etc. Ry., 160 Pa. St. 647; 40 Am. St. Rep. 752.

HAMNER v. BALLANTYNE. •

[13 UTAH, 824.]

SHERIFFS—LEVY OF EXECUTION — JUSTIFICATION WITHOUT PRODUCING JUDGMENT.—An officer who, in good faith, seizes or sells property under an execution may justify, in a suit for damages against him in consequence of such seizure or sale, without producing the judgment, though he knew of irregularities or defects that rendered it voidable; and he will be regarded as having acted in good faith, when the writ was fair on its face, and he was not advised that there was no judgment, or that, if there was, it was void.

SHERIFFS—LEVY OF EXECUTION—JUSTIFICATION—ADMISSIBILITY OF EXECUTION WITHOUT JUDGMENT.—If an officer, under an execution which purports to be on a judgment against the party defendant to the writ, and which is fair upon its face, levies upon money of such party, who brings an action, not to recover the specific money taken, but to recover damages for its wrongful conversion, the execution is admissible in evidence without the judgment upon which it issued.

Action of trover brought by Hamner against Ballantyne for the conversion of two hundred and forty-two dollars and eighty-five cents. The defendant, a deputy United States marshal, answered and justified such taking and conversion under an execution, which he offered in evidence, but which was objected to and excluded, on the ground that it was incumbent upon the defendant to show a valid judgment upon which the execution issued. There was a judgment for the plaintiff, and the defendant appealed.

J. W. Judd, for the appellant.

Evans & Rogers, for the respondent.

828 ZANE, C. J. This is an appeal by the defendant from a judgment against him, in favor of the plaintiff, for the sum of two hundred and sixty-eight dollars and fifty cents and for costs, and from an order refusing a motion for a new trial. With other facts, the plaintiff alleged, in his complaint, that he was the owner of two hundred and forty-two dollars and eighty-five cents, and that the defendant carried it away, and unlawfully converted it to his own use, to plaintiff's damage in the sum of two hundred and forty-two dollars and eighty-five cents, with interest. To this complaint the defendant filed an answer, in which he justified such taking and conversion under an execution, which he made a part thereof. The execution recites a judgment against the defendants, John Hamner and others, and appears to be fair on its face. The defendant stated further, in his answer, that, in obedience to the execution, he demanded the amount due thereon, and that plaintiff paid to him the two hundred and

forty-two dollars and eighty-five cents in satisfaction thereof, and that he returned said sum, with the execution and his return thereon, to the clerk's office. The execution and return thereon established the above facts, with the additional one that the two hundred and forty-two dollars and eighty-five cents, less the costs, were paid to Hamner's attorney.

On the trial of the cause, the defendant offered the execution ³²⁹ with the return thereon in evidence, and, the court having sustained the plaintiff's objection to its admission, defendant excepted, and assigns such refusal as error. This assignment of error raises the question, Was the execution admissible in evidence, without the judgment upon which it issued? The writ required the officer to demand of the defendants the sum mentioned in it, and, upon refusal to pay, to levy upon and sell enough of their unexempted personal property to satisfy the same, and, if enough could not be found, to levy upon and sell enough unexempted real property. In demanding and receiving the money due on the execution, and crediting the same, the officer obeyed the commands of the writ, and he was protected by the writ in so doing. An officer with an execution in his hands is not authorized to demand payment from a person not a party to it, or to levy on the property of any other person. If he levies on property in the possession of a person, not a party who claims a right to it, he must produce the judgment with the execution under a plea of justification; because possession is *prima facie* evidence of ownership. The officer is apprised, by the possession and the claim, that the person making it has the *prima facie* right according to his claim. However, we do not wish to be understood as holding that an officer would be justified in executing a writ against a person named in it as a defendant who was not a party to the judgment upon which it issued, or in executing a writ issued on a void judgment, after learning that such person was not a party to the judgment or that it was void or that there was no judgment. With such knowledge, we are of the opinion that the officer should not execute the writ: *Grace v. Mitchell*, 31 Wis. 533; 11 Am. Rep. 613; *Sprague v. Birchard*, 1 Wis. 457; 60 Am. Dec. 393; *McDonald v. Wilkie*, 13 Ill. 22; 54 Am. Dec. 423; *Leachman v. Dougherty*, 81 Ill. 325. There is a conflict in the authorities, however, as to this ³³⁰ rule, but we think it sustained by authority and better reasoning: *Freeman on Executions*, 2d ed., sec. 102. But we cannot apply this rule to this case, because knowledge that the plaintiff was not a party to the judgment upon which the execution issued is not sufficiently shown by the evidence in the record. Notice of any ir-

regularity or fraud in obtaining the judgment, or in the judgment itself, that simply renders it voidable, but not void, will not justify the officer in refusing to execute the writ, or render its execution by him wrongful, or make him liable for its execution. In that case, the judgment would be effectual until set aside, and such action must be left to the party whose rights are invaded.

The plaintiff claims that the issue tried in the court below between defendant and himself was simply a right to property; that the officer was not proceeded against as a tortfeasor. When the proceeding is one in rem, as in the case of an action of replevin, the better rule is that the officer, in justifying, must show a valid judgment as the foundation of the action, although the writ may be fair on its face, and he has no information that it has been issued on a judgment void for want of jurisdiction of the subject matter or of the person, or without any judgment upon which to base it. If an officer in good faith executes a writ, fair on its face, the writ protects him, though there was no judgment upon which to base it. Such a writ can only be used as a weapon of defense, and for protection—not for the purpose of attack for offensive purposes. An officer, who in good faith seizes or sells property under an execution, may justify, in a suit for damages against him in consequence of such seizure or sale, without producing the judgment; and he will be regarded as having acted in good faith, when the writ was fair on its face, and he was not advised that there was no judgment, or ~~that~~ that, if there was, it was void. And it will make no difference whether the suit is for damages on an implied contract or upon a tort. A ministerial officer cannot be held personally liable in any proceeding, civil or criminal, for any act done by him in executing a writ fair on its face, unless he knows, or should have known, as a reasonable man, that the judgment upon which it purported to have been issued was void, or that there was no judgment. In the trial of the title or right to property in the officer's hands under the writ, he must, however, produce the judgment, though the writ is fair upon its face, and he has no knowledge that the judgment is void, or that there is none. Such a proceeding is against the property, or to recover it, and not to subject the officer to responsibility for his acts in obedience to the mandate of the court: *Beach v. Botsford*, 1 Doug. (Mich.) 199; 40 Am. Dec. 45; *Gidday v. Witherspoon*, 35 Mich. 368; *Cobbey on Replevin*, secs. 806, 807; *Cooley on Torts*, 2d ed., 542; *Leroy v. East Saginaw City Ry. Co.*, 18 Mich. 234; 100 Am. Dec. 162; *Adams v. Hubbard*, 30 Mich. 104.

The plaintiff alleged, in his complaint, that the defendant took two hundred and forty-two dollars and eighty-five cents of his money and unlawfully converted it to his own use. The plaintiff was a party defendant to the execution under which the officer, who is the defendant in this case, took the money; and the writ purported to be on a judgment against the plaintiff in this case, and was fair on its face; and the evidence does not show that the defendant knew that the judgment was void or that no judgment had been rendered against the plaintiff; and this case was not instituted to recover the specific money taken by the officer. It was brought to recover damages for the unlawful conversion of the money by the officer to his own use. If the plaintiff had waived the tort alleged, and sued for money had and received by the officer to plaintiff's use, ³³² it would not have been an action to try the title or right to the money merely. The effect of a judgment against the officer in that case would have made him personally responsible for acts performed, in good faith, on an execution against a defendant to it; but as we have seen, the execution protected the officer for such acts, under such circumstances. While the former distinctions between civil actions in this state have been abolished, they will be regarded still as founded upon contract or tort from the facts alleged in the complaint. Actions in this state are classified with respect to the facts alleged. From the facts alleged, this action must be regarded as in trover. While in some cases the person whose property has been unlawfully converted into money or money's worth may waive the tort, and base his action on an implied contract for money had and received, the plaintiff based this one on the wrongful conversion of his money by the defendant. The action is not for the identical money which he alleges was converted, but he claims damages for the wrongful conversion of his money. The execution, being fair on its face, justified the conversion as the return shows it was made. The action could not be regarded as one to try the right to the money taken that had been paid to defendant's attorney before the suit was brought. It was for damages resulting to plaintiff, as claimed, from the wrongful and unlawful conversion of his own money by the defendant.

In sustaining plaintiff's objection to the execution offered in evidence by the defendant, we are disposed to think that the court below erred. The judgment and order appealed from are reversed, and the court below is directed to grant a new trial.

Bartch, J., concurs.

SHERIFFS — JUSTIFICATION UNDER PROCESS. — Process fair and regular on its face will protect a ministerial officer: Sprague

v. Birchard, 1 Wis. 457; 60 Am. Dec. 393; Keniston v. Little, 30 N. H. 318; 64 Am. Dec. 297. An officer, sued for taking property, may justify by showing an execution against his adversary which is regular upon its face: Clay v. Caperton, 1 T. B. Mon. 10; 15 Am. Dec. 77. A void process, however, is no justification to a sheriff for acts committed by virtue of it: State v. Page, 1 Spear, 408; 40 Am. Dec. 68. He cannot justify under a void execution: Coltraine v. McCaine, 3 Dev. 308; 24 Am. Dec. 256. Process valid on its face, and showing jurisdiction, will protect the officer, if nothing appears to apprise him of a want of jurisdiction: McDonald v. Wilkie, 12 Ill. 22; 54 Am. Dec. 423; but it will not protect him if he has notice aliunde of some jurisdictional defect which renders the judgment void: Grace v. Mitchell, 31 Wis. 533; 11 Am. Rep. 613. Contra, Henline v. Reese, 54 Ohio St. 599; 56 Am. St. Rep. 736, holding that a ministerial officer, having knowledge aliunde that a writ has been issued without jurisdiction, may, nevertheless, relying on its regularity, execute it according to its commands, and plead it in justification of his acts in so doing. But a ministerial officer cannot defend under process fair upon its face alone, where the object of the action to which he is defendant is as in replevin, only to recover possession of the property seized under the process; he must, in all such cases, in addition to the process, show by the production of a valid judgment that the court which issued it had authority to do so: Beach v. Botsford, 1 Doug. (Mich.) 199; 40 Am. Dec. 45. Compare monographic note to Savacool v. Boughton, 21 Am. Dec. 180-209, on justification of officers by their process.

WHITESIDES v. GREEN.

[13 UTAH, 341.]

ESTOPPEL—ADMITTING LOCATION OF HIGHWAY.—A person will not be heard to dispute the location of a highway, which location he has distinctly admitted by his declarations and acts.

HIGHWAYS—IMPLIED DEDICATION.—The law implies a dedication of land, on which a highway is located, to the use of the public for the purposes of travel, where it appears that the highway has been traveled by the public continually and uninterruptedly for a period of more than fifteen years.

HIGHWAYS ACQUIRED BY USER—WIDTH OF.—After the right to a highway has been acquired by user, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case. Whatever may be the width, in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path.

HIGHWAYS ACQUIRED BY USER—EVIDENCE OF WIDTH.—It may be inferred that the width of a highway acquired by user extends to the ordinary width of highways in the locality, or, if the highway is inclosed with fences, to include the entire space so inclosed, as such ordinary width, and the fact of such inclosure is, in connection with other evidence, especially circumstances of recognition by the owner of the fee and the public, of definite and fixed limits, pertinent evidence from which width may be inferred.

HIGHWAYS ACQUIRED BY USER—RIGHTS OF PUBLIC AND OWNER OF FEE.—The acquisition of a highway by user vests in the public the mere right of passage over the land, and does

not divest the owner of the fee. He may, therefore, continue to make any use thereof which is not incompatible with the public easement.

HIGHWAYS ACQUIRED BY USER—WIDTH—QUESTION OF FACT.—A controversy about the width of a highway acquired by user presents a question of fact for the jury to determine from all the facts and circumstances proved, and when such a case is tried by the court, without a jury, then it is a question of fact to be determined by the court.

HIGHWAYS ACQUIRED BY USER—APPEAL—FINDINGS OF FACT, BY COURT, AS TO WIDTH.—In a controversy about the width of a highway acquired by user, where the case has been tried by the court, without a jury, the findings of fact will not be disturbed unless they are so manifestly erroneous as to demonstrate some oversight or mistake.

Action by Whitesides against Green and others for damages sustained by the removal of a fence from a highway claimed by Davis county, and to enjoin defendants from interfering with the land claimed by the plaintiff. The main question was one as to the width of a three-rod road, which width the plaintiff sought to narrow. There was a judgment for the defendants, and the plaintiff appealed.

Sutherland & Murphy, for the appellant.

J. H. Wilcox and Bennett, Harkness, Howat & Bradley, for the respondents.

³⁴⁷ BARTCH, J. This controversy arose over a public highway, running along the western line of the appellant's land, and south through some leased land. It is about a mile and a half long, and connects two other highways, running east and west. Counsel for the appellant concede the existence of the highway, but its exact location and its width are in dispute. On the question of the location, the court ³⁴⁸ found substantially that the western line of the appellant's land formed the center line of the two highways, and that it extended on the same line through his leased land. This finding seems to be in entire accord with the location recognized by the appellant, as shown by his pleading and evidence. Among other things, he alleged that on the 25th day of March, 1895, he "had erected, and there was standing on said farm, parallel with the westerly boundary thereof, a substantial fence, separating the same from an adjoining highway." At the trial he testified, as appears from the abstract, that on the same day "there was located on said land, parallel with and east of the western boundary line thereof, a fence which witness had erected at a distance of about eight and one-fourth feet east of said western boundary line," and on cross-examination claimed expressly that the road was one rod wide. If it is one rod wide,

and the appellant erected a fence eight and one-fourth feet of, and parallel with, his western boundary line, to separate his farm from the "adjoining highway," then it is perfectly clear that the western boundary of his land forms the center line of the highway, whatever may be the width thereof. Thus, by his declarations and acts, he has distinctly admitted its location, and cannot now be heard to dispute it. Whether or not there was originally an express dedication is not material, because of the admission of the appellant, and because it appears from the evidence that the highway has been traveled by the public continually and uninterruptedly for a period of more than fifty years. Under these circumstances, the law implies a dedication of the land on which the highway is located to the use of the public for the purposes of travel.

The next question is, How wide is the highway which the public have acquired? Counsel for the appellant ²⁴⁹ appear to insist that the public have only a right to travel on the best path, and must be confined to one rod in width. We cannot agree with counsel that, where the public have acquired the right to a public highway by user, they are limited to such width as has actually been used by them. Generally, the greater part of the travel on a county highway is doubtless confined to the track made by vehicles, but there must be room enough for travelers with wagons, carriages, or implements to pass each other, and for necessary improvements and repairs to be made so as to keep it in a suitable condition. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and, where the public have acquired the easement, the land subject to it has passed under the jurisdiction of the public authorities, for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. Such authorities are bound to keep the road open and in suitable repair, and, if obstructions be placed thereon, it is their duty to remove the same, and care for the rights of the public. The easement acquired by the public, however, vests in them the mere right of passage over the land, and does not divest the owner of the fee, and he may continue to make any use thereof which is not incompatible with the public easement. This private right is not inconsistent with the public use, nor with an effectual dedication, and must be respected by the authorities, so far as it does not interfere with a safe, convenient, and unobstructed right of passage. The purpose for which the easement was acquired must determine the effect of the right parted with by the owner, and the width necessary for the enjoyment of the

highway by the public. Where the easement is acquired by prescription or use such width must be determined from a consideration of ²⁵⁰ the facts and circumstances peculiar to the case, because in such event the court cannot say that in law the highway is of a certain width, in the absence of statutory provision. The highway having been permanently fenced, and the usual width of highways in the locality, if shown, are pertinent facts from which, in connection with other evidence, width may be inferred. Whatever may be the width in any particular case, the easement cannot be limited, when acquired by user, to the actual beaten path. Angell, in his Treatise on the Law of Highways, in section 155, says: "Where there is no other evidence of dedication than mere user by the public, the presumption is not necessarily limited to the traveled path, but may be inferred to extend to the ordinary width of highways; or, if the road be inclosed with fences, to include the entire space so inclosed."

So this court, in *Burrows v. Guest*, 5 Utah, 91, speaking through Mr. Justice Henderson, said: "When a highway is established by user merely over a tract of land of the usual width of a highway, or over a tract of land where, by a survey and plat, which has been recognized and adopted by the owner, a street or highway of a certain width is laid out, the right of the public is not limited to the traveled part, but such user is evidence of a right in the public to use the whole tract as a highway, by widening the traveled part or otherwise, as the increased travel and the exigencies of the public may require. . . . In determining the extent of the dedication, all the circumstances may be considered—the width of the highways in the vicinity of the land in question, the width of highways in a system of which the one in controversy forms a part, any circumstances of recognition by the owner of the fee and the public of definite and fixed limits": *Washburn on Easements*, *137; *Davis v. Clinton*, 58 Iowa, 389; *Sprague v. Waite*, ³⁵¹ 17 Pick. 309; *Ellsworth v. Lord*, 40 Minn. 337; *Watkins v. Lynch*, 71 Cal. 21; *Moore v. Roberts*, 64 Wis. 538; *Hunter v. Trustees etc.*, 6 Hill, 407, 412.

In the case at bar, as it appears from the evidence, the road over which the dispute arose runs north and south, connecting at the north with a public highway four rods in width, running east and west, and at the south end thereof with one a part of which is four rods, and the remainder six rods wide. The highways in the locality seem generally to be four rods in width. The court found that the highway in question was three rods in width, one-half thereof being on one side and one-half on the other side of the line on which it was located, and that such width was neces-

sary to accommodate public travel. In controversies like this the width of the highway presents a question of fact for the jury to determine from all the facts and circumstances proven, and when such a case is tried by the court without a jury, as in this instance, then it is a question of fact to be determined by the court, and in such event the findings of fact have the same force and effect, respecting the width of the road, as a verdict. The findings will not be disturbed unless they are so manifestly erroneous as to demonstrate some oversight or mistake: *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31; *Davis v. City of Clinton*, 58 Iowa, 389.

It is not deemed necessary in this case to refer to the evidence in detail, because, from a full and deliberate examination thereof, we are convinced that it is ample to support the findings of the court; and therefore its decree, based on the findings, must stand. We have also examined the rulings of the court respecting the admission of testimony and conclude that neither the rulings nor the record contains any reversible error. The judgment is affirmed.

Zane, C. J., and Miner, J., concur.

HIGHWAYS—RIGHTS OF PUBLIC AND OWNER OF FEE—The public acquires a mere right of passage over a highway. The freehold, and all profits of the soil, belong still to the proprietor from whom the right of passage was acquired, and he may make any use of his lands not inconsistent with the enjoyment of such right of passage: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; *Allen v. Boston*, 159 Mass. 824; 88 Am. St. Rep. 423; *O'Neal v. Sherman*, 77 Tex. 182; 19 Am. St. Rep. 748; note to *Chase v. Oshkosh*, 29 Am. St. Rep. 903.

ESTOPPEL BY ADMISSION.—One is estopped to deny his admissions which were designed to influence the conduct of another, and which did so influence it, where such denial would operate to the injury of the latter: Note to *Holman v. Boyce*, 36 Am. St. Rep. 863.

APPELLATE PRACTICE—REVIEW OF FINDINGS.—A finding of fact made by a jury or trial judge will not be disturbed, on appeal, if it is supported by competent evidence: *Edwards v. Reid*, 89 Neb. 645; 42 Am. St. Rep. 607.

Highways by User.*

What is a Highway.—A highway is a public way for the use of the public in general, for passage and traffic, without distinction: *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522; note to *Mayhew v. Norton*, 28 Am. Dec. 302. It is an easement comprehending merely the right of all individuals to pass and repass with the incidental

* REFERENCE TO MONOGRAPHIC NOTES.

Rights and remedies of a person over whose land a highway has been established: 28 Am. Dec. 302-306.

Extinguishment of highways and other easements through nonuser or by operation of the statute of limitations: 14 Am. St. Rep. 278-282.

right of the public to keep it in repair; but it does not comprehend any interest in the soil, nor does it give the public the legal possession of it. The fee continues in the original owner of the land: *Dubuque v. Maloney*, 9 Iowa, 451; 74 Am. Dec. 358; note to *Mayhew v. Norton*, 28 Am. Dec. 302. To constitute a highway, the way must be one over which all the people of the state have a common and an equal right to travel; or, at least, a general interest to keep unobstructed: *People v. Jackson*, 7 Mich. 432; 74 Am. Dec. 729. The term "highway," in common acceptation, means a public way; but, when used in a statute, its import is restricted to county roads or county ways, unless its connection should require some different construction: *Cleaves v. Jordan*, 34 Me. 9. A public highway is one under the control of, and kept up by, the public, and must be either established in a regular proceeding for that purpose, or generally used by the public until a prescriptive right is obtained, or dedicated by the owner of the soil and accepted by the proper authorities: *Kennedy v. Williams*, 87 N. C. 6; *Louisville etc. R. R. Co. v. Survant*, 96 Ky. 197; *Kinnare v. Gregory*, 55 Miss. 612; *Baldwin v. Herbst*, 54 Iowa, 168; *Commonwealth v. Petitcher*, 110 Mass. 62. It has been held that the term "highway" means a lawful public road: *Ventilburgh v. Shann*, 24 N. J. L. 740. Contra, holding that "road" and "way" are not synonymous terms: *Chollar-Potosi Min. Co. v. Kennedy*, 8 Nev. 361; 93 Am. Dec. 409. A way may be shown to be a highway: *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 662. The term "highway" is a generic name for all public ways, whether carriageways, bridleways, bridges, ferries, or railroads: Note to *Mayhew v. Norton*, 28 Am. Dec. 303. A railroad is in many respects a highway for public use: See note to *Commonwealth v. Wilkinson*, 26 Am. Dec. 655. That railways are highways, within a grant of the right of way for the construction of highways across public lands, see *Flint etc. Ry. Co. v. Gordon*, 41 Mich. 420. Public footways may exist by prescription: *Gould v. Boston*, 120 Mass. 300. Turnpike roads are highways: *Commonwealth v. Wilkinson*, 16 Pick. 175; 26 Am. Dec. 654, and note: *Pittsburgh Co. v. Commonwealth*, 104 Pa. St. 583. So are plank roads: Note to *Mayhew v. Norton*, 28 Am. Dec. 303. All "roads" which the legislature has power to lay out and establish are public roads: *Sherman v. Bulck*, 32 Cal. 241; 91 Am. Dec. 577. A way, to become public, must be used in such a manner as to show that the public accommodation requires the way: *State v. Nudd*, 23 N. H. 327. The streets and alleys of a town or city are public highways: *Morris v. Bowers*, Wright, 749; note to *Mayhew v. Norton*, 28 Am. Dec. 303. A street or highway is a public easement, open to the community: *Dubuque v. Maloney*, 9 Iowa, 451; 74 Am. Dec. 358. The primary object of public streets and highways is to furnish a passageway for travelers in vehicles or on foot; and while they may be put to numerous other uses, such uses must be enjoyed in subordination to this primary object: *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 803. To constitute a public street a highway, it is necessary that it should be set off and used as such, for it is the use which makes it a highway: *Commissioners v. Taylor*, 2 Bay, 282; 1 Am. Dec. 647. The mere fact that an alley opens upon a public

street does not make it a public alley: *De Grilleau v. Frawley*, 48 La. Ann. 184. A cul de sac may be a highway: *Saunders v. Townsend*, 26 Hun, 306; but, as to when it is not, see *People v. Jackson*, 7 Mich. 432; 54 Am. Dec. 729. To constitute a highway, it must, at least, be of public utility, if not of necessity: *Witter v. Harvey*, 1 McCord, 67; 10 Am. Dec. 650; *State v. Nudd*, 23 N. H. 327; but when a way has become a public highway by user, it is such, regardless of any question of public utility: *Washington Ice Co. v. Lay*, 103 Ind. 48.

User.—Highways may be established by user as well as by legislative authority: *Hiner v. Jeanpert*, 65 Ill. 428; *Blodgett v. Royalton*, 17 Vt. 40; 42 Am. Dec. 476; *Young v. Garland*, 18 Me. 409; *Dimon v. People*, 17 Ill. 416.

In some of the states the mere user of a road or street, no matter how long such use is continued, does not make it a public highway: *Dicken v. Liverpool etc. Coal Co.*, 41 W. Va. 511, 516; *Commonwealth v. Kelly*, 8 Gratt, 632; *Tower v. Rutland*, 56 Vt. 28; *State v. McDaniel*, 8 Jones, 284; *Harper v. Dodds*, 8 Ill. App. 331; *Louisville etc. Ry. Co. v. Miller*, 12 Ind. App. 414; *Boyd v. Woolwine*, 40 W. Va. 282.

But in other states a public highway may be created by an uninterrupted use, or, as is said in some of the cases, a "long use," of land by the public, for the purposes of a highway: *State v. Nudd*, 23 N. H. 327; *Cemetery Assn. v. Meninger*, 14 Kan. 312; *Hiner v. Jeanpert*, 65 Ill. 428; *Barker v. Clark*, 4 N. H. 380; 17 Am. Dec. 428; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Bequette v. Patterson*, 104 Cal. 282; *State v. Walters*, 69 Mo. 463.

As said by Shaw, C. J., in *Reed v. Northfield*, 13 Pick, 94, 23 Am. Dec. 662: "If an uninterrupted use of a highway, and the support of it by the town for forty years, which is now the longest term of prescription known to the law, would not establish it, it would be equivalent to declaring that there can be no highway proved in any mode but by the record of its being laid out, which, in regard to many, and those the most important and ancient highways of the commonwealth, would be utterly impossible. But, without dwelling upon the supposed inconvenience of a different rule, we think it clear upon principle, that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority." Twenty years' use of land as a way raises a presumption that it has been dedicated by the owner for a way, and forty years' use of the land as a way gives the public a right of way over it: *Valentine v. Boston*, 22 Pick. 75; 33 Am. Dec. 711.

If doubt exists as to the true location of a public road, it may be determined by long public user: *State v. Van Derveer*, 47 N. J. L. 259. The number of people who must travel upon a highway, in order to determine whether it exists by user, is not fixed by statute, or otherwise. It must be used by the public, and the public are all who have occasion to use it: *Grandville v. Jenlson*, 84 Mich. 54. The uninterrupted use and enjoyment of land as a road or way by a limited

number of persons, for a sufficient length of time, may establish, not a public, but merely a private, right of way by prescription: *Tupper v. Huson*, 46 Wis. 646. The existence of a railroad upon a highway during a portion of the prescribed twenty years does not defeat the claim of a highway by user: *Spler v. New Utrecht*, 121 N. Y. 420. In Iowa it is held that a highway cannot be established by user alone, although the owner of the land had knowledge of such use, unless the owner also had express notice that a highway was claimed, independently of the mere use: *State v. Mitchell*, 58 Iowa, 567. As a road may be established by user, the rights of the public will be according to the user. Hence, if a road has been encumbered for forty years with movable bars or gates, the right to use the road still exists, subject to such limitation: *Hinks v. Hinks*, 46 Me. 423. A right of way cannot be established by user, where such use arose by reason of a legal location: *Larry v. Lunt*, 37 Me. 69.

User by the public for the following periods of time has been held sufficient to constitute a legal establishment of the highway: Forty years: *Hinks v. Hinks*, 46 Me. 423; *Ward v. Folly*, 5 N. J. L. 482; *Valentine v. Boston*, 22 Pick. 75; 33 Am. Dec. 711; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; thirty years: *Elliott v. Treadway*, 10 B. Mon. 22; *State v. Bigelow*, 84 Me. 243; *Brock v. Chase*, 39 Me. 300; twenty-one years: *Commonwealth v. Cole*, 26 Pa. St. 187; twenty years: *Hart v. Trustees*, 15 Ind. 226; *Day v. Allender*, 22 Md. 511; *Haywood v. Charlestown*, 34 N. H. 23; *Campton's Petition*, 41 N. H. 197; *Devenpeck v. Lambert*, 44 Barb. 596; *State v. Marble*, 4 Ired. 318; *Hutto v. Tindall*, 6 Rich. 396; *Heyward v. Chisolm*, 11 Rich. 253; *State v. Hunter*, 5 Ired. 369; 44 Am. Dec. 41; *Stewart v. Frink*, 94 N. C. 487; 55 Am. Rep. 618; *Harper v. State*, 100 Ala. 66; *Debolt v. Carter*, 31 Ind. 355; *Shugart v. Halliday*, 2 Ill. App. 45; *Lewiston v. Proctor*, 27 Ill. 414; *Landers v. Whitefield*, 154 Ill. 630; *Madison v. Gallagher*, 159 Ill. 105; *Veale v. Boston*, 135 Mass. 187; *Pillsbury v. Brown*, 82 Me. 450, 454; *Prudden v. Lindsley*, 29 N. J. Eq. 615; *Click v. Lamar County*, 79 Tex. 121; twelve years: *Colden v. Thurbur*, 2 Johns. 424; ten years: *Keyes v. Tait*, 19 Iowa, 123; *State v. Green*, 41 Iowa, 693; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334. "The adjudged cases, with respect to highways by dedication or by prescription, are not, in all points, susceptible of being reconciled," says Dillon, J., in *Onstott v. Murray*, 22 Iowa, 457, 466. "Some deny that highways can be established by prescription, and affirm that they can be established in two ways only: 1. Under the statute; and 2. By dedication. Other cases hold that highways may derive a lawful existence from long-continued use by the public under a claim of right. The cases differ as to the effect of long user by the public. Some hold that, if continued for the period which, under the statute of limitations, would bar the right of the owner of the land to recover the same, this is conclusive evidence against the owner of an intent to dedicate for a highway the land so used. The period fixed by the statute of limitations is applied to such cases by way of analogy. Others hold that user, even for such a period, does not conclude the right of the owner, who may, nevertheless, show that he did not intend to dedicate, and

rebut, if he can, any presumption of such an intent derived from mere use by the public. Many of the authorities make the effect of user by the public depend largely upon the character of the land and of the country in or through which the highway is situate": *Onstott v. Murray*, 22 Iowa, 466.

Prescription.— A public road must either be established in a regular proceeding for that purpose, or acquired by the public by dedication or prescription. It may become a highway by prescription; but, to establish a highway by prescription, there must have been a general, continuous, uninterrupted, and adverse use of the same as such, by the public under a claim of right, for a period equal to that for the limitation of real actions. The period for acquiring a highway by prescription, corresponds to the local statute of limitations as to land, and varies in different states. In support of these propositions, see the following authorities, the cases showing that a mere permissive user is insufficient, being grouped under a separate head, *infra*: *Harper v. State*, 109 Ala. 66; *Brushy Mound v. McClintock*, 150 Ill. 129; *State v. Tucker*, 86 Iowa, 485; *State v. Green*, 41 Iowa, 693.

The principle applicable to the acquisition of easements generally applies to highways. To acquire a prescriptive right to an easement, it must have been continuously used and enjoyed during the whole time prescribed by the statute of limitations: *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570. Otherwise expressed, the period required to acquire an easement in land corresponds to the statute of limitations conferring title by adverse possession: *Alcorn v. Sadler*, 71 Miss. 634; 42 Am. St. Rep. 484. We have shown above that a highway is an easement.

It is unquestioned that a general, continuous, uninterrupted, and adverse user of a highway, as such, by the public, under a claim of right, for a period equal to that for the limitation of real actions, will establish a highway by prescription, and bar the owner of the soil: *Western Ry. v. Alabama etc. R. R. Co.*, 96 Ala. 272; *Keyes v. Tait*, 19 Iowa, 123; *Onstott v. Murray*, 22 Iowa, 457; *Ewell v. Greenwood*, 26 Iowa, 377; *State v. Welpton*, 34 Iowa, 144; *Shugart v. Hallday*, 2 Ill. App. 45; *Lewiston v. Proctor*, 27 Ill. 414; *Landers v. Whitefield*, 154 Ill. 630; *Madison v. Gallagher*, 159 Ill. 105; *Sprow v. Boston etc. R. R. Co.*, 163 Mass. 830; *Veale v. Boston*, 135 Mass. 187; *Debolt v. Carter*, 81 Ind. 355; *Pillsbury v. Brown*, 82 Me. 450, 454; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334; *Prudden v. Lindsley*, 29 N. J. Eq. 615; *Devenpeck v. Lambert*, 44 Barb. 596; *Click v. Lamar County*, 79 Tex. 121; *State v. Walters*, 69 Mo. 463; *McLemore v. McNeley*, 56 Mo. App. 556.

Although the public cannot, by prescription, acquire title to land, used as a highway under a mistake of fact on the part both of the public and of the landowner, as to the true location of the highway, yet, where it is so used in mutual reliance upon proceedings establishing the highway, which are afterward found to be void, such mistake is one of law, and such use is based on color of title, and after ten years it ripens into title by prescription: *State v. Waterman*, 79 Iowa, 860, 867. The fact that there is a private way across a railroad by reserva-

tion does not prevent the public from gaining a right to use the way by prescription: *Sprow v. Boston etc. R. R. Co.*, 163 Mass. 330. The streets and alleys of a town as fixed by continuous user for more than twenty years must prevail over a prior invalid statutory dedication: *Waltman v. Rund*, 109 Ind. 366. After the lapse of twenty years, accompanied by an adverse use, a location of a way de facto becomes a location de jure: *Pillsbury v. Brown*, 82 Me. 450. An adverse public user, for the purposes of a highway of land held in trust, continuing for twenty years, will establish the highway against both the trustees and cestui que trust, whether consistent with the trust or not; and it makes no difference that the trust is for the benefit of a portion of the public: *Prudden v. Lindsley*, 29 N. J. Eq. 615. In the city of Boston, public footways may exist by prescription: *Gould v. Boston*, 120 Mass. 300. A public way may be established by prescription over a private way opened by individuals: *Weld v. Brooks*, 152 Mass. 297. A town street may become a public highway by twenty years' public use, but such use must be adverse, as of right, and accompanied by some action of the public authorities: *Stewart v. Frink*, 94 N. C. 487; 55 Am. Rep. 618. If a public road has been located under statutory proceedings, and opened, and the public travel it for more than ten years, they acquire thereby an easement in such highway, and a court will not examine the original proceedings for the laying out of the road to determine whether or not they were valid: *Beatrice v. Black*, 28 Neb. 263.

In cases where it is sought to establish a prescriptive right to a road or street many cases hold that the user must be open, adverse, and under a claim of right and with the knowledge and acquiescence of the owner or owners of the land in or over which the easement is claimed: *Brushy Mound v. McClintock*, 150 Ill. 129; *Madison v. Gallagher*, 159 Ill. 105; *Sprow v. Boston etc. R. R. Co.*, 163 Mass. 330; *Harriman v. Howe*, 78 Hun, 280; *Chicago v. Chicago etc. Ry. Co.*, 152 Ill. 561; *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Stewart v. Frink*, 94 N. C. 487; 55 Am. Rep. 618; *Alves v. Henderson*, 16 B. Mon. 131; *Coburn v. San Mateo County*, 75 Fed. Rep. 520; *Sharp v. My-natt*, 1 Lea, 375; *Johnson v. Lewis*, 47 Ark. 66; *Taylor v. Philippi*, 35 W. Va. 554; *Moore v. Hawk*, 57 Mo. App. 495; *Kansas City etc. Co. v. Riley*, 133 Mo. 574; *Mayberry v. Standish*, 56 Me. 342.

The following cases show facts from which a prescription may be inferred: *Waring v. Little Rock*, 62 Ark. 408; *White v. Foxborough*, 151 Mass. 28; *Commonwealth v. Coupe*, 128 Mass. 63; and the following show facts from which a prescription cannot be inferred: *Herhold v. Chicago*, 108 Ill. 467; *Topeka v. Cowee*, 48 Kan. 345; *Breneman v. Burlington etc. Ry. Co.*, 92 Iowa, 755; *Sprow v. Boston etc. R. R. Co.*, 163 Mass. 330.

Dedication.— A highway may be established by dedication, either express or implied. As user has nothing to do with an express dedication, we are not, of course, concerned about questions of express dedication and omit them from consideration. Two things are necessary to a dedication as distinguished from a prescriptive right by long user: 1. A dedication by the owner; 2. An acceptance by the public: *Coburn v. San Mateo County*, 75 Fed. Rep. 520. That a high-

way may be established by implied dedication, see *Stacey v. Miller*, 14 Mo. 478; 55 Am. Dec. 112; *Valentine v. Boston*, 22 Pick. 75; 33 Am. Dec. 711; *Hobbs v. Lowell*, 19 Pick. 405; 81 Am. Dec. 145; *Blodgett v. Royalton*, 17 Vt. 40; 42 Am. Dec. 476.

There must, however, be both a dedication and an acceptance, either express or implied: *Denver v. Denver etc. R. R. Co.*, 17 Colo. 583. It may be established without evidence of an express grant or other affirmative act on the part of the owner: *Onstott v. Murray*, 22 Iowa 457. A dedication of land for a highway does not pass the fee, but only an easement or right of use: *Williams v. New York etc. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651. The dedication must, of course, be made by the owner of the land: *Edwardsville v. Barnsback*, 66 Ill. App. 381. Parties are as necessary to a dedication as to a private grant: *Vick v. Mayor*, 1 How. 379; 31 Am. Dec. 167. As a dedication of lands can be for public purposes only, and as railway companies are private corporations, they cannot acquire lands, or an easement therein, by common-law dedication: *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514; 46 Am. St. Rep. 355. But a railroad company can dedicate land for a public highway: *Williams v. New York etc. R. R. Co.*, 39 Conn. 509. Under a new dedication, another way, equally convenient, may be substituted, by general and long-continued acquiescence, for the original way: *Almy v. Church*, 18 R. I. 182, 188. If an owner of land dedicates it for a highway under a mistaken belief that it is a legal highway, and it is accepted as such, and expense is incurred by others upon the faith of the dedication, it is binding on the landowner, for the mistake is one of law, not of fact: *State v. Waterman*, 79 Iowa, 360, 367. If there is a common-law dedication of a public highway or street, to public use, prior to the existence of a municipal corporation, then, upon such corporation coming into being, the use of the highway or street vests in it at once in trust for the public: *Waggemann v. North Peoria*, 160 Ill. 277. A public highway may be created by adoption and use, and the owner may thereby lose his right to fence in and control the use of the land: *Blodgett v. Royalton*, 17 Vt. 40; 42 Am. Dec. 476.

A dedication of land for a highway is an appropriation of it to that purpose made by the owner of the fee and accepted for such use by or on behalf of the public. No specific length of possession is necessary to constitute a valid dedication of land for a highway, but an intention on the part of the owner to dedicate is essential; and, unless such intent can be found in the facts and circumstances of the particular case, no dedication exists: *Ward v. Farwell*, 6 Colo. 66, 69; *Ayers v. State*, 59 Ark. 26, 31. No particular form is necessary to constitute a dedication of land for a public highway; but there must be a clear intent to dedicate, and an act of acceptance on the part of the public: *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554; *Hartford v. New York etc. R. R. Co.*, 59 Conn. 250; *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Fisk v. Havana*, 88 Ill. 208; *Chicago v. Thompson*, 9 Ill. App. 524; *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772; *Morse v. Zelze*, 34 Minn. 35; *Perkins v. Fielding*, 119 Mo. 149;

Williams v. New York etc. R. R. Co., 39 Conn. 509; **Mansur v. State**, 60 Ind. 357; **Mansur v. Haughey**, 60 Ind. 364; **Vossen v. Dautel**, 116 Mo. 379; **State v. Green**, 41 Iowa, 693; **Wheatfield v. Grundmann**, 164 Ill. 250; **Goodfellow v. Riggs**, 88 Iowa, 540; **State v. Tucker**, 86 Iowa, 485; **Coburn v. San Mateo County**, 75 Fed. Rep. 520; **Mayberry v. Standish**, 56 Me. 342.

Where the only evidence of the dedication of a highway is the conduct of the owner of the land, it is his right in denial of the dedication claimed to state what his intention was in doing as he did: **Goodfellow v. Riggs**, 88 Iowa, 540; the principle being that when the character of a transaction depends upon the intent with which it was done, a party may testify as to what his intention was: **Bidinger v. Bishop**, 76 Ind. 244. Evidence of the declarations of the owner explanatory of his intentions, both before and after the opening of the way, is admissible: **Buchanan v. Curtis**, 25 Wis. 99; 3 Am. Rep. 23; **Starr v. People**, 17 Colo. 458; **Ottawa v. Yentzer**, 160 Ill. 509. There is, however, strong ground for holding, in some cases, that the intent to be ascertained is not the secret intent of the owner, but that manifested by his acts and declarations. The assertion that he did not intend to dedicate a certain strip of land for a public highway, near his premises, "comes with a faint and dubious sound into the ear of a court of equity," after he has stood by for months, and has seen work progress, thousands of dollars expended, and nearly all of the work completed, including the heaviest part of it in front of his premises: **Perkins v. Fielding**, 119 Mo. 149, 163.

Long continued and uninterrupted user is evidence of the public right in a road, but must be considered in connection with the intention of the owner to dedicate: **State v. Trask**, 6 Vt. 355; 27 Am. Dec. 554; **Coburn v. San Mateo County**, 75 Fed. Rep. 520; **Barker v. Clark**, 4 N. H. 380; 17 Am. Dec. 428; **Onstott v. Murray**, 22 Iowa, 457; **Morse v. Zeize**, 34 Minn. 35; **Burrows v. Guest**, 5 Utah, 91; for the public cannot acquire a right of way by mere use which is permissive, and not adverse and without any intention on the part of the owner of the land to dedicate the way to the public: **Henderson v. Alloway**, 3 Tenn. Ch. 688, 695; **Witter v. Harvey**, 1 McCord, 67; 10 Am. Dec. 650; **Gardiner v. Tisdale**, 2 Wis. 153; 60 Am. Dec. 407.

In a case where there was no express manifestation or declaration of a purpose to dedicate land for a highway, and where the intent to do so can only be found by inferring it from circumstances, the question whether it existed is one of fact for the jury. An implied dedication is a conclusion of fact to be drawn by the jury from the circumstances of each particular case, the sole question as against the owner of the soil being whether there is sufficient evidence of intention on his part to dedicate the land to the public as a highway: **Ayers v. State**, 39 Ark. 26, 31; **Ward v. Farwell**, 6 Colo. 68, 69; **State v. Trask**, 6 Vt. 355; 27 Am. Dec. 554; **Hartford v. New York etc. R. R. Co.**, 59 Conn. 250; note to **People v. Reed**, 15 Am. St. Rep. 33; **Quinn v. Anderson**, 70 Cal. 454; **Morse v. Zeize**, 34 Minn. 35; **Gardiner v. Tisdale**, 2 Wis. 153; 60 Am. Dec. 407; **McKey v. Hyde Park Village**, 134 U. S. 84; **Burrows v. Guest**, 5 Utah, 91; **Porter v. Attica**, 83 Hun, 605; **Hart-**

ford v. New York etc. R. R. Co., 59 Conn. 250; Harding v. Hah, Ill. 192; Wood v. Hurd, 34 N. J. L. 87, 90.

In some jurisdictions, a dedication, or intent to dedicate, cannot be presumed or inferred from mere user of a street or highway: *Garber v. Tisdale*, 2 Wis. 153; 60 Am. Dec. 407; but the inference that the owner of land has dedicated it to the public for use as a street or highway can only be drawn from acts which show an actual intention to so dedicate it, or from acts which equitably estop the owner from denying such intention: *McKey v. Hyde Park Village*, 18 U. S. 84, 98.

But in others the existence of a street or highway may be proved by the presumption arising from long, uninterrupted use and enjoyment: *Stedman v. Southbridge*, 17 Pick. 162; *Hobbs v. Lowell*, 9 Pick. 405; 31 Am. Dec. 145; *Denver v. Denver etc. R. R. Co.*, 17 Cal. 583; *Commonwealth v. Moorehead*, 118 Pa. St. 344; 4 Am. St. Rep. 599; *Onstott v. Murray*, 22 Iowa, 457; *Ely v. Parsons*, 55 Conn. 83; *Klenk v. Walnut Lake*, 51 Minn. 381; *Porter v. Attica*, 33 Ill. 605.

The following cases show facts from which a dedication and acceptance of a highway may be inferred: *Witter v. Damitz*, 81 Wis. 385; *Moffett v. South Park Commrs.*, 138 Ill. 620; *Starr v. People*, 1 Colo. 458; *Pomfrey v. Saratoga Springs*, 34 Hun, 607; *Klenk v. Walnut Lake*, 51 Minn. 381; *People v. Blake*, 60 Cal. 497; *Webb v. Portland etc. R. R. Co.*, 57 Me. 117; *Perkins v. Field*, 119 Mo. 149; *Hins v. Jeanpert*, 65 Ill. 428.

The following cases show facts from which a dedication of a street or highway, and acceptance thereof, cannot be inferred: *Cyr v. McDore*, 73 Me. 53; *Chicago v. Thompson*, 9 Ill. App. 524; *Manchester v. Hoag*, 66 Iowa, 649; *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772; *Ottawa v. Yentzer*, 160 Ill. 509; *Mansur v. State*, 60 Ind. 357; *Mansur v. Haughey*, 60 Ind. 364; *Moore v. Hawk*, 57 Mo. App. 495; *Topeka v. Cowee*, 48 Kan. 345.

Acceptance of Dedication.—At common law, there must be both a dedication and an acceptance, either express or implied, in either event, to make a road a public highway by dedication. Unless otherwise provided by statute, a dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burden, nor confer any right, upon the public authorities, unless the road is accepted by them as a highway. The rule, therefore, is, that acceptance upon the part of the public, is necessary to a valid dedication of land as a highway: *Denver v. Denver etc. R. R. Co.*, 17 Cal. 583; *Trine v. Pueblo*, 21 Colo. 102; *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22; *Board of Supervisors v. Seal*, 66 Miss. 129; 14 Am. St. Rep. 545; *Commonwealth v. Moorehead*, 118 Pa. St. 344; 4 Am. St. Rep. 599; *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Harper v. State*, 109 Ala. 66; *Lansburgh v. District of Columbia*, 8 App. (D. C.) 10; *Williams v. New York etc. R. R. Co.*, 39 Conn. 509; *New York etc. R. R. Co. v. New Haven*, 46 Conn. 257; *Forbes v. Balenseifer*, 74 Ill. 183; *Brushy Mound v. McClintock*, 150 Ill. 129; *Mansur v. State*, 60 Ind. 357; *Mansur v. Haughey*, 60 Ind. 364; *Madison v. Gallagher*,

159 Ill. 105; *State v. Tucker*, 36 Iowa, 485; *Wilkins v. Barnes*, 79 Ky. 323; *White v. Bradley*, 66 Me. 254; *Buskirk v. Strickland*, 47 Mich. 389; *Potter v. Safford*, 50 Mich. 46; *Irving v. Ford*, 65 Mich. 241; *Baltimore etc. R. R. Co. v. McColgan*, 83 Md. 650; *St. Louis v. St. Louis University*, 88 Mo. 155; *Vossen v. Dautel*, 116 Mo. 379; *Kansas City Milling Co. v. Riley*, 133 Mo. 574; *Booraem v. North Hudson etc. Ry. Co.*, 39 N. J. Eq. 465; *Bissell v. New York etc. R. R. Co.*, 26 Barb. 630; *In re Alley in Pittsburgh*, 104 Pa. St. 622; *Tower v. Rutland*, 56 Vt. 28; *Commonwealth v. Kelly*, 8 Gratt. 632; *Boyd v. Woolwine*, 40 W. Va. 282; *Dicken v. Liverpool etc. Coal Co.*, 41 W. Va. 511; *Mahler v. Brumder*, 92 Wis. 477, 482.

A dedication of land to public use as a highway must be accepted and appropriated to the uses intended, and, until there is such acceptance, the owner may withdraw his offer and appropriate the land to any other purpose he may choose: *Forbes v. Balenselfer*, 74 Ill. 183. A conveyance of land, subsequent to an offer to dedicate it for the purposes of a highway, but before such offer has been accepted, is a revocation of the offer: *Trine v. Pueblo*, 21 Colo. 102.

The marking out of a village plat does not necessarily make the space a public way, unless the public authorities accept it as such: *Buskirk v. Strickland*, 47 Mich. 389. So the mere surveying, mapping, and laying out a tract of land, opening a street, and selling lots upon it, does not make such street a public highway: *Bissell v. New York etc. R. R. Co.*, 26 Barb. 630. There can be no dedication of land to a city for a street without acceptance, and a city cannot accept land outside of its territorial limits for the purposes of a street: *St. Louis v. St. Louis University*, 88 Mo. 155. Neither does the dedication of a private alley, for public use, make it a public highway, unless it is accepted as such by the city: *In re Alley in Pittsburgh*, 104 Pa. St. 622. The owner of land may withdraw his offer of dedication thereof to the public as a street at any time before his offer is accepted. The mere making of sales of lots with reference to a map designating certain streets does not, therefore, constitute an irrevocable dedication to the public. As between him and the public, his act alone is not sufficient to constitute an irrevocable dedication. And the acceptance of an offer of the dedication of a street must be made either by user or by some formal act of acceptance within a reasonable time. An acceptance made more than twenty years after the offer of dedication is too late: *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22.

A formal acceptance of a highway is, in general, unnecessary, where the intent to dedicate clearly appears, and the land has been used as a highway, for the acceptance may be established by user: *Kansas City etc. Co. v. Riley*, 133 Mo. 574. Thus, when land is dedicated to the public for the purposes of a street, and is used for such purposes by a city, an ordinance declaring it to be a street is unnecessary: *Taylor v. St. Louis*, 14 Mo. 20; 55 Am. Dec. 89. So, where the charter of a city provides that "whenever any street, alley, or lane shall be opened to, or used as such by, the public for the period of five years, the same shall thereby become a street, alley, or lane for all purposes," no formal act of acceptance is necessary of a street

or alley, which has been open to the public use for over twenty years having been surrendered by the owners of the fee: *Requa v. Rochester*, 45 N. Y. 129; 6 Am. Rep. 52. And where the plaintiff constructed a road, through his own land, which he permitted the public to use freely for two or three years, and subsequently closed it by fence it was held, in an action against the pathmaster for removing the fences, that, where the intention of the owner to dedicate the road to the public is evident, no formal or official acceptance is required to constitute a highway by dedication: *Buchanan v. Curtis*, 25 Va. 99; 3 Am. Rep. 23.

But the mere use of a road for public travel, however extensive that use may be, is not enough to make the road a highway by adoption, so as to impose upon the public the duty of keeping it in repair. In addition to this there must be evidence of some public act of recognition, such as putting the road in the rate bills of the highway surveyor, expending money thereon, shutting up the old road, leaving no other avenue for travel, etc.: *Tower v. Rutland*, 56 Vt. 28. To constitute a highway or street, by dedication, which the public authorities are bound to repair, there must be an acceptance of it, as such, by those authorities, but this may be proved either by formal acceptance, by repairing, or probably by the use of it by the public for many years with the knowledge and assent of such authorities. Yet, while acceptance by formal adoption by public authorities, or by public user, is necessary to impose on the public the duty to keep in repair a dedicated highway or street, that is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction, or to subject the dedication to the public use, whenever, in the estimation of such authorities, the wants or convenience of the public require it for the purpose for which it was originally given: *Board of Supervisors v. Seal*, 68 Miss. 129; 14 Am. St. Rep. 545.

If land is fenced to correspond with an old road not laid out, without subsequent acceptance by the public, there is no highway by dedication: *Brushy Mound v. McClintock*, 150 Ill. 129. A city's acceptance of a deed to a street, from a trustee, who holds the land in trust, is not an acceptance of the highway by the public: *New York etc. R. R. Co. v. New Haven*, 46 Conn. 257.

A private way does not, however, become a public highway merely because the public are for many years permitted to travel over it: *Palmer v. Palmer*, 150 N. Y. 139; 55 Am. St. Rep. 653.

An express acceptance of a road, by the public authorities, is not requisite to constitute it a public highway after a dedication thereof has been shown. Acceptance may be shown by acts of recognition, acceptance, and claim, as by proving that the public has assumed care and control of the way, and has used, worked, and improved it; and acceptance is implied from such user, work, and improvements, irrespective of the lapse of any definite length of time, as acceptance does not depend upon this: *Brakken v. Minneapolis etc. Ry. Co.*, 29 Minn. 41; *Bissell v. New York etc. R. R. Co.*, 28 Barb. 630; *Gerberling v. Wunnenberg*, 51 Iowa, 125; *State v. Tucker*, 36 Iowa, 485, 487; *Witter v. Damitz*, 81 Wis. 385; *Corning v. Head*, 86 Hun, 12;

Hartford v. New York etc. R. R. Co., 59 Conn. 250; Denver v. Denver etc. R. R. Co. 17 Colo. 583; Hiner v. Jeanpert, 65 Ill. 428; Ross v. Thompson, 78 Ind. 90; Kansas City etc. Co. v. Riley, 133 Mo. 574; Mansburgh v. District of Columbia, 8 App. (D. C.) 10; Gentleman v. Loule, 32 Ill. 271; 83 Am. Dec. 264; Dimon v. People, 17 Ill. 416; Edwardsville v. Barnsback, 66 Ill. App. 381; Taylor v. Philippi, 35 W. Va. 554; Nichols v. New England Furniture Co., 100 Mich. 230. If there has been no acceptance, there is of course no highway, however long it may have been used: Laughlin v. Washington, 63 Iowa, 652; State v. McDaniel, 8 Jones, 284; Mahler v. Brumder, 92 Wis. 577.

Mere travel is not evidence of acceptance: Forbes v. Balenseifer, 74 Ill. 183; nor will mere use by individual members of the community prove it; nor will unauthorized repairs by a street commissioner, whether sufficient to raise an estoppel against the city or not: White v. Bradley, 66 Me. 254. But acceptance by the public does arise where the municipal authorities do not punish the obstruction of an old highway, and the people use the new one: Hobbs v. Lowell, 19 Pick. 405; 31 Am. Dec. 145. Acceptance may be manifested by some corporate act, or acts of public officers, recognizing and adopting the highway as public: Harper v. State, 109 Ala. 66; such as recognizing or naming a strip of land as a street of the town by ordinance of the town council: Taylor v. Philippi, 35 W. Va. 554; or placing it on the map of roads for the proper district: Forbes v. Balenseifer, 74 Ill. 183. It has been held, in fact, that without an acceptance of a dedication by the constituted representative of the public in its organic capacity, it is ineffectual: Wilkins v. Barnes, 79 Ky. 323. Public user alone, when sufficiently general and long continued, will constitute an acceptance of a road or street as a highway: Adams v. Iron Cliffs Co., 78 Mich. 271; 18 Am. St. Rep. 441. Contra, Richmond v. Stokes, 31 Gratt. 713.

In Iowa, it is doubted whether, under the code of that state, user is in any case sufficient to establish the public character of a street in a city; but, if so, such user must be shown to be open, notorious, and continuous for such a length of time as that an acceptance on the part of the city can be presumed. The use of the street by the public, with knowledge by the city, for two or three weeks is not sufficient: Laughlin v. Washington, 63 Iowa, 652, 655. In Virginia, the mere user, by the public, of the locus in quo, does not of itself constitute an acceptance, without regard to the character of the use and the circumstances and length of time under which it is claimed and enjoyed; but where property in a town is set apart for public use, and is enjoyed as such, and public and private rights acquired with reference to it and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel in pais, and preclude the owner from revoking the dedication: Richmond v. Stokes, 31 Gratt. 713. Acceptance of one side of a street is an acceptance of the whole dedication: Southern Pac. R. R. Co. v. Ferris, 98 Cal. 268. Compare Commonwealth v. Royce, 152 Pa. St. 88.

Proof of Dedication.—In Illinois, the inference that an owner of land has dedicated it to the public for use as a street or highway can only be drawn from acts which show an actual intention to dedicate it, or from acts which equitably estop the owner from denying such intention: *McKey v. Hyde Park Village*, 134 U. S. 84, 97, 98; *Ottawa v. Yentzer*, 160 Ill. 509; *Moffett v. South Park Commrs.*, 138 Ill. 620; *Chicago v. Johnson*, 98 Ill. 618; *Kyle v. Logan*, 87 Ill. 64; *Fox v. Virgin*, 5 Ill. App. 515; *Harper v. Dodds*, 3 Ill. App. 331; *Shugart v. Halliday*, 2 Ill. App. 45. See, also, *Starr v. People*, 17 Colo. 458. The voluntary use of a way by the public, with the assent of the owner, is not of itself sufficient, in that state, to make it a public highway; but such use and assent, in connection with proof of actual recognition and repair by the public authorities, may warrant a jury in finding that the way is a public highway: *Harper v. Dodds*, 3 Ill. App. 381; *Dinion v. People*, 17 Ill. 416; *Kyle v. Logan*, 87 Ill. 64. In other states, as elsewhere shown in this note, the existence of a highway may be established by user. A dedication may be presumed from circumstances from which the consent of the owner of the soil may be inferred: *Hobbs v. Lowell*, 19 Pick. 405; 31 Am. Dec. 145.

If the conduct and declarations of the owner are relied on to establish a dedication, any act of his satisfactorily showing an intention to dedicate is sufficient; but, in arriving at a conclusion as to whether an act was done by a landowner with the intent to dedicate his land to the public use, the location of the property and all its surroundings must be considered. For example, the intention to dedicate is more readily presumed with respect to urban property than to country property; and more freely with respect to well settled or frequented country than it is in regard to wild, wood, waste or unfrequented land: *Moffett v. South Park Commrs.*, 138 Ill. 620. If every act of the owner relied on to show a common-law dedication of a part of a lot for a street is susceptible of an explanation consistent with the theory that there was no such dedication, and every act of the owners has been in resistance of the claim of an easement, no dedication can be found: *Chicago v. Johnson*, 98 Ill. 618, 621. Neither is dedication established where the evidence, in all its bearings, tends only to prove the lack of any settled, definite purpose on the part of the owner of the land: *Mason v. Chicago*, 163 Ill. 351. As a dedication of land for the purposes of a highway rests entirely on the intent or assent of the owner, the evidence of acts and declarations tending to show a dedication must be of such a deliberate and decisive character as to leave no doubt of the owner's intention: *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772; *Moore v. Hawk*, 57 Mo. App. 495; *Vossen v. Dautel*, 116 Mo. 379; *Starr v. People*, 17 Colo. 458. The maintenance of gates and bars across a traveled way negatives an intention to dedicate the way to public use: *State v. Green*, 41 Iowa, 693; *Cyr v. Madore*, 73 Me. 53; and a failure, for a few years, to maintain gates and bars, which have existed, leaving the highway open, does not, of itself, prove a change of intention: *Cyr v. Madore*, 73 Me. 53. The presumption of dedication arising

erely from circumstances may be rebutted: *Mansur v. Haughey*, 10 Ind. 364.

A street may be shown to be a public thoroughfare by evidence of dedication, acceptance, and user: *Garnett v. Slater*, 56 Mo. App. 207; *Pickerson v. Detroit*, 99 Mich. 498. To establish the character of the locality where an injury occurred as a part of a public street, nothing more is essential than to show that it was in the actual possession of the city and open and used by the public as a thoroughfare at the time, without proof of formal dedication: *Garnett v. Slater*, 56 Mo. App. 207; *Maus v. Springfield*, 101 Mo. 613; but no duty is imposed upon the city to keep a street in repair until after dedication and acceptance, though it will be liable after acceptance by user, for injuries caused by defects in the street: *Garnett v. Slater*, 56 Mo. App. 207; *Salida v. McKenna*, 16 Colo. 523; *Blodgett v. Royalton*, 17 Vt. 40; 42 Am. Dec. 476.

Permissive User or License.—The mere fact of acquiescence on the part of the owner in the use and enjoyment of a way by the public, as a public road or highway, does not create the presumption of a dedication, until after the lapse of twenty years, without some clear and unequivocal act on his part amounting to an explicit manifestation of his intention to make a permanent gift of the road to the public: *Hoole v. Attorney General*, 22 Ala. 190, 196. User of the road, by the public, for a considerable length of time without objection by the owner of the land, may increase the weight of the evidence, if any there be, arising from acts or declarations of the owner, indicating his intent to dedicate. But mere user, without such acts or declarations, unless for a period of time corresponding to the statutory limitation of real actions, cannot be held sufficient to vest the easement in the public as by prescription: *Starr v. People*, 17 Colo. 458, 460. A dedication, from a user of twenty years, may be presumed, but the presumption is not conclusive, as the owner may show any fact that will overcome it: *Kyle v. Logan*, 87 Ill. 64, 67. In determining whether there was such acquiescence in the use of a way as is necessary to establish a public right, it must always be borne in mind that mere permission is not enough. There must be something to show that such permission was accompanied with knowledge or reason to believe that the way was used under a claim of public right. Until then, no question of acquiescence can arise: *Sprow v. Boston etc. R. R. Co.*, 163 Mass. 330, 342. While a dedication may be inferred from a long and uninterrupted user by the public, with the knowledge and consent of the owner, mere knowledge and nonaction, or failure of the owner to assert his rights, is not conclusive evidence of a dedication, for it may be rebutted. The landowner is always allowed to show facts and circumstances to overcome the presumption: *Coburn v. San Mateo County*, 75 Fed. Rep. 520, 535. So, a mere tacit permission or license by a landowner does not give the public a right by prescription. If, therefore, a landowner, for a long period of years, permits the residents of a neighboring village, and visitors thereto, to pass through his gate, and over his land, to an attractive beach on the seashore, this creates no pre-

scriptive right to a public road through his land: *Coburn v. San Mateo County*, 75 Fed. Rep. 520, 532.

The authorities are direct and clear to the effect that, to establish a highway by implied dedication, there must be unequivocal and satisfactory proof of the intention of the party, whose dedication is claimed, to grant the easement to the public. Hence, if there is no evidence of an intention to dedicate the way to the public, except the mere fact that they have used it, with the knowledge, permission, or acquiescence of the owner, or if there are any acts which indicate the intention of the owner of the soil to reserve the control to himself, like the erection of a fence and gate, it cannot be said that the intention is established, and the road does not become a highway, however long it may have been used, even beyond the period of twenty years. Such permissive use, in the absence of any intention to dedicate, is but a mere license, which may be revoked at the pleasure of the owner: *White v. Bradley*, 66 Me. 254; *Ramthun v. Halfman*, 58 Tex. 551; *Harper v. Dodds*, 8 Ill. App. 331; *Field v. Mark*, 125 Mo. 502; *Worthington v. Wade*, 82 Tex. 26; *Coberly v. Butler*, 63 Mo. App. 556; *State v. Horn*, 35 Kan. 717; *Commissioner of Highways v. Riker*, 79 Mich. 551; *Fall River etc. Works v. Fall River*, 110 Mass. 428; *Fox v. Virgin*, 5 Ill. App. 515; *Dicken v. Liverpool etc. Coal Co.*, 41 W. Va. 511; *Kansas City etc. Ry. Co. v. Woolard*, 60 Mo. App. 631; *Ottawa v. Yentzer*, 160 Ill. 509; *Tucker v. Conrad*, 103 Ind. 349; *Morgan v. Lombard*, 26 La. Ann. 462; *Cyr v. McDore*, 73 Me. 53; *Cooper v. Monterey County*, 104 Cal. 437; *Sharp v. Mynatt*, 1 Lea, 375; *Jones v. Phillips*, 59 Ark. 85; *Huffman v. Hall*, 102 Cal. 26; *State v. Mitchell*, 58 Iowa, 567; *Frankford etc. Ry. Co. v. Philadelphia*, 175 Pa. St. 120; *Lewis v. Portland*, 25 Or. 133; 41 Am. St. Rep. 772; *People v. Livingston*, 27 Hun. 105; 63 How. Pr. 242; *Torres v. Falgoust*, 37 La. Ann. 497.

Thus, the mere fact that people may have traveled over the way in question, and that it may sometimes have been denominated a highway, does not make it such, though such travel may have been permitted, without objection, for over twenty years. Consequently, if a short piece of road, having no connection with prominent points, is used only by a neighborhood, and has never, in any way, been regarded by the public authorities as a highway, it cannot be considered a public highway in the legal sense of that term: *Harper v. Dodds*, 8 Ill. App. 331, 335. The bare fact that a farmer leaves a lane open through his farm for his own convenience, and permits the public to use it as a highway, does not authorize an inference that he intends to dedicate such road to the public. It is a mere license revocable at pleasure: *Kansas City etc. Ry. Co. v. Woolard*, 60 Mo. App. 631; *Coberly v. Butler*, 63 Mo. App. 556; *Stacey v. Miller*, 14 Mo. 478; 55 Am. Dec. 112. So the fact that an owner permits the public generally to pass over a strip of land in connection with its use by himself and his tenants does not show an intent to dedicate the strip to public use, where he has, at times, maintained gates across the strip and exercised other acts of ownership: *Field v. Mark*, 125 Mo. 502. And mere passive acquiescence, with knowl-

edge, by the owner of an uninclosed and unimproved lot in a town or city, in its use by the public, for the purposes of a street or highway, until such time as he may be able and willing to improve it, is not a dedication thereof: *Tucker v. Conrad*, 103 Ind. 349, 353. So if a landowner on a highway erects a building or solid wall standing back from the highway, the fact that the strip between the building or wall and the highway has been used by the public for more than twenty years is not conclusive evidence that the strip has become a part of the highway: *Fall River Print Works v. Fall River*, 110 Mass. 128. An unexecuted license to open a highway has no efficacy to establish the existence of such highway: *Curtiss v. Hoyt*, 19 Conn. 154; 48 Am. Dec. 149.

While the mere user by the public of land for a public highway under a mere license, which is subject at any time to revocation, affords no foundation from which to infer a dedication, as such use is not under a claim of right, yet the right of the public does accrue by such acquiescence as carries with it the intention of the owner of the fee to subject it to the public use; and it has been held that mere acquiescence for twenty years, unaccompanied by any act which repels the presumption of such intention, is conclusive evidence of abandonment to the public: *Wood v. Hurd*, 34 N. J. L. 87. Other cases hold that if the public, with the knowledge of the owner of land, has claimed and continuously exercised the right of using it for a public highway, for a period equal to that fixed by the statute for bringing actions of ejectment, their right to the highway, as against the owner, is complete, there being no proof that the road was so used by leave, favor, or mistake: *Onstott v. Murray*, 22 Iowa, 457, 468.

Time of User as Evidence of Dedication.—The creation of a highway by dedication does not as in prescription depend upon duration of user, but upon the fact of user with the assent of the owner. It is his intention, not the length of user, which determines the existence of a highway where circumstances are relied upon to establish it. Time is not an essential ingredient in the act of dedication, where it rests upon express declaration or act, because it takes effect instantaneously; but it is a material element in the evidence of dedication, where it rests upon user under the acquiescence of the owner of the fee. Whenever an intention to dedicate is found to exist, the dedication becomes complete, upon acceptance by the public, in states where such acceptance is essential to conclude the donor. The length of time necessary to raise a presumption of dedication from user must, therefore, depend, necessarily, upon the circumstances of each particular case; no absolute rule can be laid down to govern it: See *Bissell v. New York etc. R. R. Co.*, 26 Barb. 630; *Mason v. Sioux Falls*, 2 S. Dak. 640; 39 Am. St. Rep. 802; *Connehan v. Ford*, 9 Wis. 240; *State v. Marbel*, 4 Ired. 818; *Hiner v. Jeanpert*, 65 Ill. 428; *Quinn v. State*, 49 Ala. 353; *State v. Birmingham*, 74 Iowa, 407; *Mayberry v. Standish*, 56 Me. 342; *Carr v. Kolb*, 99 Ind. 53; *Hays v. State*, 8 Ind. 425; *Cemetery Assn. v. Meninger*, 14 Kan. 312; *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622; *Schenley v. Commonwealth*, 36 Pa. St. 29; 78 Am. Dec. 359; *Ayers v. State*, 59 Ark. 26, 31.

Acts of an unequivocal nature on the part of the owner and the public may establish a highway by implied dedication in a very short time. User for twenty years or for the full statutory period is not, therefore, necessary, where the intent to dedicate is clear, and the public have impliedly accepted the dedication: *Connehan v. Ford*, 9 Wis. 240; *Bissell v. New York etc. R. R. Co.*, 26 Barb. 630; *Stacey v. Miller*, 14 Mo. 478; 55 Am. Dec. 112; *Ward v. Farwell*, 6 Colo. 66; *Hays v. State*, 8 Ind. 425; *Ross v. Thompson*, 78 Ind. 90; *Kansas City etc. Co. v. Riley*, 133 Mo. 574; *Kyle v. Logan*, 87 Ill. 64. The use of land for a highway for such length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, would be evidence that the owner intended a dedication to the public: *State v. Hill*, 10 Ind. 219. A dedication of land to public use as a street may be inferred from its use as a street for a much shorter period than would be required to create title by prescription: *Mason v. Sioux Falls*, 2 S. Dak. 640; 39 Am. St. Rep. 802. Whether the user has been continued for such length of time, and is of such a character, as to show a dedication is ordinarily a question for the jury: *Cemetery Assn. v. Meninger*, 14 Kan. 312. A dedication of land for a public highway may be presumed against a married woman from the fact of its long-continued use as such by the public during the continuance of a lease of the premises to her, and her failure to resume her rights as a reversioner for four or five years after the expiration of the lease, and until after the street has been graded and paved. Twenty-one years' adverse enjoyment is not necessary to perfect the presumption: *Schenley v. Commonwealth*, 86 Pa. St. 29; 78 Am. Dec. 859.

"Where the only evidence of dedication," says Van Syckel, J., in *Wood v. Hurd*, 34 N. J. L. 87, 90, "is user by the public, unaccompanied by any circumstance or act indicating an intention to dedicate, or where the public, or individuals, have not acted upon the acquiescence in such a way that its retraction would materially affect the public accommodation and private rights, and thus evince bad faith in the owner, the weight of authority is, that such user, from analogy to the statute of limitations, must be for twenty years to establish the public right. This view of the law is supported by the authorities, and will reconcile a mass of cases in which the courts have spoken of time with reference to the particular facts of the case before them." That a user must exist for twenty years, or for a shorter time, prescribed by statute, before the public right can be established by user, in the absence of any intention of the owner to dedicate, see *Cunningham v. Hendricks*, 89 Wis. 632; *Starr v. People*, 17 Colo. 458; *Huffman v. Hall*, 102 Cal. 26; *State v. Marble*, 4 Ired. 318; *Haywood v. Charlestown*, 34 N. H. 23; *State v. Wolf*, 112 N. C. 889; *Eames v. Northumberland*, 44 N. H. 67; *State v. Horn*, 35 Kan. 717; *Mayberry v. Inhabitants of Standish*, 56 Me. 342; *Madison v. Gallagher*, 159 Ill. 105; *Wheatfield v. Grundmann*, 164 Ill. 250, 252; *Kansas City etc. Co. v. Riley*, 133 Mo. 574; *State v. Wolf*, 112 N. C. 889; *State v. Young*, 27 Mo. 259.

It is said by Henshaw, J., delivering the opinion of the court in *Schwerdtle v. County of Placer*, 108 Cal. 589, 593, that: "If a dedica-

tion is sought to be established by a use which has continued a short time—not long enough to perfect the rights of the public under the rules of prescription—then truly the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved and none could be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because the offer to dedicate, and the acceptance by use, both being shown, the rights of the public have immediately vested. But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license." In the absence of any statute, the common-law rule, as to the presumption of a dedication of land as a public highway by adverse user, prevails in California: *Schwerdtle v. County of Placer*, 108 Cal. 589. If user alone is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land: *State v. Young*, 27 Mo. 259.

Many cases hold that an uninterrupted user of land by the public as a highway, with the knowledge and acquiescence of the owner, for twenty years, or more, or for the period prescribed by the local statute of limitations, and which user is not merely permissive, raises a presumption of a grant from the owner, confers a right in the public, and bars the owner. In other words, user of land as a highway, for the statutory period, conclusively establishes the dedication of the land for that purpose; *State v. Marble*, 4 Ired. 318; *Onstott v. Murray*, 22 Iowa, 457; *Askew v. Wynne*, 7 Jones, 22; *French v. Marstin*, 24 N. H. 440; 57 Am. Dec. 294, and note; *State v. Hunter*, 5 Ired. 369; 44 Am. Dec. 41; *Gerberling v. Wunnenberg*, 51 Iowa, 125; *Campau v. Detroit*, 104 Mich. 560; *Hart v. Trustees*, 15 Ind. 226; *Ross v. Thompson*, 78 Ind. 90; *State v. Wilkinson*, 2 Vt. 480; 21 Am. Dec. 560; *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622; *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 662; *Plummer v. Sheldon*, 94 Cal. 533; *Valentine v. Boston*, 22 Pick. 75; 33 Am. Dec. 711; *Corning v. Head*, 86 Hun, 12; *Western Ry. v. Alabama etc. R. Co.* 96 Ala. 272; *Onstott v. Murray*, 22 Iowa, 457; *Witter v. Damitz*, 81 Wis. 385; *McLemore v. McNeley*, 56 Mo. App. 556.

If, however, there is any question as to the nature or character of the use, an uninterrupted user with the knowledge and acquiescence of the owner would not necessarily give title to the public, although such user might have been continued much longer than twenty years or for many years beyond the time fixed by statute as the period of limitations for real actions. So, while long-continued, uninterrupted public use of a way is a proper element of proof to establish the existence of a highway by dedication, evidence of a mere permissive user is of no effect, for the public use of a way as a "highway," excludes the idea of permissive use. The presumption, therefore, arising from evidence of long-continued, uninterrupted

use of a way, that there has been a legal location at some forgotten period in the past, is one of fact, according to some authorities, and liable to be rebutted, especially by proof that the use was by the mere sufferance or tolerance of the owner, and was unaccompanied by any other fact tending to show a dedication: *Mayberry v. Standish*, 56 Me. 342; *Torres v. Falgoust*, 37 La. Ann. 497; *Fall River Print Works v. Fall River*, 110 Mass. 428; *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772; *State v. Wolf*, 112 N. C. 889; *Kyle v. Logan*, 87 Ill. 64; *Ottawa v. Yentzer*, 160 Ill. 509. Twenty-five years' uninterrupted use of land as a public thoroughfare does not amount to a dedication, where the owner frequently asserted his rights against the public during such time: *Quinn v. State*, 49 Ala. 353. So, a user by the public, for over twenty years, of a passageway to a wharf and warehouse, the owner always controlling, claiming to own, and keeping one end of the way inclosed, does not constitute a dedication to a public use, because such use by the public is not inconsistent with private ownership: *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772. A private way cannot be converted into a public way by any length of user as a private way: *State v. Tucker*, 36 Iowa, 485, 487. User of itself ought not to be evidence of dedication in a country where roads and highways are enjoyed over lands without any authority of law, and by the tacit permission of the owners, but without any acts showing an intention to appropriate and yield the property to public use. Other facts and circumstances ought to be shown which might not only evidence an intention to devote the use of the property to the public, but an actual appropriation: *Gardiner v. Tisdale*, 2 Wis. 253; 60 Am. Dec. 407.

Unoccupied Lands.—The mere user of wild, vacant, timber, uncultivated, or unoccupied lands, with the acquiescence of the owner, is not sufficient to give the public a title to any part of the land as a highway, either by prescription or dedication, although such use has continued for over twenty years: *Fox v. Virgin*, 11 Ill. App. 513; 5 Ill. App. 515; *Worthington v. Wade*, 82 Tex. 26; *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480; *State v. Horn*, 35 Kan. 717; *Graham v. Hartnett*, 10 Neb. 517; *Gulf etc. Ry. Co. v. Montgomery*, 85 Tex. 64; *Kyle v. Logan*, 87 Ill. 64; *Harper v. Dodds*, 3 Ill. App. 331. Contra, *Dimon v. People*, 17 Ill. 416; *Ely v. Parsons*, 55 Conn. 83. In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner: *Brushy Mound v. McClintock*, 150 Ill. 129. And to establish it by dedication, there must be some act indicating an intent to dedicate the road to public use: *Rathman v. Norenberg*, 21 Neb. 467. With respect to such lands much stronger evidence of a dedication or prescriptive right is required than in other cases: *Onstott v. Murray*, 22 Iowa, 457; *Moffett v. South Park Commrs.* 138 Ill. 620. A road over government lands cannot be established by prescription, dedication, or limitation: *Smith v. Smith*, 84 Kan. 293; *Phipps v. State*, 7 Blackf. 512; *Oyr v. Madore*, 73 Me. 53.

Definite Line—Deviations.—The public cannot acquire a right, either by prescription or dedication, to pass over a tract of land generally. The right must be confined to a definite, certain, and precise line of way: *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Friel v. People*, 4 Col. App. 259; *Ottawa v. Yentzer*, 160 Ill. 509; *Brushy Mount v. McClintock*, 150 Ill. 129; *Johnson v. Lewis*, 47 Ark. 66; *Bryan v. East St. Louis*, 12 Ill. App. 390; *Owens v. Crosset*, 105 Ill. 354; *Madison v. Gallagher*, 159 Ill. 105; *Short v. Walton*, 61 Ga. 28; *Manrose v. Parker*, 90 Ill. 581. To establish a highway by prescription, there must be a certain well-defined line of travel in the same place over the entire route for the time required. A highway cannot be held to be established by prescription, when the proof shows only an indefinite and indiscriminate use of a wide extent of country, over an undefined way of travel, or when it shows that the way has been changed as the people saw fit, to avoid obstructions, or for convenience: *South Branch R. R. Co. v. Parker*, 41 N. J. Eq. 489; *Friel v. People*, 4 Col. App. 259; *Short v. Walton*, 61 Ga. 28; *Owens v. Crosset*, 105 Ill. 354. The time during which various and distinct lines of travel have been used cannot be so united as to make up the requisite time to establish a right by prescription to a given single line of road: *Bryan v. East St. Louis*, 12 Ill. App. 390. If a highway is laid out with its center on a section line, the mere use by the public for highway purposes of land a few rods off of such line, for a period of twenty years, does not give title by prescription or dedication, where there has been a mistake as to the location of the section line, because the use must correspond with the claim of right: *Manrose v. Parker*, 90 Ill. 581; *Bolton v. McShane*, 79 Iowa, 26.

It is not indispensable, however, to the establishment of a highway by adverse user that there should be no deviation from a direct line of travel. If the travel has remained substantially unchanged, it is sufficient, although, at times, there may have been slight deviations from the common way to avoid encroachments, obstacles, or obstructions upon the road: *Nelson v. Jenkins*, 42 Neb. 183; *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Howard v. State*, 47 Ark. 431; *Kelsey v. Furman*, 36 Iowa, 614; *Hart v. Red Cedar*, 63 Wis. 684; *State v. Welpton*, 34 Iowa, 144; *Kurtz v. Hoke*, 172 Pa. St. 165. But when the whole length of the road is abandoned for eight or nine years, and is not sufficiently traveled to prevent its becoming obstructed by the growth of weeds and grass, there is not that continued user essential to a prescriptive right: *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264.

Width.—If the public has acquired the right to a public highway by user, the right carries with it such width as is reasonably necessary for the public easement of travel: *Marchand v. Maple Grove*, 48 Minn. 271; *Bowers v. Barrett*, 85 Me. 382; *Pillsbury v. Brown*, 82 Me. 450. The width of a road as used at the end of the period of prescription is the established width of the road: *Hart v. Trustees*, 15 Ind. 226; *Pillsbury v. Brown*, 82 Me. 450. The court, however, cannot say, as a matter of law, that a highway acquired by prescription is of any particular width, beyond such portion as is ac-

tually used by the public. The width, therefore, to which the public is entitled is a question for the jury in each case, and is not limited to the actual beaten path, nor is it necessarily the full width of a regular highway: *Davis v. Clinton*, 58 Iowa, 389; *Beach v. Meriden*, 46 Conn. 502; *Hannum v. Belchertown*, 19 Pick. 311; *Sprague v. Waite*, 17 Pick. 309; *Lawrence v. Mt. Vernon*, 35 Me. 100; *McKay v. Doty*, 63 Mich. 581. A highway established by user need not be of the statutory width. A highway by user becomes such to the width and extent used: *Wayne County etc. Bank v. Stockwell*, 84 Mich. 586; 22 Am. St. Rep. 708. Upon the question as to where the usual travel on a highway is, evidence of wheel tracks is relevant and competent to show the limits of a highway established by use: *Plummer v. Ossipee*, 59 N. H. 55.

In cases of dedication, the character and extent of the use of the public determine the width of the way dedicated: *Western Ry. v. Alabama etc. R. R. Co.*, 96 Ala. 272; *Marchand v. Maple Grove*, 48 Minn. 271. The extent of the dedication is determined by all the circumstances, not only by the part actually used, but also the width of highways in the vicinity and of the system of which the particular highway is a part: *Burrows v. Guest*, 5 Utah, 91. The public may acquire, by user, a right to more than the main traveled track of a road, especially where the owner of the land has manifested an intention to dedicate to the public a highway of the usual width: *Bartlett v. Beardmore*, 77 Wis. 356; but where the owner did not intend to dedicate a highway of the full statutory width, the public is only entitled to claim the part which it has been permitted to use: *Kruger v. Le Blanc*, 70 Mich. 76. The extent of the dedication is a question for the jury to be determined from all the facts and circumstances: *Burrows v. Guest*, 5 Utah, 91; *Marchand v. Maple Grove*, 48 Minn. 271.

Interruptions of Use.—If the use of a way is interrupted, prescription is annihilated, and must begin again, and any unambiguous act by the owner, such as closing the way at night, or erecting gates or bars, which evinces his intention to exclude the public from its uninterrupted use, destroys the prescriptive right: *Harper v. State*, 109 Ala. 66; *Shellhouse v. State*, 110 Ind. 509; *O'Connell v. Bowman*, 45 Ill. App. 654; *Root v. Commonwealth*, 98 Pa. St. 170; 42 Am. Rep. 614; *Field v. Mark*, 125 Mo. 502; *Cunningham v. San Saba County*, 11 Tex. Civ. App. 557. An interruption, to prevent the public use of a road from constituting a highway by prescription, must be made by the owner, not a trespasser, and within the statutory period or time of prescription: *Madison v. Gallagher*, 159 Ill. 105; *Stacey v. Miller*, 14 Mo. 478; 55 Am. Dec. 112. Thus, evidence that the owner had plowed up the way, within the statutory time, declaring at the same time that the claimant had no right of way, is admissible: *Barker v. Clark*, 4 N. H. 380; 17 Am. Dec. 428. An interruption to prevent the public use of a road from constituting a highway by prescription must also be of the right and not simply of the use or possession: *Madison v. Gallagher*, 159 Ill. 105; *Toof v. Decatur*, 19 Ill. App. 204. Thus, the fact that a landowner erects a barrier

across a way over his land which is claimed to be a public way by prescription does not establish an interruption of the adverse use of the way, in the absence of evidence of the occasion, circumstances, or effect of the act: *Weld v. Brooks*, 152 Mass. 297, 306. The rights of the public in a highway which has become such by user are not affected by the fact that the land is listed for taxation to the former owner, and the payment by him of the taxes so assessed: *Campau v. Detroit*, 104 Mich. 560. Neither is the levy of taxes against the owner, and their collection, conclusive against the claim of a highway by user: *Toof v. Decatur*, 19 Ill. App. 204.

It is not every slight or occasional use of the land, even by the owner, that will constitute an interruption of the public use. Mere intermission is not interruption. The act of an individual in obstructing a highway cannot divest the public of its rights therein, unless the obstruction is submitted to for such a period of time as to raise a fair presumption of abandonment: *Madison v. Gallagher*, 159 Ill. 105, 113.

Statutes.—Confusion in the authorities upon the question of the establishment of highways by prescription is caused by the existence, in some of the states, of statutes altering the rules otherwise applicable, and, in some instances, reducing the period of user required on the part of the public. An uninterrupted user of a road for the period prescribed by statute will make it a highway: *Bolger v. Foss*, 65 Cal. 250; *Hope v. Barnett*, 78 Cal. 9; *Huffman v. Hall*, 102 Cal. 26; *Louisville etc. Ry. Co. v. Etzler*, 3 Ind. App. 562; *Hays v. State*, 8 Ind. 425; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Potter v. Safford*, 50 Mich. 46; *Grandville v. Jenison*, 84 Mich. 54; *State v. Wells*, 70 Mo. 635; *Devenpeck v. Lambert*, 44 Barb. 596; *James v. Sammis*, 132 N. Y. 239; *Haas v. Choussard*, 17 Tex. 588; but, if the user is for a less period, the existence of a highway has been denied: *Hope v. Barnett*, 78 Cal. 9; *Cooper v. Monterey County*, 104 Cal. 437; although a highway may be established by user for a shorter period than that prescribed by such statutes: *Hays v. State*, 8 Ind. 425. Under the statute of Michigan, it has been held that user for ten years will not, of itself, make a road a public highway if proceedings have not been taken to lay it out or to establish it as one: *Potter v. Safford*, 50 Mich. 46; but in Indiana it is held that it is the twenty years' use of a road, under the statute, that makes it a public highway, regardless of its origin, and that it is immaterial whether the use is with the consent or over the objections of the adjoining landowners; *Strong v. Makeever*, 102 Ind. 578. In New York, the uninterrupted user of land by the public, as a public highway, for twenty years, makes it a public highway, under the statute, although the owner is under disability, such as being a lunatic, an infant, or a married woman, and has no knowledge thereof, during the entire time: *Devenpeck v. Lambert*, 44 Barb. 596, 599. As to what constitutes a "public user" and "adverse public user" of a highway under the Wisconsin statute, see *Blute v. Scribner*, 23 Wis. 857; *Scribner v. Blute*, 28 Wis. 148; *Williams v. Giblin*, 86 Wis. 147.

Nonuser.—A highway dedicated to the public continues to exist until it is vacated or abandoned: *Plummer v. Sheldon*, 94 Cal. 533.

Nonuser of a highway by the public for many years is *prima facie* evidence of abandonment; but the abandonment must be voluntary and intentional: *Hartford v. New York etc. R. R. Co.*, 59 Conn. 250. If the right to a road is acquired by adverse user for twenty years, its nonuser for a like space of time, with the knowledge and acquiescence of the owner of the inheritance, extinguishes the right so acquired, because such cesser to use the road affords a legitimate presumption of a release of the right: *Browne v. Trustees*, 37 Md. 108. A delay, however, of thirty years, in improving a street, where the ground is rough and hilly, and where the street is not much needed or used by the public, does not cause the land to revert to the dedicator: *Shea v. Ottumwa*, 67 Iowa, 39. The effect of nonuser of highways is discussed in a monographic note to *Orr v. O'Brien*, 14 Am. St. Rep. 278-282, on the extinguishment of highways and other easements through nonuser or by operation of the statute of limitations, and in the note to *Chase v. Oshkosh*, 29 Am. St. Rep. 904.

Relocation.—A highway by prescription may be relocated: *Lincoln v. Commonwealth*, 164 Mass. 1; and twenty years' user after the relocation vests title in the public: *Stockwell v. Fitchburg*, 110 Mass. 305.

WILSON v. SOUTHERN PACIFIC COMPANY.

[18 UTAH, 352.]

EVIDENCE—ADMISSION OF NEGLIGENCE OR CARE—ACTS OR DECLARATIONS OF SWITCHMAN—RES GESTAE.—After the occurrence of a railroad accident, a switchman is not authorized to make any admission of negligence on the part of the company, or of care by a party injured; and any narration of the facts by him, subsequent to the occurrence, and not made upon the witness stand, is inadmissible in evidence; but the acts and declarations of the switchman constituting a part of the *res gestae* are admissible, though given to the jury by a third party.

EVIDENCE—WHAT ACTS AND DECLARATIONS ARE PART OF RES GESTAE.—If a train of cars is moving backward and forward over a street crossing, and a person riding in a wagon with the driver is injured while they are attempting to cross, and while a switchman is at his post, all acts and declarations of the parties which are the immediate expressions of the fears, the intentions, and the conflicting purposes brought into play by the occurrences of the occasion, the situations of the respective parties, and their dangers and emergencies, real or apparent, constitute a part of the transaction, and are, therefore, a part of the *res gestae*.

EVIDENCE—RES GESTAE—CONVERSATION ABOUT RAILROAD ACCIDENT.—A train of cars was moving backward and forward over a street crossing, and a person riding in a wagon with the driver attempted to cross, but the wagon was struck by the cars, and the passenger, in jumping out, was injured. Immediately thereafter, the train having moved along, the injured party walked across the track and said to the switchman, "Who is to blame for this?" The latter replied, "It was the engineer. I told him to stop, and I told you to go on." The party injured then asked, "Did you

tell us to go across?" The switchman answered, "That is what I did." This conversation, being immediately and intimately connected with the transaction, was held to be admissible as part of the *res gestae*, which included the fact that the train stood across the street, the movement of the cars, and the different attempts of the driver to cross.

RAILROADS—CONTRIBUTORY NEGLIGENCE AT CROSSING—JUMPING OUT OF WAGON.—When a train of cars and a wagon in which the plaintiff was riding were approaching a railroad crossing, the question as to whether his jumping out of the wagon to avoid being hurt was contributory negligence is one for the jury to determine.

RAILROADS — RELATIVE RIGHTS AT CROSSINGS.—Neither a train nor a vehicle has the exclusive right to the use of a railroad crossing, but both have the right to pass over it. If they approach the crossing at the same time, the vehicle should stop and let the train pass, but the train should not stop on the crossing, or, by moving backward and forward, subject the vehicle to unreasonable delay in crossing after the train has first passed.

DAMAGES—INJURY FROM NEGLIGENCE—PROOF OF EXPENSES.—If special damages are claimed in an action for damages for injuries occasioned by defendant's negligence, proof of charges against the plaintiff for surgical and medical attendance may be made, if the plaintiff has become legally bound to pay the amount thereof, although it has not been actually paid at the time of trial.

Action by Wilson against the railroad company for damages sustained by a collision between the defendant's train and a wagon in which plaintiff was riding. There was a judgment for the plaintiff, and the defendant appealed from an order denying a new trial.

Marshall & Rayle, for the appellant.

Evans & Rogers and A. G. Horn, for the respondent.

356 ZANE, C. J. This action was instituted to recover damages in consequence of an injury caused, as alleged, by the negligence of the defendant in controlling a train upon its railway at the point where it crosses Twenty-fourth street in Ogden City. The case was submitted to a jury, who returned a verdict of two thousand and sixty-five dollars for the plaintiff. The defendant excepted to the judgment of the court upon the verdict, and to the order refusing a new trial, and appealed to this court, and assigns the same as error. The plaintiff claims that the evidence shows that defendant's negligence caused the injury. This claim the defendant denies, and it alleges that the injury was caused by plaintiff's negligence. It appears that the defendant had a switch at the crossing, and three parallel tracks running east and west across the street at right angles; that plaintiff was riding east upon the street, with one Fielding, his neighbor, who was driving; that Fielding stopped his team before reaching the west

track, upon ³⁵⁷ seeing a train consisting of fourteen or fifteen cars with an engine attached to the south end standing on the east track across the street, and that the train then moved north; that Fielding then drove across the west track, when the train moved back across the street, and he stopped again; the train then moved north, and Fielding started his team again; that the train then moved south across the street again, the north car clearing the street about a rod and a half. At this point an important conflict in the evidence is found. The plaintiff and Fielding testified that Dalton, the switchman, signaled, looking in the direction of the engineer, and then turned, and said to Fielding, "Come on"; while Dalton testified that he said to plaintiff, who asked him if they could cross: "No; hold on. The slack of the cars will strike you." It further appears that Fielding started his team across the track immediately after the switchman spoke, and the train came back north; that Fielding tried to rein his horses off the track, and his wagon locked, and the cars struck the wheel, and shoved it from twenty to twenty-five feet, and then suddenly pulled south again; that the car caught in the harness, and pulled the horses and wagon back two or three rods, when the harness broke; that when the wagon and team were being pushed, the plaintiff jumped out, and struck his shoulder against the wagon, and severely bruised it. It also appears that the plaintiff was well acquainted with the switchman, and after he got up he walked a few steps to where he was standing by his switch. The plaintiff testified that he then said, "Dal, who is to blame for this?" and that the switchman said: "It was the engineer. I told him to stop, and I told you to go on"; and that he then said: "Dal, did you tell us to go across?" and that he answered, "That is what I did." The switchman testified that the plaintiff walked across to him, but denied the conversation. The plaintiff testified ³⁵⁸ that this conversation occurred within three minutes after the collision. When the above question had been asked and answered, the defendant entered a motion to exclude both from the jury, but the court denied the motion, and he excepted. This ruling of the court the defendant assigns as error.

Before determining the effect of the evidence upon the issues of fact involved on the trial, it is necessary to decide this error. Defendant's counsel correctly urge that the switchman was not authorized, after the occurrence, to make any admission of negligence on the part of the defendant or of care by the plaintiff. Any narration by him, subsequent to the occurrence, of the facts not made upon the witness stand, was inadmissible. But the

acts and declarations of the switchman constituting a part of the *res gestae* were admissible, though given to the jury by a third party. The *res gestae* included the fact that the train stood across the street, and the movement of the cars, and the different attempts of Fielding to cross, and what was said or done by him or the plaintiff, the switchman, or the engineer, during such movements, the jumping from the wagon when it was struck, the fact that the train then moved back; that Fielding drove on, and that plaintiff walked across the track to the switchman, and what they then said, were all so connected as to constitute a part of the transaction, and therefore a part of the *res gestae*. All of these acts and declarations were the immediate expressions of the fears, the intentions, and the conflicting purposes brought into play by the occurrences of the occasion, the situations of the respective parties, and their dangers and emergencies, real or apparent: *People v. Kessler*, 13 Utah, 69; *Sullivan v. Salt Lake City*, 13 Utah, 122.

We come now to the question of fact, Was there any ³⁵⁹ proof of negligence on the part of the defendant? The evidence shows that the plaintiff was traveling on a street of Ogden City, a public road, and found defendant's train standing across the street; that the train then moved north of the street; that the team moved across the first track; that the train then moved south across the street; that the team then stopped; that the driver of the wagon, seeing that the car had gone beyond the south line of the street, started again, when the train ran back again across the street, and struck the wagon, before it could get off the track. The engineer must have seen the men in the wagon attempting to cross, yet he continued to run his train backward and forward across the street without paying attention to them. The engineer should have given the wagon a reasonable time to cross over after he moved the train off of the street. But, conceding the defendant was guilty of negligence, the defendant insists that the plaintiff was guilty of negligence contributing to the injury. Whether the switchman said to the men in the wagon, "Come on," or "Hold on," presented a question of fact, under the evidence, for the jury to determine. The jurors probably found that he said, "Come on." If they did so find, they certainly were justified that the plaintiff used due care in attempting to cross. But it is said that the plaintiff negligently jumped out of the wagon. The wagon and horses were being pushed by the train when he made the leap. As a prudent man, he may have thought he would be safer on the ground. It was proper for the jury to characterize this act from the evidence.

The defendant's counsel insist that the court erred in stating the relative rights of the parties in the following paragraph of the charge: "Now the law is that upon crossing a highway and of a railroad track the railway ³⁶⁰ trains have the right of way; that is, they have the right to pass first. The wagon must stop for the railway train to pass, instead of the railway train waiting for the wagon to pass. But this right does not authorize a railway company to continue passing and repassing, and thus exclude wagons from the crossing. The wagon must stop, in the first instance, to permit the train to pass, if one is ready to pass; but the rule does not go so far as to require it to continue to wait for trains to pass and repass upon the same track, or for the same train to do so." The court stated, in substance, that when a vehicle and train approach a crossing at the same time the vehicle should stop, and let the train pass; but the train should not continue to repass so as to prevent the vehicle from crossing afterward. This was a correct statement of the law upon the point applicable to the facts before the jury. The paragraph embraces two propositions. The first applies to passing trains, the second to trains repassing. The vehicles can stop with less effort and inconvenience than a train, and, generally, time is more important to a train. Both, however, have the right to pass over the crossing. Neither has the right to the exclusive use of it. The railway has no right to obstruct a highway an unreasonable length of time with its trains, either by allowing them to stand on its crossings or by moving backward and forward. Persons in the use of either modes of travel have a right to pass without being subjected to unnecessary or unreasonable delay.

The defendant assigns as error the ruling of the court in permitting the physician to testify to his charges against the plaintiff for the surgical and medical treatment he gave him for the injury complained of, it appearing that the bill had not been paid. In view of the fact that charges were claimed as special damages in the complaint, ³⁶¹ we are of the opinion that the ruling complained of was not erroneous. If the plaintiff became legally bound to pay such amount for the treatment of the wound, caused, as alleged, by defendant's negligence, we are of the opinion that plaintiff was properly allowed to offer evidence to prove it, though it had not been paid at the time of the trial.

The plaintiff also insists that the damages were excessive. If the plaintiff was injured to the extent that his evidence indicates, the verdict would not be excessive. But if the injury was no greater than the defendant's evidence indicates, they would be. In view of the evidence, we do not feel authorized to find

that the jury was actuated by passion, prejudice, or any improper motive. We find no error in the record authorizing a reversal of the order or judgment appealed from. The judgment of the lower court is affirmed.

Miner, J., concurs.

Bartch, J., dissents.

EVIDENCE—RES GESTAE.—All declarations or exclamations uttered by the parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design, and which are calculated to throw light on the motives and intention of the parties, are admissible in evidence as part of the *res gestae*: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902; *Hermes v. Chicago etc. Ry. Co.*, 80 Wis. 590; 27 Am. St. Rep. 69; *Lewis v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720, and note. The declarations of one injured in a railway accident as to its cause, made at the place within a few minutes after it occurred, are admissible as part of the *res gestae*: *Texas etc. Ry. Co. v. Robertson*, 82 Tex. 657; 27 Am. St. Rep. 929; *International etc. Ry. Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902; note to *Globe Accident Ins. Co. v. Gerisch*, 54 Am. St. Rep. 490. So the declarations of an engineer, made within a few moments after a child was killed by being run over by a locomotive in his charge, are admissible as part of the *res gestae*: *Hermes v. Chicago etc. Ry. Co.*, 80 Wis. 590; 27 Am. St. Rep. 69.

RAILROADS.—THE RIGHTS OF A TRAVELER and of a railroad company upon a highway crossing are equal, in a sense; but the right of the company is superior in respect to the priority of passage: *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Louisville etc. Ry. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155.

DAMAGES—PERSONAL INJURIES—MEDICAL EXPENSES.—If one has been injured by the negligence of another, medical expenses may be included in estimating the damages: Note to *Standard Oil Co. v. Tierney*, 36 Am. St. Rep. 603.

ENGLISH v. SOUTHERN PACIFIC COMPANY.

[18 UTAH, 407.]

RAILROADS—SIGNALS AT CROSSING—DUTY—NEGLIGENCE NOT RELIEVED BY COMPLIANCE WITH STATUTE.—Everyone must so use his property as not to injure another if it can be avoided by the use of reasonable care. Hence, a statute imposing upon a railroad company the duty of ringing a bell and sounding a whistle, upon the approach of trains at public crossings, does not relieve the company from a charge of negligence in failing to adopt such other reasonable measures for public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case.

RAILROADS—DUTY AT CROSSINGS, GENERALLY—QUESTION FOR JURY.—A railroad company is not required to maintain extra precautions to prevent accident at ordinary crossings in the country, where a few persons only pass each day; but the vigilance and care to be used at public crossings in populous cities and towns, where many tracks are built across the streets, and are constantly in use, is much greater than that required at ordinary road crossings in the country, or less populous and less used localities; and the reasonable care and prudence to be used must, therefore, depend upon the facts of each particular case.

RAILROADS—DUTY AT CROSSINGS EXTRAORDINARILY DANGEROUS—NEGLIGENCE.—If railroads cross a thickly populated street in a large city, at which crossing there is a network of railroad tracks, where there is much travel, and where the crossing is dangerous, reasonable care and prudence, on the part of the railroad companies, require them to keep at such crossing a flagman, or gates, during the time that the tracks are in use, so as to lessen the danger to passengers and travelers caused by the almost constant use of the tracks in operating and switching trains across the street, and a failure to provide such flagman, or to maintain gates, at the crossing, is negligence.

RAILROADS—COMPETENT EVIDENCE OF COMPANY'S NEGLIGENCE AT DANGEROUS CROSSING.—In an action against a railway company to recover damages for negligently causing death at a railroad crossing in a populous city, it is proper to submit to the jury, under careful instructions from the court, testimony showing the locality and use of the crossing, as well as the danger of going over it, as bearing upon the question of the company's negligence in not providing a flagman, or maintaining gates, at such crossing to protect travelers from danger.

NEGLIGENCE CAUSING DEATH—COMPETENT EVIDENCE.—In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband on a railroad crossing, it is competent for her, where she is called as a witness, to give the names and ages of the children of the deceased, especially where they are all parties to the action. Such testimony would be proper even if they were not parties.

NEGLIGENCE CAUSING DEATH—DAMAGES—MEASURE OF.—In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband on a railroad crossing, the law will allow nothing more than the pecuniary loss, as shown by the proof and measured by a pecuniary standard. The extent of this loss should not be measured by the wealth or poverty of the recipient or giver, but by his earnings, care, health, beneficent and pecuniary contributions given, or in reasonable expecta-

tion of being given, to the widow and children, as shown by the proof and judged from all the circumstances of the case to be just, but measured by a pecuniary standard.

NEGLIGENCE CAUSING DEATH—EXCESSIVE DAMAGES—MODIFICATION OF JUDGMENT ON APPEAL.—In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband at a railroad crossing, a verdict and judgment for thirteen thousand dollars damages is excessive to the amount of three thousand dollars, where it is shown that the deceased was thirty-eight years old, in good health, and earning fifty dollars per month, which he contributed to the support of his wife and seven children, the eldest being seventeen years of age, and that the expectancy of life of the deceased was twenty-nine years. The damages should be reduced to ten thousand dollars and the judgment be modified accordingly.

Action by Jane English and others against the Southern Pacific Railway Company and the Ogden Union Railway & Depot Company, for damages occasioned to the plaintiff by reason of the death of her husband, which was caused by a passenger train at a railroad crossing. There was a judgment for the plaintiffs, and the defendants appealed.

Marshall & Rayle and Parley L. Williams, for the appellants.

Evans & Rogers and A. G. Horn, for the respondents.

⁴¹² MINER, J. This action was brought to recover damages arising from the alleged negligence of the defendants, in causing the death of William English. Upon a trial, the jury found a verdict for the plaintiffs in the sum of fifteen thousand dollars. Upon a motion for a new trial the verdict and judgment were reduced to thirteen thousand dollars.

It appears that on November 21, 1894, the defendants owned and controlled numerous railroad tracks crossing Twenty-fourth street, in the city of Ogden; that the depot and grounds of the companies consisted of sixty acres of land, at which point numerous railroad tracks center; that during nearly every hour of the day, and at times almost continually, the three different railroad companies were moving their trains upon the tracks across Twenty-fourth street, running north and south, to and from the depot. Twenty-fourth street is a well-settled ⁴¹³ and much-traveled street, near the center part of the city, consisting of about fifteen thousand people. Prior to the date of the injury complained of, the defendants had never stationed a flagman at the crossing to warn those using the street of the approach of trains, which were almost constantly passing and switching their trains and cars across the street, and no gates were ever erected, or other precautions used, to warn the numerous traveling public of the danger, except the ringing of the bells and the blowing of the locomotive

whistles, as the trains passed over the crossing. At the time of the accident, the Rio Grande Western Railroad Company were switching an engine and three cars from the ice-house switch, going northward across Twenty-fourth street. While doing so, the deceased, William English, was traveling west, across Twenty-fourth street, with a horse and express wagon. He stopped a few feet east of the Rio Grande track and train, until it cleared the center of the street, just north, where it remained close to the street. At this time the Southern Pacific train, consisting of seven cars, started about a mile north of Twenty-fourth street, and pushed a train of seven cars toward Twenty-fourth street. The Rio Grande train obstructed the view of the deceased so far as the movements of the Southern Pacific train were concerned. Without seeing the Southern Pacific train, the deceased started to drive across the track No. 1, in the rear of the hind car of the Rio Grande train, standing on the track. As he crossed track No. 1, and came upon track No. 2, nine feet to the west of it, the Southern Pacific train backed up at the rate of five or six miles per hour, and he was struck by the rear end of the Southern Pacific train, and crushed under the wheels of the cars. He died from such injuries shortly thereafter. The accident occurred about 4 o'clock in the afternoon of a clear day. Several witnesses testify ⁴¹⁴ that the Southern Pacific train bell was rung, and the whistles sounded many times; while other witnesses say they heard bells and whistles and other noises, but did not hear the Southern Pacific bell or whistle. When the deceased was taken from under the cars, he remarked that he did not see the train coming. Before the deceased reached track No. 2, he inquired of Mr. Couch, a switchman on the Rio Grande train, and said, "Can I cross now?" The switchman answered, "No; do not try to cross." Deceased drove on afterward, and was injured. At this time, witness states that he did not see the Southern Pacific train, but had heard its whistle before. Witness further states, "I do not think English could see the Southern Pacific train from the wagon where he was. He was thirty or forty feet from me. I could not say whether deceased heard me or not."

Another witness says that Couch halloosed to English as he went upon the track, but did not hear anything said. Testimony was also introduced tending to contradict the testimony of Couch. Page testifies that he was present and saw English come out from behind the Rio Grande cars, and when his horse was upon track No. 2, said to him, "For God's sake, Bill, what are you doing there?" English jerked up his horse, and let loose of the lines, as if to jump out. Could not say as English heard me.

It was all done in a moment. At this time the rear car struck him." Deceased, at the time of his death, was thirty-eight years old, of good health and habits, never used liquor or tobacco, and weighed one hundred and sixty-five pounds. He was earning fifty dollars per month, and contributed his earnings to the support of his family, consisting of a wife and seven children, the oldest child being seventeen years of age. He was shown to be a kind and affectionate husband and father. According to the American mortality table, it appears that his expectation of life was twenty-nine and sixty-two one-hundredths years. His funeral expenses ⁴¹⁵ amounted to one hundred and five dollars. He was familiar with the street crossings and the conduct of the train.

The appellants contend that the deceased contributed to cause the injury and death complained of by his own negligence and want of ordinary care. It was the duty of the deceased to have looked and listened, and to have done everything that a prudent man would do, before he attempted to cross the track at the place in question. This crossing was one in use by the several railroad companies every hour in the day in the arrival and departure of trains, and in switching cars across, to and from the depot, and from the several freight departments located near by. At the time in question, the wind was blowing hard, several bells were being rung and whistles sounded in different parts of the yard; and deceased's position behind the Rio Grande cars was such that it might not have been possible for him to see the train backing up, or to hear the bell from that locomotive. The crossing, as shown by the proof, was one more than ordinarily dangerous; and, in order to cross over it at all, in the absence of a gate or flagman, one must wait until the trains are all out of the way, or run the risk of being injured by the many trains constantly backing up, and crossing and recrossing this locality. When crossing this network of numerous railroad tracks, the utmost vigilance is not always sufficient to protect one from danger. If a traveler looks in one way to avoid danger, he frequently encounters it from a direction least expected. We think the question of contributory negligence on the part of the deceased was properly submitted to the jury.

Plaintiffs introduced evidence upon the subject of the negligence of the defendants in not providing a flagman or gates at this crossing, to prevent travelers crossing this track from being exposed to injury, and upon that subject the court instructed the jury as follows: "The ⁴¹⁶ second matter of negligence that is alleged is a failure to provide a switchman or flagman at this

crossing, or to provide gates which should be closed and opened, so as to prevent passengers upon the highway from being exposed to danger. The plaintiffs claim that under the facts and circumstances developed in this case, that this became a duty which the defendants owed to the traveling public. . . . The terms 'neglect,' 'negligence,' 'negligent,' 'negligently,' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Now, just simply apply that rule, gentlemen, to the facts in this case, and you can by that determine whether or not the defendants have been guilty of negligence in this matter. Did their conduct in operating this railroad track crossing this highway, under all the circumstances and facts that have been detailed in evidence, import a want of such attention to the nature and probable consequences of their acts as a prudent man ordinarily bestows in his own concern? If it does, if there was such a want, then there is negligence, and it constitutes a ground of complaint on behalf of any person who is injured by reason of it. As to what a prudent man would do under the circumstances, gentlemen, is for you to determine, and you are to determine it for yourselves." To the introduction of evidence upon that subject, and to the charge of the court thereon, the defendants assign error.

'The statutes of Utah only impose upon railroad companies the duty of ringing the bells and sounding the whistles upon the approach of trains at public crossings, and the appellants contend that, if the defendants performed the statutory requirement before reaching the crossing, no additional duty was imposed under any circumstances to prevent injury. The question is surrounded⁴¹⁷ with much difficulty and many conflicting decisions. In discussing it, we must remember that this crossing is over one of the main streets and avenues of travel in Ogden City, about three blocks from the business portion of the city, containing fifteen thousand people, and that the street is well settled; that farmers and the traveling public are almost constantly passing over the crossing. Numerous railroad tracks of the three railroad companies cross this street, and engines and cars are very frequently, and almost constantly, passing and being switched one way or the other over this street.

In the case of *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 419, where this question was raised, the trial court charged the jury as follows: "So if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city, much used, and necessarily frequently presenting a

point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger—that owing to the near situation of houses, barns, fences, trees, bushes, or other natural obstructions, which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad company should provide special safeguards to persons using the crossing in a cautious manner—the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning, although you have a statute in Michigan which undertakes, by its provisions, to secure such safeguards in the way such statute points out. The duty may exist outside the statute to provide flagmen or gates or other adequate warning appliances, if the situation of the crossing reasonably requires that—and of this you are to judge—and it depends upon the general rule ⁴¹⁸ that the company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the rights of other persons using the highway with proper care and caution on their part.” And the supreme court held this instruction in harmony with the general rule of law in most of the states and at common law, continuing as follows: “The general doctrine is well stated in *Central etc. Ry. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309, as follows: ‘The doctrine with reference to injuries to those crossing the track of a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country. So what is reasonable care and prudence must depend on the facts in each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient’: Citing *Thompson on Negligence*, 417; *Louisville etc. R. R. Co. v. Goetz*, 79 Ky. 442; 42 Am. Rep. 227. And it was accordingly held in that case that a railroad company which had failed to provide a flagman or gates, during the night-time, when many trains were passing, at a crossing in a thickly populated portion of the city of Louisville, buildings being situated near the track at that point, was guilty of negligence of the most flagrant character”: See, also, to the same effect, *St. Louis etc. R. R. Co. v. Dunn*, 78 Ill. 197; *Bentley v. Georgia Pac. Ry. Co.*, 86 Ala. 484;

Western etc. R. R. Co. v. Young, 81 Ga. 397; 12 Am. St. Rep. 320; Troy v. Cape Fear etc. R. R. Co., 99 N. C. 298; 6 Am. St. Rep. 521; Bolinger v. St. Paul etc. R. R. Co., 36 Minn. 418; 1 Am. St. Rep. 680.

⁴¹⁹ Commenting upon this case, the supreme court further say: "It is also held in many of the states (in fact, the rule is well-nigh, if not quite, universal), that a railroad company, under certain circumstances, will not be held free from negligence, even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings. Thus, in Chicago etc. R. R. Co. v. Perkins, 125 Ill. 127, it was held that the fact that a statute provides certain precautions will not relieve a railroad company from adopting such other measures as public safety and common prudence dictate". Citing Thompson v. New York Cent. etc. R. R. Co., 110 N. Y. 636. The reason for such rulings is found in the principle of the common law that everyone must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way. As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence, although in some cases it has been held that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous—as, for instance, that it is in a thickly populated portion of the town or city; or that the view of the track is obstructed, either by the company itself or by other objects proper in themselves, or that the crossing is a much traveled one, and the noise of approaching trains ⁴²⁰ is rendered indistinct, and the ordinary signals difficult to be heard, by reason of bustle and confusion incident to railway or other business; or by reason of some other such like cause—and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. The following cases are illustrative of various phases of the rules we have just stated: Eaton v. Fitchburg R. R. Co., 129 Mass. 364; Bailey v. New Haven etc. R. R. Co., 107 Mass. 496; Pennsylvania R. R. Co. v. Matthews, 36 N. J. L. 531; Philadelphia etc. R. R. Co., v. Killips, 88 Pa. St.

405; *Kansas Pac. Ry. Co. v. Richardson*, 25 Kan. 391; *State v. Philadelphia etc. R. R. Co.*, 47 Md. 76; *Welsch v. Hannibal etc. R. R. Co.*, 72 Mo. 451; 37 Am. Rep. 440; *Frick v. St. Louis etc. Ry. Co.*, 75 Mo. 595; *Pittsburgh etc. Ry. Co. v. Yundt*, 78 Ind. 373; 41 Am. Rep. 580; *Hart v. Chicago etc. Ry. Co.*, 56 Iowa, 166; 41 Am. Rep. 93; *Kinney v. Crocker*, 18 Wis. 74.

From these authorities, it is clear that, while the statutes of Utah make some provision for the safety of the public while crossing tracks when crossing over the public thoroughfares in thickly settled communities or cities, yet these statutes will not relieve the railroad company from adopting such other reasonable measures for the public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case. The reason of such rule is founded in the common law that everyone must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way, if such injury can reasonably be avoided by the use of reasonable care. The vigilance and care to be used would be much greater at public crossings in populous cities and towns, where many tracks are built across the streets, and are constantly in use, than the ordinary road crossings in the country, or less populous and less used localities; so that the reasonable care and prudence to ⁴²¹ be used must depend upon the facts of each case. In the crossing of this particular street, where the travel is shown to be great and the danger in crossing to be greater, we are of the opinion that reasonable care and prudence would require that a flagman be kept constantly at the crossing during the time that trains continue to cross over it, or that gates should be erected and controlled so as to lessen the danger of injury to passengers and travelers, and thus lessen the danger caused by the almost constant use of the tracks by the defendants and their trains. And, while this is true of this particular crossing, we are not of the opinion that these precautions should be observed by railroad companies in country districts, cities, or smaller localities, where but few persons pass each day, and where the probable danger would be much lessened: *Freeman v. Duluth etc. Ry. Co.*, 74 Mich. 86; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408.

We are of the opinion that the testimony was properly admitted, and concur with the jury that the defendants were negligent in not maintaining gates or providing a flagman at the crossing in question, and the court committed no error in giving the instructions to the jury.

We are equally convinced that no error was committed in allowing the plaintiff Jane English to give the names and ages of the children of the deceased. They were all parties to the action, and such testimony was proper even if they were not parties to the action, as this court held in *Pool v. Southern Pac. Co.*, 7 Utah, 303, and *Chilton v. Union Pac. Ry. Co.*, 8 Utah, 47.

Appellants also contend that the damages awarded the plaintiffs were excessive. The jury rendered a verdict for fifteen thousand dollars, and the court, on motion for a new trial, reduced the damages to thirteen thousand dollars. The deceased was thirty-eight years old, with an expectancy of life, under the American ⁴²² table, of twenty-nine and sixty-two one-hundredths years, and was earning fifty dollars per month as driver of an express wagon. The jury were called upon to fix the pecuniary loss of the plaintiff by reason of the death in question. Appellants claim that, according to the American Experience Table, the value of a life at thirty-eight would be nine thousand five hundred and forty-six dollars; that, according to the interest table issued by the Mutual Life Insurance Company, the insurable value of a healthy man of thirty-eight years would be, at six per cent, eight thousand two hundred and fourteen dollars; ten thousand dollars placed at interest, at the legal rate of eight per cent, would amount to eight hundred dollars per year, or two hundred dollars more than the deceased was earning. The law will allow nothing more than the pecuniary loss as shown by the proof and measured by a pecuniary standard. The extent of this loss should not be measured by the wealth or property of the recipient or giver, but by his earnings, care, health, beneficent and pecuniary contributions given, or in reasonable expectation of being given, to the widow and children, as shown by the proof and judged from all the circumstances of the case to be just, but measured by a pecuniary standard: *Pool v. Southern Pac. R. R. Co.*, 7 Utah, 310; *Chilton v. Union Pac. Ry. Co.*, 8 Utah, 47. Under the circumstances of this case, we are of the opinion that the damages and judgment are excessive to the amount of three thousand dollars, and should be reduced to the sum of ten thousand dollars; and that judgment should be entered for that amount accordingly, with costs in addition thereto. The judgment of the district court is modified accordingly, and that court is directed to set aside the judgment herein, and enter judgment in favor of the plaintiffs, and against the defendants, for the sum of ten thousand dollars and costs.

Zane, C. J., and Bartch, J., concur.

RAILROADS—CROSSINGS—NEGLIGENCE.—The performance of statutory requirements as to the giving of signals is not always the full measure of the duty of a railroad company toward the public at highway crossings. Circumstances may arise when the giving of other warnings or signals may be necessary and obligatory upon the company: *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284; 45 Am. St. Rep. 278. Compare *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82. If a railroad company and the public both use a street, the company must keep a lookout for persons upon its track, and travelers in the street must keep a lookout for approaching trains: Note to *Dyson v. New York etc. R. R. Co.*, 14 Am. St. Rep. 87. Greater care is required of a railroad company than is otherwise necessary in running its trains in a populous town: *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521. Increased vigilance must always be used to prevent accidents while trains are moving in or through a city or town: Note to *McMarshall v. Chicago etc. Ry. Co.*, 20 Am. St. Rep. 453. The omission of a railroad company to maintain a flagman at a highway crossing may be considered on the question of its negligence in an action for an injury to a traveler driving on the highway: *Hart v. Chicago etc. R. R. Co.*, 56 Iowa, 106; 41 Am. Rep. 93; *Pittsburgh etc. Ry. Co. v. Yundt*, 78 Ind. 373; 41 Am. Rep. 580; monographic note to *Welsch v. Hannibal etc. R. R. Co.*, 87 Am. Rep. 44; notes to *Central Passenger Ry. Co. v. Kuhn*, 9 Am. St. Rep. 313; *Louisville etc. R. R. Co. v. Hall*, 13 Am. St. Rep. 98. A railroad company is bound to give signals of warning to travelers on public highways at crossings, although none are required by statute: Note to *Welsch v. Hannibal etc. R. R. Co.*, 87 Am. Rep. 443. Whether the presence of a watchman or other precautions not taken were necessary for the safety of the public is a question to be determined by the jury, in case of a railway accident occurring at a crossing on a public thoroughfare in a city: *Bolinger v. St. Paul etc. R. R. Co.*, 36 Minn. 418; 1 Am. St. Rep. 680. While a failure to maintain a flagman at a crossing is not negligence, the rule is, that when the company has created extra danger, it is bound to use extra precautions, and this may demand the placing of a flagman at a crossing: See *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61; 100 Am. Dec. 405, and monographic note thereto on the duty of a railroad company to keep a flagman or other person at crossing to give warning of approaching trains or cars.

NEGLIGENCE CAUSING DEATH—EVIDENCE—DAMAGES.—A widow suing to recover damages for the death of her husband may testify as to the number and ages of her minor children: Note to *Abbot v. McCadden*, 29 Am. St. Rep. 913. In such cases, the true measure of damages is the pecuniary loss suffered by her alone, the actual damages: *McHugh v. Schlosser*, 159 Pa. St. 480; 39 Am. St. Rep. 699; *Liermann v. Chicago etc. Ry. Co.*, 82 Wis. 286; 33 Am. St. Rep. 87, and note; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *Klepsch v. Donald*, 4 Wash. 436; 31 Am. St. Rep. 936. In estimating this, the jury may consider the age, health, habits of life, the capacity of the deceased for making a living for himself and family, his condition in life, the probable duration of his life, the wages he was actually earning, and his disposition to be industrious and frugal, or otherwise: *McHugh v. Schlosser*, 159 Pa. St. 480; 39 Am. St. Rep. 699; but neither the wealth of the defendant nor the poverty of the survivors is to be considered: See monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 378, on the elements and measure of damages in actions for having caused the death of human beings.

CASES
IN THE
SUPREME COURT
OF
VIRGINIA.

MOROTOK INSURANCE COMPANY v. CHEEK.

[98 VIRGINIA, 8.]

INSURANCE—PROOFS OF LOSS.—A MISTAKE IN DESIGNATING THE NAME of the owner of property in proofs of loss, not induced by fraud nor a desire to deceive, is not fatal to a recovery where the policy is an open, floating one, intended to cover the loss of goods while in a warehouse, under the control of its manager, and irrespective of their ownership.

INSURANCE IN THE NAME OF THE MANAGER OF A WAREHOUSE for account of whom it may concern applies to the benefit of any person who may own property therein at the time of a loss, though such property was not therein when the policy issued.

INSURANCE—PROOFS OF LOSS.—THE SILENCE of the agents and managers of an insurance corporation after receiving proofs of loss is a waiver of any further proofs.

INSURANCE ON PROPERTY IN A WAREHOUSE, WHO MAY MAINTAIN AN ACTION THEREON.—If a policy of insurance is issued to the manager of a warehouse for the account of whom it may concern, he, upon the happening of a loss, may maintain an action on the policy in his own name to recover the value of goods destroyed, and out of the recovery pay himself to the extent of his interest, and the balance he will hold for the benefit of the owners of the property destroyed.

Staples & Munford, for the plaintiff in error.

Harmanson, Heath & Heath, for the defendant in error.

• **CARDWELL, J.** The policy of insurance sued on in this case insured W. B. Cheek, manager Roper Storage Warehouse (in Norfolk city), for account of whom it may concern, for the term of two months from the twenty-fourth day of September, 1892, at noon, to the twenty-fourth day of November, 1892, at noon, against all direct loss or damage by fire, to an amount not exceeding seven hundred dollars on one hundred and fifty barrels of flour while contained in said warehouse; the policy provid-

ing for the usual proof of loss contained in like policies, and containing also all other usual provisions and conditions.

On the 11th of November, 1892, the Roper Storage Warehouse, with its contents, was entirely destroyed by fire, together with one hundred and fifty barrels of flour that assured claimed was covered by this policy; and on December 17, 1892, Cheek, as manager of the warehouse, made out and furnished to Geo. D. Pleasants & Son, general agents of the Morotock Insurance Company, upon blanks furnished by these agents, the proof of the loss of the one hundred and fifty barrels of flour as required by its policy of insurance, accompanied by the certificate of the notary public, residing in Norfolk, and most contiguous to the property destroyed, as also required by the provisions of the policy. This proof of loss set forth that the property described, that is, the one hundred and fifty barrels of flour, belonged at the time of the fire to J. E. Rayl, and no other person or persons had any interest therein.

¹⁰ On the 5th or 6th of February, 1893, Cheek received from Arthur L. Pleasants, a member of the firm of Geo. D. Pleasants & Son, general agents, a letter requiring of Cheek the original invoices and warehouse receipts, also the names and the address of each of the parties for whose direct benefit the insurance effected, covered either by the policy issued by the Morotock Insurance Company or that of the Agricultural Insurance Company, issued by Pleasants & Son on other property in the warehouse; and immediately upon the receipt of this letter Cheek forwarded to the agents at Richmond, Virginia, the original invoices and warehouse receipts called for, and along therewith he inclosed this paper:

“W. B. Cheek, Esq., Supt. Roper Storage Co., Norfolk, Va.

“Dear Sir: Enclosed I hand you invoices for 150 barrels flour bought of the Agosta Milling Company, which had not been accepted by me at the time of the fire. This company has forwarded me bill lading for same, with power to collect insurance for their benefit. Flour destroyed in your storagehouse by fire November 11, 1892.

J. E. Rayl.”

He sent also a statement showing what part of the amount of the loss he was entitled to for freight advanced, storage charges, etc., and what amount belonged to the owner of the flour destroyed. Nothing further was heard by Cheek, the assured, from the agents until March 3, 1893, when Mr. Pleasants, a member of the firm

of Geo. D. Pleasants & Son, came to Norfolk and took the deposition of Cheek as to the fire, the property destroyed and the owners of the property, and in this deposition Cheek explained who were the owners of each and every species of property destroyed by the fire. ¹¹ From that time until May, 1893, the Morotock Insurance Company and its agents remained silent. Whereupon, W. B. Cheek, manager of the Roper Storage Warehouse, suing for himself and also for the Agosta Milling Company, brought suit against the insurance company in the circuit court of the city of Norfolk to recover the amount claimed to be due on the policy, to which action the defendant company pleaded "non assumpsit," and, at the trial of the cause, on the seventeenth day of July, 1893, took three bills of exceptions to the rulings of the trial court. The first is to the refusal of the court to exclude the paper purporting to be the proof of loss furnished by the assured, as before stated, and introduced in evidence by him. The second, to the action of the court in overruling the defendant company's demurrer to the evidence of the plaintiff, and the third, to the refusal of the court to set aside the verdict and judgment on the demurrer to the evidence—the verdict and judgment being for the sum of six hundred dollars, with interest thereon from the twentieth day of February, 1893. To this judgment a writ of error was awarded by this court.

The only error assigned and relied on in the petition of the plaintiff in error is to the ruling of the trial court in refusing to reject the proof of loss furnished by Cheek, manager, December 17, 1892, wherein he represented that the one hundred and fifty barrels of flour lost in the fire belonged to J. E. Rayl, and that no other person had any interest therein.

The contention of the plaintiff in error is, that as the Agosta Milling Company had furnished no proof of loss such as is required by the policy of insurance sued on, this action brought by W. B. Cheek, manager of the Roper Storage Warehouse, suing for himself and also for the Agosta Milling Company, could not be maintained.

It is true that the proofs furnished on the seventeenth day of December, 1892, erroneously stated that the flour which was destroyed was the property of J. E. Rayl, when in fact it was ¹² the property of the Agosta Milling Company, of which J. E. Rayl was the agent at Norfolk, which fact of ownership was correctly stated in plaintiff's declaration. When Cheek stated in the proof of loss furnished the defendant company that Rayl was the owner of the flour, he was simply mistaken, and the mistake oc-

curring doubtless because Rayl, as the representative of the owner, was on the spot looking out for its interests, and Cheek did not draw the distinction between the owner and the representative of the owner. This, however, worked no harm or prejudice to the defendant company, and there is no fraud or deception charged by it, or even intimated. On the contrary, as we have seen, so soon as Cheek received the letter from J. E. Rayl of December 5, 1892, informing him that he (Rayl) had not accepted the one hundred and fifty barrels of flour consigned to him by the Agosta Milling Company and destroyed by the fire, he at once forwarded that letter to the agents of the defendant company, together with the original invoices and warehouse receipts asked for by them. This policy of insurance is but an open, floating policy, in which the manifest intention of the parties is that it shall cover, to the amount of insurance named therein, any goods of the character and description specified in the policy, which, from time to time during its continuance, might be in the Roper Storage Warehouse under the control of its manager. In such a case, the policy applies to the benefit of the person who may own the property at the time of the loss, although he had no interest in the property when the policy was issued; and extrinsic evidence is admissible to show who was in fact concerned: *Wood on Fire Insurance*, secs. 38, 40; *Turner v. Burrows*, 8 Wend. 144.

The silence of the agents of the Morotock Insurance Company from and after the receipt of the proof of the loss furnished by Cheek, manager, and the information as to the parties who were really concerned in the loss, certainly as early as March 3, 1893, cannot be considered otherwise than as a ¹³ waiver by those agents of any further proof of the loss. Therefore Cheek, the assured, had the right to institute this suit to recover the value of the goods destroyed, and out of the recovery to pay himself to the extent of his interest, and the balance to pay over to the owner: *Wood on Fire Insurance*, secs. 280-282.

We are of opinion that there is no error in the judgment of the circuit court of Norfolk city, and it is therefore affirmed.

INSURANCE—FIRE—PROOFS OF LOSS—WAIVER OF.—If an assured, in good faith and within the time stipulated, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, the failure of the insurance company to notify him of any objections to the proofs furnished constitutes a waiver of objections to such proofs, and of any other or further proof: *Moyer v. Sun Ins. Co.*, 176 Pa. St. 579; 53 Am. St. Rep. 690, and note. See, also, *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; 54 Am. St. Rep. 196. An insurance company, by refusing to pay a loss, and defending on the ground that the policy in suit was not in force

at the time of the loss, thereby waives the right to be furnished with any proofs of loss as required by the policy: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note.

INSURANCE—FIRE—PROOFS OF LOSS—MISTAKES IN.—Proofs of loss do not form a part of the contract of insurance; and the assured is not estopped from showing that a statement in the proofs of loss was a mistake so far as it states facts going to annul the policy: *McMaster v. Insurance Co. of N. A.*, 55 N. Y. 222; 14 Am. Rep. 239; *Fowle v. Springfield Ins. Co.*, 122 Mass. 191; 23 Am. Rep. 308.

INSURANCE—FIRE—ON PROPERTY IN WAREHOUSE—WHO MAY SUE UPON.—Where goods were deposited with a wharfinger for sale, the owner paying warehouse rent, and the wharfinger insured the goods, and, on their being destroyed by fire, collected the insurance money, the owner was held entitled to it: Extended note to *Schmidt v. Blood*, 24 Am. Dec. 159. A warehouseman insuring property in his custody, under a contract requiring him so to do, is, in respect to such insurance, the trustee of the owners, and as such bound to make proofs of loss, and to institute proceedings for collection: *Lancaster Mills v. Merchants' etc. Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586, and note. See, also, as to the effect of an insurance policy issued "for account of whom it may concern": *Frierson v. Brenham*, 5 La. Ann. 540; 52 Am. Dec. 603.

CONNELL v. CHESAPEAKE & OHIO RAILWAY COMPANY.

[93 VIRGINIA, 44.]

PRACTICE.—IF A DEMURRER TO THE COMPLAINT IS SUSTAINED and the plaintiff then amends, he cannot afterward be heard to object that the order sustaining the demurrer was erroneous.

RAILWAYS CARRYING PASSENGERS ARE BOUND TO CARRY THEM SAFELY so far as human care and foresight may provide; that is to say, they are bound to use the utmost care and diligence of very cautious persons, and they will be held liable for the slightest negligence which human care, skill, and foresight could have foreseen and guarded against.

CARRIERS—SLEEPING-CAR CORPORATIONS—LIABILITY FOR MURDER.—If, while a passenger is sleeping in his berth in a sleeping-car, he is shot and killed by one who enters with intent to commit murder or robbery, neither the railway nor the sleeping-car corporation is answerable if neither, nor any employé of either, knew that any danger impended over the passenger, and there was no circumstance to rouse suspicion, however watchful and alert they might have been.

NEGLIGENCE, WHEN ACTIONABLE.—To warrant the finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances.

Cabell & Cabell, for the plaintiffs in error.

Henry T. Wickham, Henry Taylor, Jr., and Tazewell Ellett, for the defendants in error.

53 KEITH, P. The executors of D. F. Connell, in an action of trespass on the case brought in the circuit court of the city of Richmond, complain of the Chesapeake & Ohio Railway Company and the Pullman Palace Car Company, defendants, and set out the following cause of action:

That on the 1st of August, 1891, their testator was a passenger upon a sleeping-car owned by the Pullman Palace Car Company, which was attached to and made a part of the train running upon the tracks of the Chesapeake and Ohio Railway Company, and that it became the duty of the defendants to use due and proper care that he should be safely and securely carried on said railway, as aforesaid, and protected from violence and injury while on the train; that the defendants did not use due and proper care in that behalf, but by their negligence, carelessness, and default, at or near Waynesboro or between Waynesboro and Basic City, on the line of said railway, some person to the plaintiffs unknown, armed with a deadly weapon, was allowed by the defendants to enter the car or coach, owned or controlled and run by the defendants, in which plaintiffs' testator was then riding, with the intent to rob or murder him, and who did, without default on his part, shoot him in the abdomen, with a ball fired then and there from a gun or pistol, without any attempt being made by the defendants, or their servants or agents, to protect him; inflicting thereby a deadly wound, hurt, and injury, and that as the result and direct consequence of the wound and injury thus inflicted their testator died on the 4th of August, 1891.

54 The second count alleges that, being a passenger on the Chesapeake and Ohio Railway Company, their testator, out of extra precaution and for the purpose of obtaining greater security and protection, took passage on the sleeping-car or lodging coach owned or leased by the defendants, and lost his life as substantially as described in the first count. The third count avers that he was shot while asleep in his bed or berth.

The fourth count charges negligence upon the part of the defendants in failing to perform their duty reasonably to guard and protect the plaintiffs' testator, while a passenger, against violence from any person on said coach or car; and the fifth count avers that, while occupying a berth in the sleeping-car, the defendants and their servants carelessly and negligently conducted and behaved themselves in not keeping proper care and watch so as to reasonably protect plaintiffs' testator from violence from any person on or in said sleeping-car, and that by and through their negligence, carelessness, and default, some person unknown to the

plaintiffs, armed with a deadly weapon, was allowed to go to the berth in which their testator was sleeping, with the intent to rob or murder him, and inflicted the wound before described.

To this declaration, and to each one of its five counts, which, while varying somewhat as to the mode of stating the plaintiffs' case, present substantially the same question of law, the defendants filed their demurrer. The circuit court sustained the demurrer and permitted the plaintiffs to amend their declaration, and an amended declaration was accordingly filed. To this declaration, and to each count thereof, the defendants also demurred, and the court sustained this demurrer; and thereupon the plaintiffs applied to one of the judges of this court for a writ of error, which was allowed.

The first ground of error assigned here is to the action of the court in sustaining the demurrer to the original declaration. This position cannot be maintained, this court having held that where a demurrer is sustained with leave to amend, if the plaintiffs exercise that privilege, they cannot afterward be heard to object to the judgment upon the original declaration: See *Hopkins v. Richardson*, 9 Gratt. 487; *Darracott v. Chesapeake etc. Ry. Co.*, 83 Va. 288; 5 Am. St. Rep. 266.

The demurrer to the amended declaration presents a question of novelty and interest, which, it is believed, has seldom arisen, and which certainly has never been passed upon by this court.

Railways engaged as carriers of passengers, while not insurers against all injuries except by the act of God or of public enemies, as are the carriers of goods, are yet bound to carry safely those whom they take into their coaches in so far as human care and foresight can provide; that is to say, are bound to use the utmost care and diligence of very cautious persons; and they will be held liable for the slightest negligence which human care, skill, and foresight could have foreseen and guarded against: See *Farish v. Reigle*, 11 Gratt. 697; 62 Am. Dec. 666. A passenger who sustains an injury growing out of the act of the carrier's servants or agents, or because of any defect in machinery, coaches, roadway, or other appliance connected with its transportation of passengers, is presumed, until the contrary is shown, to have been injured through the negligence of the carrier; and upon proof of the injury he has a prima facie case which, in the absence of proof to the contrary, entitles him to recover damages for the wrong.

The injury, here, however, is not the result of any defect in the instrumentalities used by the defendants. The negligence

averred is in the failure to observe such care and to take such precautions as would effectually protect a passenger, asleep in the night-time, upon a Pullman coach constituting a part of the train of the Chesapeake & Ohio Railway ⁵⁶ Company from an assault made upon him by some unknown person, a passenger or intruder, as the declaration alleges, who was permitted to enter the Pullman car with intent to commit murder or robbery, and who did inflict upon the plaintiffs' testator injuries from which he died. It is not averred that the defendants or their employes knew that any danger impended over the testator of the plaintiffs in error, or that there was any circumstance to arouse their suspicion, however watchful and alert they may have been.

Counsel for the plaintiffs in error have brought to the attention of the court a number of adjudged cases, which, upon investigation, turn out to be suits brought to recover damages for the loss of property upon sleeping-cars by robbery or larceny. These cases establish a very high degree of duty from sleeping-car companies to their patrons, and language is used which would go far to sustain the contention of the plaintiffs in error were the facts under investigation in those cases at all similar to those under consideration here.

In the case of *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644, the court says: "A traveler who pays for a berth is invited, and has a right, to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which the passengers are exposed." And again, in the same case, it is said: "They are bound to have an employé charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleeping passengers."

In that case, a passenger was robbed while asleep, and the court held that the company had been negligent in failing to keep a continual watch upon the interior of the car, and was liable.

There is a strong array of cases of a like character, but ⁵⁷ as all of them deal with the liability of carriers for the property of passengers which had been lost or stolen, an extended discussion of them would be unprofitable.

On the part of the defendants, it is claimed, among other grounds of defense, that no responsibility for a wrong attaches wherever there intervenes the independent act of a third person

between defendant's negligence and the injury sustained, which affects and is the immediate cause of the injury.

This proposition is, without doubt, sustained by a convincing weight of authority, but we do not think it applies to this case, because the very negligence alleged consists in permitting the intrusion into the car of the third person whose independent act was the immediate cause of the injury. It will be necessary, therefore, to inquire what, upon principle, should be deemed the measure of duty which the defendants owed to the injured person in this case, and what degree of negligence in the performance of that duty will render them responsible for the injury sustained.

Under no circumstances is a carrier of passengers for hire held as an insurer of their safety, though the highest degree of care and diligence in guarding their safety is required, and the slightest imputation of negligence against which human care and skill can provide will make them responsible for any defect in machinery, or for any negligence on the part of their servants; but the negligence complained of must stand as the proximate cause of the injury sustained; that is, it must be the direct and efficient cause of the injury.

As was said by Justice Miller in *Scheffer v. Railroad Co.*, 105 U. S. 249: "To warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the ⁵⁸ attending circumstances." In this quotation is to be found the principle upon which this case should be decided—a principle which goes far to reconcile the seeming conflict between the authorities cited on behalf of the plaintiffs and the defendants in error.

The cases relied on by the plaintiffs in error are actions to recover the value of goods which passengers have lost while occupying berths upon sleeping-cars. Robbery is of frequent occurrence and larceny yet more frequent, and to invite a passenger to enter a sleeping-car with his property and to go to sleep in the confidence that his person and property will be shielded and protected by those who have undertaken that duty, imposes a very high degree of watchfulness and care upon the sleeping-car company. Passengers are invited to enter and to sleep; they are thereby disarmed and incapacitated for self-protection; carriers are paid to preserve watch and ward over their sleeping guests, and they are rightfully held to a due and faithful discharge of

the obligations thus assumed. Experience teaches us that when property is exposed to theft it is apt to be stolen, but murder is of infrequent occurrence. When, therefore, a sleeping-car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented. It cannot be deemed to have anticipated nor be expected to guard and protect him against a crime so horrid, and happily so rare, as that of murder. There is no causal connection between the negligence pleaded and the injury sustained.

In a peaceful community, in a law-abiding and Christian land, a car of the defendant company is invaded in the night-time by an assassin, and an innocent man falls a victim to his murderous assault. Can it be said that, in leaving a door ajar, in permitting a stranger or passenger to enter, ⁵⁰ the defendants were guilty of negligence, when to hold them negligent would be to say that they should have expected the tragedy which gave rise to this action? To do so would be to require of them more than human foresight as to the minds and motives of men, and make them indeed insurers of the safety of passengers, while under their care, against all dangers, however remotely connected with their acts of omission or commission. This view does not seem to have prevailed in those cases in which injuries to the persons and not to the property of passengers have been the subject of investigation.

In the case of Putnam v. Broadway etc. R. R. Co., 55 N. Y. 108, 14 Am. Rep. 190, the subject is very fully considered, and the court says: "The conductor is only called upon to act upon improprieties or offenses witnessed or made known to him; and the company can only be charged for the neglect of some duty arising from circumstances of which the conductor was cognizant, or of which, in the discharge of his duties, he ought to have been cognizant. The law only looks to the proximate cause of an injury in holding a wrongdoer liable to an action; and, if the damage is not the probable consequence of a wrongful act, it is not the proximate cause, so as to make the wrongdoer liable.

In McGrew v. Stone, 53 Pa. St. 436, the rule is declared to be that "a man is answerable for the consequences of a fault, which are natural and probable; but if the fault happens to concur with something extraordinary and not likely to be foreseen, he will not be answerable."

In the case of Pittsburgh etc. R. R. Co. v. Hinds, 53 Pa. St.

512, 91 Am. Dec. 224, one of the leading cases upon this subject, it is said: "There is no such privity between a railroad company and a passenger as to make it liable for that passenger's injury to another upon the principle of respondeat superior. The only ground on which the company can be charged is a violation of the contract made ⁰⁰ with the injured party. The company undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action—it can rest upon no other."

In that case, a riotous crowd rushed upon the cars in such numbers as to defy the power of the conductor to resist them. They commenced to fight in the car in which the plaintiff was injured. Three causes of error were assigned: 1. "The evidence shows that the conductor did not do his duty, by allowing improper persons to get on the cars; 2. He allowed more persons than were proper under the circumstances, to get on the train and remain upon it; 3. He did not do what he could and ought to have done to put a stop to the fight upon the train, which resulted in the plaintiff's injury."

In discussing these errors, the court said that it had been left to the jury to "determine whether the disorderly character of the men who came upon the train had fallen under the conductor's observation so as to induce a reasonable man to apprehend danger to the safety of the passengers." The plain meaning of this is, that the liability depended upon the fact that the disorderly character of the men who were permitted to enter the train had come under the conductor's observation, and was such as to induce a reasonable man to apprehend danger to the safety of the passengers. The liability was made to rest upon the express or implied notice to the conductor of the dangerous character of those entering the train.

In the case of *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, four or five persons were copassengers with the plaintiff on a special train. They were riding together in the baggage-car and rudely deprived the plaintiff of his hat. The plaintiff sent to the conductor and informed him of the injury. The conductor asked them to return the hat. They became insulting, and a fight ensued, in which the plaintiff ⁰¹ was shot. He sued and recovered damages, the court holding that it is the duty of the conductor of a passenger train to preserve order, to protect passengers from insult and injury from their fellow passengers, and, if necessary to the discharge of this duty, he should stop the train and summon to his aid his fellow

employés, and such passengers as might be willing to assist, and eject the disorderly persons from the train. Failure to discharge this duty as far as he has the means and power renders the railroad company liable in damages to the injured or insulted passenger. In the course of its opinion the court says: "The liability of the carrier arises, not from the fact that the passenger has been injured, but from the failure of the officials to afford protection. It will be necessary, therefore, to bring home to the conductor (or other agent or officer of the company) knowledge or opportunity to know that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it."

In the case of *Britton v. Atlanta etc. Air Line Ry. Co.*, 88 N. C. 536, 43 Am. Rep. 749, it is held that it is the duty of the company to protect every passenger from the violence and assault of his fellow passengers or of intruders, and that it will be held responsible for its own or its servants' negligence in the premises when the same might have been foreseen and prevented by the exercise of proper care. The liability of the defendant to the plaintiff grows, not out of the fact that she was injured, but out of the failure of its servants to afford protection after they had reasonable grounds for believing that violence to her was imminent.

In the case of *Batton v. South etc. R. R. Co.*, 77 Ala. 591, 54 Am. Rep. 80, it was held that, while it is the duty of a railroad company, as a common carrier, to protect its passengers against violence or disorderly conduct on the part of its own agents, or other passengers, and strangers, when such violence or misconduct may be reasonably expected and ⁶² prevented, yet it is not liable to an action for damages for a wrong when it is not shown that the company had notice of any facts which justified the expectation that a wrong would be committed; and the court in its opinion says: "All the cases upon the subject impose the qualification that the wrong or injury done passengers by strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur."

These cases seem to stand upon a safe middle ground between the English cases, which declare that a passenger is only entitled to protection at the hands of the carrier and its servants against such injuries as might reasonably be considered as within the contemplation of the parties at the time the ticket was purchased which is the evidence of the contract of carriage (see *Pounder v.*

North Eastern Ry. Co., L. R. 1 Q. B. Div. (1892) 390), and the cases relied upon by the plaintiffs in error in which the liability of sleeping-car companies as to the property of passengers is enforced, and in which there are expressions which seem to support the contention as to liability for injuries to their persons. As we have seen, the responsibility of the carrier does not flow directly from the injuries sustained, but rests upon the principle that it is the duty of railroad and sleeping-car companies to convey their passengers and guests in comfort and safety; and while not directly responsible to a passenger for a wrong inflicted by an intruder, or stranger, or fellow passenger, they are responsible for such injury if it appear that the companies knew, or ought to have known, that danger existed or was reasonably to be apprehended, and that they could, by the use of the agencies at their disposal, have prevented the mischief. It is better that the carrier should be held responsible to a passenger for injuries received at the hands of an intruder, a stranger, or a fellow passenger only in those cases where its agents or employes knew, or, in the light of surrounding ⁶³ circumstances, ought to have known, that danger was threatened, or to be apprehended, and then failed to use their authority and power to protect him from the impending peril, than that the hitherto recognized limits of responsibility for negligent acts should be enlarged and the carrier be held to answer for a casualty wholly unforeseen and of which this declaration contains the only recorded instance.

In this case, notice to the company or its agents is not charged, and no circumstance is alleged which could have put the company or its agents upon inquiry, or have excited the apprehension of the most careful and cautious. The wrong itself was not only unusual, but it is believed to be wholly without precedent; certainly, the diligence of counsel and the researches of the court have failed to discover any similar case. Under such circumstances, we think it would be harsh and oppressive to impose a liability upon the defendants.

The court did not err in sustaining the demurrer, and its judgment is affirmed.

PLEADING—PLEADING OVER AFTER DEMURRER OVERRULED—EFFECT OF.—Where a defendant demurs to a declaration, and, after his demurrer is overruled, pleads over, he will be precluded from insisting upon a motion in arrest of judgment for insufficiency in the declaration: *Shreffler v. Nadelhoffer*, 133 Ill. 536; 28 Am. St. Rep. 626. Right to object to ruling of court on demurrer is waived by amending the declaration and going to trial on its merits: *Darracott v. Chesapeake etc. R. R. Co.*, 83 Va. 268; 5 Am. St. Rep. 266, and note.

RAILROAD COMPANIES—PASSENGERS—DEGREE OF CARE TO BE EXERCISED TOWARD.—The care required by a railway toward passengers is the highest practical care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances: *Furnish v. Missouri etc. Ry. Co.*, 102 Mo. 438; 22 Am. St. Rep. 781, and note. See, also, *Texas etc. Ry. Co. v. Miller*, 79 Tex. 78; 23 Am. St. Rep. 308, and note. Railroad companies, as to their passengers, are bound to the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves under like circumstances: *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369; 29 Am. St. Rep. 378, and note; *Gardner v. Waycross etc. R. R.*, 97 Ga. 482; 54 Am. St. Rep. 435, and note.

RAILROAD COMPANIES—SLEEPING-CAR COMPANIES—DUTIES AND LIABILITIES OF.—A railway passenger traveling in the coach of a sleeping-car company, who sustains an injury through the negligence of such company, may maintain an action therefor against the railroad company: *Note to Carpenter v. New York etc. R. R. Co.*, 21 Am. St. Rep. 647. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed: *Extended note to Pullman Palace Car Co. v. Lowe*, 26 Am. St. Rep. 331-340.

NEGLIGENCE—PROXIMATE CAUSE.—To warrant a finding that negligence or an act not amounting to wanton wrong is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent and wrongful act, and that it ought to have been foreseen in the light of attending circumstances: *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306; 55 Am. St. Rep. 728, and note. Negligence is not the proximate cause of an accident unless, under the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is a natural consequence of the negligence: *Block v. Milwaukee etc. Ry. Co.*, 89 Wis. 371; 46 Am. St. Rep. 849, and note.

LACEY v. PALMER.

[93 VIRGINIA, 159.]

THE OFFICE OF THE WRIT OF HABEAS CORPUS is not to determine the guilt or innocence of a prisoner, but only to ascertain whether he is restrained of his liberty by due process of law.

CONSTITUTIONAL LAW—STATUTE, WHEN EMBRACES MORE THAN ONE SUBJECT.—A statute entitled "An act to prevent poolselling, and so forth, upon the result of any trials of speed of any animals or beasts taking place without the limits of the commonwealth," and which makes it unlawful for any person, association, or corporation, by any means or device, to make any bet or wager, or to receive, record, register, or forward, purport or pretend to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trials of speed, power of endurance, or skill of animals which is to take place beyond the commonwealth, conflicts with that provision of the state constitution declaring that no law shall embrace more than one object, which shall be expressed in its title, because it prohibits acts which are not included in the term "poolselling."

POOLSELLING, WHAT IS.—A "pool," as the term is used in connection with horseracing and contestants in games, is a combination of a number of persons, each staking a sum of money on the success of a horse in a race, or a contestant in a game, the money to be divided among the successful betters according to the amount put in by each.

CONSTITUTIONAL LAW.—IF A STATUTE IS BROADER THAN ITS TITLE, the part within the title can stand, while the parts not indicated thereby must be denied effect.

CONSTITUTIONAL LAW—STATUTE, WHEN DOES NOT EMBRACE MORE THAN ONE OBJECT.—If the subjects embraced in a statute, but not specified in its title, have congruity or are naturally connected with the subjects stated in the title, or are cognate or germane thereto, it does not embrace more than one object. Therefore, a statute, having as its object the suppression of gambling upon the speed or endurance of animals, may make unlawful and provide for punishing every device for making, receiving, forwarding, or registering, any bet or wager upon the speed or endurance of animals.

STATUTE, TITLE OF.—THE USE OF THE TERM "AND SO FORTH" cannot enlarge the meaning of other words employed in the title of an act, nor supply any omission therein.

INTERSTATE COMMERCE—POOLSELLING.—The purchasing and selling in this state of pools on races and games conducted in another state may be prohibited by our laws. Such prohibition is not an unauthorized interference with the power of Congress to regulate commerce, nor is it material that the money to be wagered is forwarded by telegraph to a state where it is not unlawful to make the wager.

CRIMINAL LAW.—WARRANTS OF ARREST ARE REQUIRED to recite the offenses charged, but not with the same particularity as an indictment. A warrant is not fatally defective because it merely avers in general terms that the accused has been guilty of each and all of the acts forbidden by a statute designated therein.

JURISDICTION.—IF A STATUTE GIVES JUSTICES OF THE PEACE EXCLUSIVE JURISDICTION of all misdemeanors occurring within their jurisdictions, and confers a right of appeal to the county courts, the latter have no original jurisdiction of such misdemeanors.

INTERSTATE COMMERCE AND THE POLICE POWER.—A statute enacted in the bona fide exercise of the police power of a state for the suppression of a recognized vice, the prohibition of the sale or manufacture of adulterated or impure food, or the prevention of the spread of disease among men or beasts, will not be held invalid as repugnant to the clause of the national constitution giving Congress exclusive power to regulate commerce among the states.

STATUTES, WHEN NOT REPEALED BY IMPLICATION.—A statute to prevent gambling and the selling and making of books, pools, or mutuels, within the commonwealth, is not repealed by implication by another statute enacted previously on the same day making it unlawful for anyone to make any bet or wager upon the result of any trial of speed or power of endurance of animals which is to take place beyond the limits of the state.

Samuel G. Brent, R. Walton Moore, Francis L. Smith, and Edmund Burke, for the petitioner.

Attorney General R. Taylor Scott, for the commonwealth.

162 KEITH, P. This is a petition for a writ of habeas corpus addressed to this court by Richard M. Lacey, who alleges that he is detained without lawful authority and deprived of his liberty by one William H. Palmer, sheriff, and ex officio jailer, of the county of Alexandria.

It seems that he was committed to the custody of the sheriff by virtue of a warrant dated the 31st of March, 1896, charged with violating an act of the legislature, approved February 29, 1896 (Acts 1895-96, c. 539, p. 576), which declares it to be "unlawful for any person or persons, or association of persons, corporation or corporations, by any ways, means, or devices to make any bet or wager, or receive or record or register, or forward, or purport or pretend to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of this commonwealth, or by any ways, means, or devices to aid, assist, or abet in making of any bet or wager, or the receiving, recording, or registering, or forwarding or purporting or pretending to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of this commonwealth, or to aid or assist or abet in any way or in any manner in any of the acts forbidden by this act.

"2. That any person or persons or association of persons or corporation or corporations violating the provisions of **163** this act, shall be fined not less than two hundred nor more than five hundred dollars, and be imprisoned not less than thirty nor more than ninety days."

The warrant of arrest does not charge the defendant with having done any of the specific acts which the statute just quoted makes unlawful, but avers, in general terms, that the defendant, with others named in the said warrant, was guilty of each and all of the acts forbidden therein; and the commitment commands the sheriff to deliver Richard M. Lacey to the custody of the jailer of the county of Alexandria to answer an indictment for the offense thus described, at the September term of the county court.

The petitioner claims that this statute is repugnant to article 5, section 15, of the constitution of Virginia; that it is repugnant to article 1, section 8, clause 3, of the constitution of the United States; that it is inoperative, because two laws received the signa-

ture of the governor upon the same day which are inconsistent, the one with the other, and, as there is no means of determining which of the two is the last expression of the legislative will, neither can be operative, the one repealing the other by necessary implication; that the warrant in this case is void because it is vague and indefinite, and does not with sufficient certainty recite the offense with which the petitioner is charged, as required by section 3956 of the code; and, finally, that the commitment is a nullity because, by section 4106 of the code, as amended by act of the general assembly of Virginia, approved March 5, 1895 (Acts 1895-96, c. 845, p. 924), it was the duty of the justice to try the prisoner for the offense with which he was charged instead of committing him for trial by the county court.

The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner. The only issue which it presents is, whether or not the prisoner is restrained of his liberty by due process of law.

¹⁶⁴ A person held under proper process to answer for an offense created by a statute enacted within the constitutional power of the legislature cannot be discharged upon a writ of habeas corpus, however clear his innocence may be, but must abide his trial in the mode prescribed by law.

Is the statute under consideration repugnant to the constitution of the state? Article 5, section 15, of the constitution declares that "no law shall embrace more than one object, which shall be expressed in its title." This section has been recently construed by this court, which ruled that it was intended to forbid the use of deceptive titles as a cover for vicious legislation; to prevent bringing together in one bill subjects diverse and dissimilar in their nature and having no necessary connection with each other; and to avoid surprise in matters of which the title gave no intimation: See *Commonwealth v. Brown*, 91 Va. 762; *Ingles v. Straus*, 91 Va. 209.

The title of the act in question is as follows: "An act to prevent poolselling, and so forth, upon the results of any trials of speed of any animals or beasts taking place without the limits of the commonwealth."

A pool is defined by the Century Dictionary to be, in horse-racing, ball games, etc., "the combination of a number of persons, each staking a sum of money on the success of a horse in a race, the contestant in a game, etc., the money to be divided among the successful betters according to the amount put in by each." It is, therefore, one of the forms of making bets or

wagers upon horseraces, while the statute makes "unlawful a bet or wager by any ways, means, or devices, or the receiving, or recording, or registering, or forwarding, or purporting or pretending to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance, or skill of animals or beasts which is to take place beyond the limits of the commonwealth." Without quoting further ¹⁶⁵ from the act, which is set out in full in the warrant, it sufficiently appears that it is far broader and more comprehensive than its title. It may be said to embrace the genus, while the title only sets out a particular species. The act makes unlawful almost every conceivable form of making bets or wagers upon the results of trials of speed of horses, while the title only mentions the particular form of wager or bet known as a "pool" or "pool-selling."

Cooley, in his work on Constitutional Limitations, speaking of the effect of such a constitutional provision as that under consideration, where the act is broader than the title, says: "In such a case, it may happen that one part of it can stand, because indicated by the title; while as to the objects not indicated by the title, it must fail."

We do not consider the act as obnoxious to that part of the clause of the constitution, just quoted, which says that "no law shall embrace more than one object." The object of this law is the suppression of gambling, or that form of gambling, where the bet or wager is made upon the speed or endurance or skill of animals or beasts, for, as was said in *Ingles v. Straus*, 91 Va. 209: "If the subjects embraced by the statute, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the constitution is satisfied." Were the title sufficiently broad to cover the objects declared in the bill, there would be, in our judgment, no repugnancy to the constitutional provision in question, because all the provisions of the act may fairly be regarded as in furtherance of a single object, "the suppression of gambling." The constitution, moreover, is to be construed so as to uphold the law if practicable. All that is required by the constitutional provision is, that the subjects embraced in the statute, but not specified in the title, shall be congruous, and have natural connection ¹⁶⁶ with, or be germane to, the subject expressed in the title: *Commonwealth v. Brown*, 91 Va. 772.

There is no such incongruity of objects and purposes in the statute as to render it obnoxious to the clause under considera-

tion. The act, however, is far broader than the title, and can therefore only be operative as to that part of it which is indicated by its title. In other words, the only offense which can be punished by virtue of this statute is the particular form of making a bet or wager known as "poolselling."

It is claimed on behalf of the commonwealth that the defect is cured by the use of the words "and so forth," but in this view we cannot concur. The provision of the constitution is mandatory. We think it is a wise and salutary provision, but whether it be or not, it is the law of the land, and must be obeyed. To hold that the legislature could, by the use of such a phrase as "and so forth" supply an omission and cure an otherwise defective title would be to fritter away the constitutional provision, and render it illusive and nugatory: See Cooley's Constitutional Limitations, 6th ed., 174. These words express nothing, and amount to nothing as a compliance with this constitutional requirement. Nothing which the act would not embrace without them can be brought in with their aid: *Fishkill v. Fishkill etc. Ry. Co.*, 22 Barb. 634; *Johnston v. Spicer*, 107 N. Y. 185.

We are of opinion, therefore, that while the body of the act is broader than its title, and the title is not aided by the introduction of the phrase just discussed, the statute is not wholly inoperative for repugnancy to the constitution of the state, but is a valid law so far as it makes poolselling an offense and prescribes the punishment for it.

We will now proceed to consider the alleged repugnancy of the act in question to article 1, clause 3, section 8 of the constitution of the United States, which declares that "Congress shall have power to regulate commerce with foreign ¹⁶⁷ nations, and among the several states, and with the Indian tribes." In discussing this branch of the case, we shall treat the subject as though the prisoner were charged specifically with the offense of selling in Virginia a pool upon a trial of speed of horses to take place at St. Louis, as he can under the statute set forth in the warrant be found guilty of none other.

It is conceded that the power thus conferred is, when exercised by Congress, exclusive in its operation. It is also conceded that the abstention on the part of Congress from passing laws in the exercise of its power to regulate commerce is equivalent to an expression of its will that, in those respects in which it can be reached and controlled by regulations of a general character, it shall remain free. On the other hand, there is a reserve of power and duty in the states, the due exercise of which is essential to

the maintenance of order, the preservation of health, and the promotion of good morals. In fact, almost the whole of the great body of municipal law which establishes and enforces the duties of citizens to each other is embraced within and known as the police power. In it is to be found, says Blackstone (4 Blackstone's Commentaries, 162), the "due regulation and domestic order of the kingdom whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good morals, and to be decent, industrious, and inoffensive in their respective stations." The professed object of all government is to promote the general welfare, and it cannot be denied that the subjects enumerated in the above extract are of prime importance, not only to the welfare and happiness of men, but are essential to their very existence in a state of civilized society. The object of the law is the suppression of gambling in its most attractive, seductive, and, therefore, the most dangerous of its many forms. That gaming is a vice which it is the right and duty ¹⁶⁸ of a state to forbid under severe penalties is recognized, I think, by the codes of every state in the Union, if not, indeed, by those of all civilized communities.

"The right to legislate upon the subjects of intoxicating liquors is acknowledged by everyone, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crime, poverty, and enormous suffering, and bears most harmfully upon the sum of happiness of the human race. So in regard to lotteries in general. A widespread custom of indulgence in the purchase of tickets leads, among the poorer classes certainly, and so among others, to habits of recklessness, waste, and idleness. It cultivates a gambling spirit and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy": *People v. Gillson*, 109 N. Y. 404; 4 Am. St. Rep. 465.

The act in question would seem, then, to be in the performance of the obligation which rests upon the general assembly of Virginia to pass laws to suppress a recognized vice. There is no question that the police power must be exercised in subordination to the constitution of the state, and a fortiori that it must not be in contravention of the constitution of the United States. Now, the proper discharge of the functions and duties intrusted to the national and state governments is necessary to the highest efficiency of both, it follows that in the development and growth of the two systems thus blended and interwoven and operating

directly, each by its own force, upon the same individuals, wisdom and prudence must prevail in order that the happiest and best results may be achieved.

In the case before us, there would seem to be no reason why any antagonism or conflict should result from the exercise within their appointed limits of the power on the part of Congress to regulate commerce among the states, and the duty of the state to suppress a recognized offense against ^{the} good morals. There can be none unless the transmission of money or other thing of value to be bet on a race to take place beyond the limits of the state be a subject of commerce which is entitled to shelter itself under the aegis of the constitution of the United States, and invoke for its protection the power to regulate commerce with which Congress was clothed, to the end that legitimate intercourse between the states might forever remain free and unfettered.

In *Cohens v. Virginia*, 6 Wheat. 264, 443 (a case, by the way, in which a lottery established by the Congress of the United States sought to set at naught a law of the state of Virginia which forbade the sale of lottery tickets within her borders), it was said by Chief Justice Marshall: "To interfere with the penal laws of a state, where they are not leveled against the legitimate power of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed."

The same spirit, happily, still animates the supreme court of the United States. It fully recognizes the difficulty oftentimes presented of securing harmonious operation to the just and necessary powers of the federal and state governments, and with none of the provisions of the federal constitution is there more frequent opportunity for interference and conflict than under the commerce clause of the one and the police power of the other. The great truth must be recognized that the government of our people in its entirety consists of an "indissoluble union of indestructible states," and that, as a consequence, it is as much the duty of every department of the government of the United States to preserve in their full and unimpaired vigor those powers which in the distribution of governmental functions, were reserved to the states as to cherish and foster the growth and expansion ⁱⁿ to their conditions of highest usefulness those functions and duties which were confided to the federal government. Though it

power of Congress is held to be exclusive in its nature, and to embrace not only the subjects of commerce, but all the agencies and instrumentalities by which that commerce is to be carried on, we find the supreme court readily conceding in a number of instances the free exercise of the police power of the state, though incidentally it might have the effect of interfering with or to some extent regulating interstate commerce. For instances of this sort, see cases cited, in *Richmond etc. R. R. Co. v. Patterson etc. Co.*, 92 Va. 670, and *Commonwealth v. Meyers*, 92 Va. 809. In the latter case, it is said "that the right of the state to impose a license tax upon peddlers where it operates uniformly upon all citizens, and does not discriminate in favor of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police power and is not a regulation of commerce under cover of that power, although incidentally it may have that effect, has been uniformly maintained; but where any injurious discrimination is discovered in favor of the resident as against the nonresident, or with respect to the sales of articles manufactured in this state over similar articles manufactured abroad, the state laws are declared to be void, as repugnant to the constitution of the United States."

Since that case was decided we have further investigated the authorities on the subject, and are strengthened in the conviction that no decision of the supreme court of the United States can be found holding a state law invalid as being repugnant to the commerce clause of the constitution, which was enacted in the bona fide exercise of the police power of the state, for the suppression of a recognized vice, or to prevent the sale of adulterated food, or the manufacture of food from impure materials, or to prevent the spread ¹⁷¹ of disease among men or beasts. Under cover of the police power efforts are constantly being made to promote some unlawful purpose, as in *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, where a law was held unconstitutional which, under the police power, undertook to forbid what was held to be an innocent act, and one which the legislature could not make criminal. The supreme court has held state laws to be void which impose tonnage duties (*Inman S. S. Co. v. Tinker*, 94 U. S. 238), and taxes on imports, as in *Almy v. California*, 24 How. 169; and inspection laws discriminating in favor of the citizens of the state as against citizens of other states (*Voight v. Wright*, 141 U. S. 62); or which in some of a great variety of modes endeavored to give to its own citizens, or to its own products, an advantage over the citizens or products of other states;

and in some instances to favor one industry engaged in by its own citizens over an innocent but less favored occupation. An example of the latter is to be found in the case of *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34. Not unfrequently it happens that the police power is resorted to merely for purposes of revenue. In these and like cases, which might be greatly multiplied, the courts have held that they did not come properly within its domain.

While a state law which operates as a regulation of interstate commerce, or which affects it, except incidentally, could not be upheld under the police power of the state; while laws pretending or purporting to be in the exercise of the police power, but which are but devices and schemes under cover of that power to accomplish some purpose forbidden to the state are void; yet state laws passed with the honest purpose of promoting the health, the morals, or the well-being of its citizens, are valid.

Contracts are peculiarly under the protection of the constitution of the United States, which declares that no state shall pass a law impairing their obligation; and yet it is not ¹⁷² pretended that a state may not prohibit the enforcement of contracts resting upon a vicious or immoral consideration, the enforcement of which would have a vicious and immoral influence. So, too, we think that to call into activity the inhibition upon the states to interfere with interstate commerce implied from the grant to Congress of the exclusive power to regulate it, the first thing to be shown is some subject of commerce which commends itself as at least not injurious to health and morals. In no case can the just and proper exercise of the police power of the state, acting with the honest purpose to protect the health and morals of a community, conflict with the proper exercise of the power in Congress to regulate commerce unless the means of disseminating disease and encouraging vice are proper subjects of commerce.

It is insisted here, however, that inasmuch as the offense consists in forwarding a sum of money by telegraph to Wheeling, West Virginia, to be wagered on a trial of speed of horses to take place at St. Louis, Missouri, it not being unlawful, as it is claimed, to make such a wager in West Virginia, the act making it criminal is void, not only as being repugnant to the commerce clause of the constitution, but as an attempt to punish the doing in West Virginia of an act lawful in that state.

We have said enough to show that there is, in our opinion, no repugnancy in the statute to the commerce clause of the constitution. Upon the other point we might content ourselves with ob-

serving that as we are not trying the issue of guilty or not guilty, but only whether there is lawful cause for the detention of petitioner disclosed by the warrant and commitment, the effect of the proof of the law of West Virginia, as of all other facts, must be postponed till the trial; but as an expression of opinion has been sought, and there can be no impropriety in giving it, we are willing to go somewhat into this branch of the subject also.

¹⁷³ We do not perceive that the fact that the race upon which the wager is to be made is to be run in Missouri, and that the money is to be placed in West Virginia, at all affects the question. It remains that by the statute the act is made unlawful here, and may be punished unless it be under the protection of the constitution of the United States. With the laws of our sister states we have no concern, except in so far as they appear in this record, and they are not the proper subjects of animadversion or criticism. If West Virginia has not legislated against this form of gambling, it is no concern of ours. Virginia has a right to repress and punish that which by the common consent of mankind is a vice, without regard to the laws of other states. To make a bet or wager upon a race to take place in Missouri is as injurious to good morals as though it were to take place within our own borders; nor is the quality or character of the act at all affected by the fact that a stage in the transaction takes place upon the neutral ground of West Virginia. The root of the evil is here, and here its baneful influence and example are felt. The act at which the punishment is aimed takes place in Virginia, and over it and the actors in it Virginia has complete jurisdiction unless, as has been so often said, shelter and protection are found under the commerce clause of the constitution of the United States.

Another objection taken to the warrant is that it is too vague and indefinite; that it is the right of a person accused of crime to be informed of the "cause and nature of the accusation against him."

Warrants of arrest are required to recite the offense charged, but the same particularity is not expected or required as in indictments or more formal papers: See 3 Robinson's Practice, old ed., 10; Bishop on Criminal Procedure, sec. 714.

While we think it would be better practice to state the offense more specifically than has been done here, we are not prepared to say that we would on that account alone be ¹⁷⁴ content to quash the proceedings, and to discharge the prisoner.

The remaining ground of objection, however, is fatal to the

warrant of commitment under which the prisoner is held. By section 4106 of the code, as amended by an act approved March 5, 1896 (Acts 1895-96, c. 845, p. 924), justices of the peace are given "exclusive original jurisdiction of all misdemeanors occurring within their jurisdiction," and are authorized to inflict the same punishments theretofore imposed by county and corporation courts. By section 4107 an unrestricted right of appeal to the county or corporation court is secured, where the accused can demand a jury, but the trial and judgment must in the first instance be before the justice. The effect of this statute is to take away from county and corporation courts the power to try misdemeanors as courts of original jurisdiction. It takes away their power to try misdemeanors even in those cases where indictments or informations were pending: See *Dulin v. Lillard*, 91 Va. 718, where the effect of a similar statute is fully discussed and considered and the authorities bearing upon it are collated.

For the foregoing reasons, we are of opinion: 1. That on account of the insufficiency of the title of the act set out in the warrant, poolselling is the only form of bet or wager that is made punishable thereby; 2. That there is no repeal by implication of either of the two acts passed February 29, 1896, but that the act entitled "An act to prevent poolselling, etc., upon the results of any trials of speed of any animals or beasts taking place without the limits of the commonwealth" (Acts 1895-96, c. 539, p. 576), is effective only as to poolselling; while the act entitled "An act to prevent gambling and selling or making books, pools, or mutuels within the commonwealth of Virginia" (Acts 1895-96, c. 545, p. 579), is in all respects in full force and vigor; 3. That neither act is repugnant to the constitution ¹⁷⁵ of the United States; 4. That it would be better practice to state the offense with more precision than has been observed, especially, in view of the fact that justices are now clothed with exclusive original jurisdiction to try misdemeanors and the warrant gives to the accused the only information as to the nature of the offense with which he is charged; and 5. That the warrant of commitment under which the petitioner is held in custody is void, because it was the duty of the justice to try the case, instead of committing the prisoner for trial by the county court, which is without authority as a court of original jurisdiction as to misdemeanors.

The prisoner must be discharged.

HABEAS CORPUS—WHAT QUESTIONS MAY BE CONSIDERED.—A discharge on habeas corpus cannot be obtained on the ground that the prisoner is innocent of the offense for which he is

held under indictment. The question of his guilt or innocence must, after indictment, be submitted to a jury: *Farmer v. Lewis*, 92 Ind. 4; 47 Am. Rep. 153; *People v. McLeod*, 1 Hill, 377; 25 Wend. 483;

Am. Dec. 328, and extended note. Inquiry on habeas corpus into the commitment of the prisoner for contempt is confined to the determination whether or not the court had jurisdiction. No irregularity in the proceedings taken to obtain jurisdiction, and no question of injustice or wrong that may have been done to the petitioner, can be considered: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *Smith v. Clausmeyer*, 136 Ind. 105; 43 Am. St. Rep. 311, and note.

STATUTES—CONSTITUTIONAL PROVISION THAT NO LAW SHALL EMBRACE MORE THAN ONE OBJECT, WHICH MUST BE EXPRESSED IN TITLE—INTERPRETATION OF.—The proposition in the constitution against enacting laws which embrace more than one subject must be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical and natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection or relation to each other. All that is necessary is, that the act shall embrace some one general subject; and by this is meant merely that all matters treated of should fall under some general idea, and be so connected with, and related to, one another, either logically or in popular understanding, as to be parts of and germane to one general subject: *Johnson v. Harrison*, 47 Minn. 575; 28 Am. St. Rep. 382, and note; *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304, and note. Though a constitution forbids any bill to embrace more than one subject, the act may create the means and instrumentalities required for its own accomplishment: *State v. Nowland*, 3 N. Dak. 427; 44 Am. St. Rep. 572, and note. Provisions in an act which are not clearly within the title are void: *Note to Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 19 Am. St. Rep. 873.

STATUTES—GENERAL WORDS—INTERPRETATION OF.—When general words follow an enumeration of particular cases in a statute, they are held to apply to cases of the same kind and description. A statute enumerating things inferior cannot, by general words, be construed so as to extend to and embrace those which are superior: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202; *People v. Richards*, 108 N. Y. 137; 2 Am. St. Rep. 373.

STATUTES—REPEAL BY IMPLICATION—WHEN IT TAKES PLACE.—A repeal by implication does not exist unless there is a positive repugnancy between the provisions of the new law and those of the old, and even then the law is repealed by implication only pro tanto to the extent of the repugnancy: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663, and note. See, also, note to *Winona v. School Dist.*, 12 Am. St. Rep. 695.

ARREST IN CRIMINAL CASES—FORM AND SUFFICIENCY OF WARRANT.—A warrant issued upon an original complaint on information and belief, but reciting that, upon examination under oath, it appeared to the justice that the offense had been committed, and there was just cause to suspect the accused to be guilty thereof is valid and legal, as the complaint presumptively shows a legal and proper ground for the issuance of the warrant: *Haskins v. Ralston*, 69 Mich. 63; 13 Am. St. Rep. 376. See, also, *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250.

INTERSTATE COMMERCE—LIMITS OF STATE POLICE POWER OVER.—Regulations imposed in good faith by a state, for the purpose of promoting and better securing the health of its citizens and protecting them from contagion, may doubtless incidentally af-

fect or regulate interstate or foreign commerce without being unconstitutional: Extended note to *People v. Wemple*, 27 Am. St. Rep. 547-568, on the constitutionality of state regulations of interstate commerce. See, also, note to *Bennett v. American Exp. Co.*, 3 Am. St. Rep. 779; *Gulf etc. Ry. Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926, and note; *Norfolk etc. Ry. Co. v. Commonwealth*, 93 Va. 749; post, p. 827 and note; *State v. Southern Ry. Co.*, 119 N. C. 814; 56 Am. St. Rep. 689, and note.

BETHEL v. SALEM IMPROVEMENT COMPANY.

[98 VIRGINIA, 254.]

DAMAGES.—FOR THE BREACH OF A CONTRACT TO PAY MONEY, no matter what amount of inconvenience is sustained by the plaintiff, the measure of damages is only the interest on the money.

DAMAGES.—WHERE THE FAILURE OF ONE PARTY TO PERFORM HIS CONTRACT IS DUE TO THE FAILURE OF THE OTHER TO MAKE PAYMENTS as therein provided, the former cannot recover as damages the profits which could have been realized had he performed his contract. His recovery is limited to the amount due him for work actually done, with interest.

G. W. & L. C. Hansbrough and Scott & Staples, for the plaintiffs in error.

R. H. Logan, A. B. Pugh, and Phlegar & Johnson, for the defendant in error.

255 KEITH, P. On the 20th of January, 1891, the Salem Improvement Company entered into a contract, under seal, with Geo. W. Bethel & Co., by which the latter agreed to make and burn for the former 1,500,000 bricks, during the summer of 1891, the Salem Improvement Company agreeing to pay \$6.50 per thousand for the bricks in the kiln, provided "the brick should not run less than two-thirds well burned, hard brick; that the brick are to be examined when the kiln is burned, and, if approved by the Salem Improvement Company, it is to pay Geo. W. Bethel & Co. for three-fourths of their value, at the price aforesaid, but if, upon opening the kiln and hauling the brick, they are found to be imperfect, and not equal to the standard above named, the Salem Improvement Company shall have the power of rejecting them."

Geo. W. Bethel & Co. under this contract burned 803,491 bricks, and received therefor \$3,212.31.

A disagreement having arisen between the parties as to their rights under this contract, Geo. W. Bethel & Co., on the fifth day of March, 1892, brought an action of covenant against the Salem Improvement Company, and after setting out in their declaration

the terms of the contract just stated, and referring to the contract itself for the complete provisions thereof, they aver that, except in so far as they have been prevented by the defendant, they have always well and truly performed all things in the said contract on their part to be done, according to its tenor and effect, but that the defendant hath not hitherto performed and kept its covenants in the said contract contained, according to the true intent and meaning of the same, "in this, that after the said plaintiffs had, according to the tenor of the contract aforesaid, manufactured 803,491 bricks, and when they were proceeding with the manufacture of the residue of the said 1,500,000 bricks, the said defendant notified the plaintiffs that it would not purchase any more of the said bricks than had already been made, and to discontinue the manufacture of the same, ³⁵⁶ and that the said defendant, although the said 803,491 bricks, made according to this contract, were kilned on the said premises according to the provision of the said contract the said defendant hath not paid to the said plaintiffs the sum of \$6.50 per thousand, for 1,500,000 bricks above mentioned, nor any part of said sum, except the sum of \$3,212.31, whereby the plaintiffs have been damaged on account of the failure to pay for the bricks actually manufactured as aforesaid, by the outlay necessarily incurred by them in the preparation for the manufacture of the residue of the said bricks, and the failure of the defendant to allow the plaintiffs to continue the manufacture of the residue of the said 1,500,000 bricks, or to pay the plaintiffs their reasonable profit, to-wit, the sum of \$3 per thousand for the same to be manufactured."

The second count after setting out the contract sets out the breach as follows: "In this, that the said defendant, as soon as the said plaintiffs had manufactured the 803,491 bricks mentioned in the first count, and when they had gone to the expensive preparation to manufacture the residue of the 1,500,000 aforesaid, and were proceeding with the manufacture of the same, the said defendant notified the said plaintiffs not to manufacture any more bricks than they had already manufactured, and that it would not purchase nor pay for any bricks thereafter manufactured, and the said defendant, although the said plaintiffs had manufactured and kilned the said 803,491 bricks, which were not less than two-thirds well burned, hard brick, and had, in every way, complied with the said contract on their part to be performed, except as aforesaid, hath not paid to the said plaintiffs the sum of \$6.50 per thousand for 1,500,000 bricks as aforesaid,

or any part thereof, except the sum of \$3,212.31, in the first count mentioned."

The third count after reciting the contract, states the breach thereof in the following language: "In this, that ³⁵⁷ the said defendant hath not purchased of the said plaintiffs the said 1,500,000 bricks, nor paid to the said plaintiffs the said sum of \$6.50 per thousand for said 1,500,000 bricks, whereby the said plaintiffs were put to heavy costs and expenses, and incurred heavy losses in and about performing the covenant in the said contract, on their part to be performed, to wit, the sum of \$4,000."

To this declaration the defendant filed several pleas, about which no question was made, and upon these pleas the plaintiffs joined issue; and thereupon a jury was impaneled, which, after hearing the evidence and instructions from the court, found a verdict for the plaintiffs, and assessed their damages at the sum of \$4,000. The defendant moved for a new trial, which the court, after consideration, granted, upon the ground, as stated in its order, that it had erroneously instructed the jury. To the ruling of the court setting aside the verdict the plaintiffs excepted.

At a subsequent term, the whole matter of law and fact arising upon the case was submitted to the judge on the evidence given at the former trial as the same appears in the bill of exceptions filed at that term. Thereupon the court proceeded to give judgment for the plaintiffs in the sum of \$1,403.04, with legal interest thereon from January 1, 1892, till paid, and their costs therein expended. The plaintiffs again excepted, and tendered their bill of exceptions, which was allowed by the court; whereupon the plaintiffs applied to one of the judges of this court for a writ of error, which was granted.

The errors assigned here are: 1. To the action of the court in setting aside the verdict rendered in behalf of the plaintiffs; the contention being that there was no error in the instructions given by the court, and that it should have given judgment in their favor upon the verdict as rendered by the jury; and 2. That there was error in the court to give its final judgment for \$1,403.04 but that it should have been ³⁵⁸ for the sum of \$3,746.07, with interest from January 1, 1892, till paid.

The instruction given by the court, and which it afterward decided was erroneous, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiffs, up to

time he stopped the manufacture of bricks, had been manufacturing them according to the requirement of the contract, or that the brick so manufactured had been accepted by the defendant, and that the defendant refused and failed to pay the plaintiffs the sums of money, if any, due them under said contract, as the said sums became due, and by reason of such failure, the plaintiffs were forced to stop, and did stop, the manufacture of bricks, then the plaintiffs are entitled to recover for the price of the bricks manufactured by them, according to the said contract, and for the profit on the difference between the number of the bricks so manufactured by them, and 1,500,000 bricks, manufactured according to the terms of the contract, and, in estimating such profit, the jury shall place the bricks at the price fixed in the said contract, and deduct therefrom the cost of said bricks, as they shall believe such costs to be from the evidence."

This instruction is predicated upon the performance on the part of the plaintiffs of the conditions set out in their covenant, and upon the failure of the defendant to pay to the plaintiffs the sums of money due them under the contract as the same became payable.

It is claimed by the defendant in error that this instruction was erroneous for two reasons: 1. That there was no such issue presented by the pleadings, the breach laid in the declaration being that the defendant had failed to perform the covenants in the said contract on its part to be performed, in this "that the said defendant notified the plaintiffs that it would not purchase any more of the said bricks than had already been made, and to discontinue the manufacture of the same.

³⁵⁹ The theory upon which this action was brought, as appears from the declaration, was that the plaintiffs were entitled to recover because the defendant had broken its contract, not by failure to pay for the bricks manufactured, but by its notification to the plaintiffs that it would not purchase any more of the bricks than had already been made, and to discontinue the manufacture of the same. Had this breach been established by the evidence, there is abundant authority to warrant the verdict and judgment for the plaintiffs upon proper instructions; but, as has already been observed, the instruction under consideration is predicated solely upon the performance by the plaintiffs of the covenants and conditions to be performed on their part, and the refusal and failure of the defendant to pay to the plaintiffs such sums of money as were due them under the contract, as the same became payable. The failure to pay the money is the cause alleged in

the instruction that forced the plaintiffs to stop the manufacture of the bricks, and which entitles the plaintiffs to recover, not only for the bricks manufactured by them according to said contract, but for the profit on the difference between the number of the bricks so manufactured by them and the 1,500,000 bricks manufactured according to the terms of the contract, to be ascertained by placing the bricks at the price fixed in the contract and deducting therefrom the cost of the bricks as shown by the evidence.

For the breach of a contract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest on the money only: Wood's *Mayne on Damages*, 1st Am. ed., 15. That this is the rule is admitted. That there are exceptions to it may also be conceded, and it is earnestly contended on behalf of plaintiffs in error that the case before us comes within the exception, and not within the rule. In support of its contention the case of *Masterton v. Mayor*, ³⁰⁰ 7 Hill, 61, 42 Am. Dec. 38, is relied upon. That was an action of covenant on an agreement whereby the plaintiffs undertook to furnish, cut, fit, and deliver all the marble to build the city hall of Brooklyn, to be of the best kind of white marble from Kain & Morgan's quarry, for which the defendants agreed to pay a certain sum in installments, payable at different stages in the erection of the building. The defendants suspended work on the building for the want of funds, and refused to receive or pay for any more marble. This was the breach complained of. Part of the marble had at that time been delivered and paid for, another part was ready for delivery, but the greater part had not yet been procured and prepared for delivery. The plaintiffs, as a part of their case, put in evidence articles of agreement between them and Kain & Morgan made on the faith of the agreement between the plaintiffs and the defendants, whereby Kain & Morgan covenanted to furnish, in blocks prepared for cutting, all the marble required to fulfill the plaintiffs' contract, and the plaintiffs agreed to pay them a certain sum therefor out of the sum agreed to be paid by the defendants, and in similar installments, but expressly stipulated that the said Kain & Morgan should not look to the plaintiffs, except to the funds as supplied by the defendants.

"The circuit judge instructed the jury that the plaintiffs were entitled to recover the profits which would have accrued to them from the actual performance of the contract, and that, as the rough marble was to be procured from Kain & Morgan's quarry, the contract was to be deemed a part of the performance of the plaintiffs' contract, and the plaintiffs were entitled to recover

from the defendants the damages for which they would be liable to Kain & Morgan for that contract. There was a verdict for the plaintiff for a large amount, greatly exceeding the loss of the marble actually on hand. The defendants appealed."

It is obvious that the ground of complaint here was not ³⁶¹ the failure to pay for the marble already cut and delivered, but the ground of complaint and the breach alleged was that the defendant refused to receive or pay for any more marble, want of funds being alleged as the cause. The only item of damage in which the failure on the part of the defendants to pay money cuts any figure, was the damage growing out of the contract with Kain & Morgan, with whom plaintiffs had contracted and whom they were to pay in installments similar to the installments due the plaintiffs from the defendants, but the circuit court was reversed in the court of appeals for having allowed this damage to be computed in the verdict, Chief Justice Nelson saying: "I am unable to comprehend how these can be taken into the account, or become the subject matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract." So this may be laid out of the case altogether. Said the chief justice: "The damages for the marble on hand, ready to be delivered, was not a matter in dispute on the argument. . . . The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so."

Not that the means and ability were to be obtained from the defendants in the form of the payment of the installments as the work became due, as provided in the contract, but that the plaintiffs were possessed of sufficient means and ability, independent of what they were to receive from the defendants, to perform all things on their part to be performed had they been permitted to do so, but they were not ³⁶² allowed to perform the contract, the defendant refusing to receive or pay for any more marble, but it was that refusal alleged and proved which constituted the breach for which the plaintiffs were in that case permitted to recover. So far from being an authority for the plaintiffs, it seems

to us that it can be relied upon to establish the contrary doctrine.

The case of *McElwee v. Bridgeport etc. Co.*, reported in 54 Fed. Rep. 627, is upon its face a mere dictum upon the point under consideration. In that case, a land company, in order to procure the erection of a mill near its land, contracted to pay a bonus to the manufacturer, a fixed sum to be paid when the latter was ready to begin work thereon, and the rest in installments as the work progressed. The first installment was promptly paid, but two others were earned and not paid, whereupon the manufacturer ceased work, and sued for damages for breach of contract. It appeared that his entire outlay and expenses were less than the first installment received, and there was no proof of loss or profit. Held, that he could recover nothing.

The proposition upon which the plaintiffs in error relied here, as stated hypothetically by the court in that case, was not necessary to a decision of the case, and is a mere obiter dictum.

Kendall Bank Note Co. v. Commissioners etc., 79 Va. 563, was a case where, after having entered into a contract with the defendant in error, the plaintiff in error, without any sufficient cause, revoked the contract which it had made. Thereupon the Kendall Bank Note Company sued in the circuit court of the city of Richmond, obtained a judgment for a large sum, and the commissioners of the sinking fund brought it upon a writ of error to this court. Judge Lacy, in delivering the opinion, at page 573 says, "The plaintiffs can recover for respective profits when they are prevented from going on by being ordered to desist from ~~the~~ the work, or by the omission to perform some condition precedent to its further prosecution by the other party." The board of sinking fund commissioners had canceled the contract, and forbidden the Kendall Bank Note Company to proceed further in the execution of it. Clearly, therefore, the bank note company had a right to recover for whatever profits would reasonably accrue upon its contract. There is not one word said in that case about the failure to pay money as constituting the cause of action, or that the mere failure to pay money would in any case entitle the plaintiff to recover any damages in addition to the principal sum with lawful interest thereon. It is conceded, however, that there are such cases. A familiar example of such a case is, that a banker is liable to damages for the refusal to pay a check: *Marzetti v. Williams*, 1 Barn. & Adol. 415. See, also, *Tuers v. Tuers*, 100 N. Y. 196.

Many instances of a like character might be given, but we have seen no case which will sustain the instruction under consideration. It is the ordinary case of a failure to comply with a contract to pay money at a stipulated time. In such cases, the measure of damages for the breach of the contract is the principal sum due, and legal interest thereon. To make a defendant responsible for the profits which might have accrued to the plaintiffs by the use of the money, in addition to the interest, would be harsh and oppressive, and should not be sanctioned by the court, unless the plaintiffs can bring their case within some well-recognized exception to the rule.

For the foregoing reasons, we are of opinion that the circuit court did not err in setting aside the verdict and granting a new trial. We are also of opinion that there was no error in the judgment rendered by the court, which is fully supported by the facts shown in evidence, and it is affirmed.

DAMAGES—MEASURE OF, FOR BREACH OF CONTRACT—PROFITS.—Damages for breach of a contract should be such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things from such breach—or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach: *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky. 340; 25 Am. St. Rep. 536, and note. Where a breach of contract results in the loss of definite profits which are ascertainable and within the contemplation of the parties, they may generally be recovered; but when prospective profits are remote, conjectural, and speculative, they cannot be said to be the direct and unavoidable result of the breach and cannot be recovered: *Sherman Center etc. Co. v. Leonard*, 46 Kan. 354; 28 Am. St. Rep. 101, and note; *State v. Andrews*, 39 W. Va. 35; 45 Am. St. Rep. 884, and note.

DAMAGES—MEASURE OF, FOR BREACH OF CONTRACT TO PAY MONEY.—When a tenant agrees to pay all taxes assessed against the land in lieu of rent, his failure to pay such taxes, resulting in the sale of the land therefor, renders him liable in damages only for the amount of unpaid taxes with interest thereon: *Fontaine v. Schulenburg etc. Lumber Co.*, 109 Mo. 55; 32 Am. St. Rep. 648, and note.

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MAN v. HOCKMAN.

[98 VIRGINIA, 855.]

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ARE DEEMED TO HAVE BEEN ENTERED
the term of the court at which they were recor-
was in such a condition that it might have been
had it occupied the first place on the docket.
THE LIEN OF A JUDGMENT OR DECREE BEGINS WITH
MOMENT OF THE DAY on which it attaches. If it
is entered by confession entered in vacation, the lien commences
at the first moment of the day of such entry, irrespective of the
day which the entry was in fact made.

THE LIEN OF A JUDGMENT HAS PRIORITY OVER A
CONVEYANCE RECORDED ON THE SAME DAY on which the
judgment was entered, though the indorsement of the clerk shows
that the judgment was, in fact, entered after the deed was filed for
record.

Scott & Staples and A. B. Pugh, for the appellant.

G. W. & L. C. Hansbrough and R. H. Logan, for the appellees

456 RIELY, J. There were but two questions raised or dis-
cussed in this case: The priority of lien between the decree and
the deed of trust, and the validity of the latter. The question
of priority will be first considered.

It is provided by section 3567 of the code that "every judg-
ment for money rendered in this state, heretofore or hereafter
against any person, shall be a lien on all the real estate of or to
which such person is or becomes possessed or entitled, at or after
the date of such judgment, or, if it was rendered in court, at or
after the commencement of the term at which it was so ren-
dered."

A decree for money, by express enactment, is embraced by the
word "judgment," and consequently the statute, fixing the lien
of a judgment, applies equally to decrees: Code, sec. 3557.

At common law, all judgments were, by legal fiction, it is now
supposed to be entered on the first day of the term of the court
at which they were recovered. This rule has always prevailed in
this state whenever the action, in which the judgment was rendered,
was in such condition that it might have been then tried, or
it had happened to occupy the first place on the docket. As to
the law not regarding fractions of a day, the lien of a judgment
began by relation at the first moment of the first day of the
term: Mutual Assur. Soc. v. Stanard, 4 Munf. 539; Conitt v.
Walker, 2 Leigh, 268; Skipwith v. Cunningham, 8 Leigh, 271;
31 Am. Dec. 642; Horsley v. Garth, 2 Gratt. 474; 44 Am. Dec.
393; Withers v. Carter, 4 Gratt. 407; 50 Am. Dec. 78; Jones v.
Myrick, 8 Gratt. 179; Brockenbrough v. Brockenbrough, 487

Gratt. 580; Yates v. Robertson, 80 Va. 475; Janney v. Stephen, 2 Pat. & H. 11.

It being established by the decisions of this court that under the statute, as well as by the rule of the common law, a judgment or decree recovered or rendered during the term of a court in an action or cause that was ready for trial on the first day of the term, becomes a lien on the real estate of the debtor as of the first day of the term, and that the lien thereof begins with the day itself, the language of the statute furnishes no ground for fixing a different or other time of the day for the commencement of the lien of a judgment or decree confessed or rendered in vacation. It discloses no intention on the part of the legislature to abrogate the principle of unity of the common law, in respect to the day, as a point of time. Its provisions give no warrant for drawing any distinction in this respect between judgments and decrees pronounced in term by the courts, and judgments and decrees confessed or rendered in vacation—certainly none to the prejudice of the latter. The one class becomes a lien from “the commencement of the term,” the day on which the term began; the other, from “the date of the judgment,” the day on which it was confessed or rendered. In respect to the time of the day when the lien of each begins, there is no distinction. Both begin with the first moment of the day on which the judgment or decree becomes a lien. There is no substantial ground for the claim that the lien of a decree rendered in vacation should begin at a fractional part of the day. It is a sound policy that rejects fractions of the day in fixing the lien of judgments and decrees. It gives to the public a plain and simple rule for their guidance, diminishes the opportunity for fraud, removes ground for controversy, and tends to prevent litigation.

Wherever the legislature has seen fit to depart from the common-law principle of the unity of the day, its purpose to do so has been plainly declared. It has seen proper to ⁴⁵⁸ create a priority between executions, where two or more come to the hands of the officer on the same day; and to this end it requires him to indorse on each execution not only the year, month, and day he receives the same, but also the time of day: Code, secs. 3589, 3590. It has also prescribed that a deed of trust or mortgage shall be void as to subsequent purchasers for valuable consideration and without notice, and creditors, except from the time that it is duly admitted to record; and that where two or more deeds of trust or mortgages embracing the same property are admitted to record on the same day, that which was first admitted to rec-

ord shall have priority: Code, secs. 2465, 2469. Other instances from the code will readily suggest themselves. But the statute law of the state contains no similar provision in regard to the lien of judgments and decrees. It nowhere prescribes that the clerk shall indorse on the record the time of day when a judgment or decree is confessed, or when a decree made in vacation is returned to his office to be recorded. And there being no statute requiring it to be done, such indorsement would be without force or effect. The law does not sanction what it does not enjoin.

The decree in favor of the appellant against Noah Hockman was made by the judge in vacation on November 9, 1892; was returned by the judge on that day to the clerk's office to be recorded, and was entered on the lien docket on November 18, 1892. The deed from Hockman to L. C. Hansbrough, trustee, to secure creditors, bears date on November 8, 1892, but was not admitted to record until the next day at 8:30 A. M. It went to record on the same day that the decree was made and returned to the clerk's office. The deed, by the express terms of the statute (section 2465 of the code), took effect as against the appellant only from the time it was admitted to record, at 8:30 A. M. on November 9, 1892, while, under the statute and the established rule of law, notwithstanding ⁴⁵⁹ the indorsement of the clerk that it was filed on November 9, 1892, at 12 M., the decree became a lien on the real estate of the defendant at the first moment of that day. It, therefore, has priority over the deed of trust.

This being our conclusion, it becomes unnecessary to consider the question of the validity of the deed of trust which was assailed in the bill on the ground that it was fraudulent.

The circuit court having held that the deed of trust took precedence over the decree, and was a valid conveyance, its decree, for the reasons herein stated, must be reversed.

JUDGMENTS—WHEN DEEMED TO HAVE BEEN ENTERED. The lien of a judgment relates to the first day of the term at which it was rendered, if it might have been rendered at that date, and takes precedence over other judgments which could not have been rendered until after such day, irrespective of the dates on which such judgments were in fact entered: *First Nat. Bank v. Huntington etc. Co.*, 41 W. Va. 530; 56 Am. St. Rep. 878, and note. See, contra, *Pope v. Brandon*, 2 Stew. 401; 20 Am. Dec. 49.

JUDGMENTS—PRIORITY BETWEEN, AND OTHER LIENS OR ENCUMBRANCES.—The lien of a judgment upon lands relates to the first day of the term at which it was rendered, and overreaches intermediate deeds of trust or other encumbrances: *Skipwith v. Cunningham*, 8 Leigh. 271; 31 Am. Dec. 642. The lien of a judgment, in the absence of proof of the actual time of entry, begins

with the day of entry, and antedates an assignment by the judgment debtor for the benefit of creditors, executed and delivered the same day at an hour proved: Boyer's Estate, 51 Pa. St. 432; 91 Am. Dec. 29, and note. Between the liens of judgments entered at different hours of the same day there is no priority: Metzler v. Kilgore, 3 Pennr. & W. 245; 23 Am. Dec. 76. See, also, Cook v. Dillon, 9 Iowa, 407; 74 Am. Dec. 354, and note. Contra, Biggam v. Merritt, Walk. 30; 12 Am. Dec. 577, and note.

FACKLER v. BERRY.

[93 VIRGINIA, 565.]

DEED FOR AN EXPRESSED PURPOSE, WHEN VESTS THE FEE.—A conveyance by a husband to a trustee for the benefit of the grantor's wife, which declares that the property is conveyed as the absolute property of the wife, "that she may have a permanent home for her life, and his children by her a pittance after her death," vests her with the fee, and does not create any remainder in favor of their children. These words indicate the motive of the grantor in making the deed, but do not limit its effect.

Elder & Elder, for the appellant.

J. J. L. & R. Bumgardner, for the appellees.

565 KEITH, P. Ann Eliza Berry and others filed their bill in the circuit court of Augusta county, alleging that they are the children of Michael and Elizabeth Fackler, deceased; that on October 5, 1852, Michael Fackler conveyed a tract of land in the county of Augusta, containing nineteen acres, "to John B. Watts, trustee, to hold as the absolute property of his wife, Elizabeth Fackler, by whom he derived the premises, that she may have a permanent home for her life, and his children by her a pittance after her death." Elizabeth Fackler, on the 31st of July, 1888, conveyed this tract of land to her son, F. P. Fackler, in fee simple, upon the consideration set out in the deed. The bill alleges that, under the deed from Michael Fackler to John B. Watts, trustee, Elizabeth Fackler took only a life estate, with remainder to the children of herself and Michael Fackler, and that therefore the deed from Elizabeth Fackler to F. P. Fackler conveyed to him no greater interest than Elizabeth Fackler herself possessed, and that at her death the property vested in the children of Michael and Elizabeth Fackler, and is subject to be partitioned among them.

The bill prays that F. P. Fackler, and such others of the children of Michael and Elizabeth Fackler as had not been named plaintiffs to the bill, be made parties defendants thereto, naming them; that the deed from Elizabeth Fackler to F. P. Fackler, in so

far as it purports to convey anything more than the life estate of Elizabeth Fackler, may be declared null and void; that the property may be partitioned among those interested; and, if found to be incapable of partition in kind, that it be sold for the purpose of partition, and the proceeds of sale divided among those entitled.

F. P. Fackler answered the bill, and the cause came on to be heard before the circuit court which decreed that the deed from Elizabeth Fackler to F. P. Fackler should be declared ⁵⁶⁷ null and void, and "of no effect so far as the same is in conflict with the rights of the children and grandchild of Elizabeth Fackler," and, it being conceded that the land was not susceptible of partition, commissioners were appointed to sell it. From this decree F. P. Fackler applied to one of the judges of this court for an appeal and supersedeas, which were awarded.

The only point necessary to be decided, though others were discussed at the bar, is what estate vested in Elizabeth Fackler by the deed from Michael Fackler to John B. Watts, trustee, in her benefit.

We must, of course, give effect to the intention of the grantor, which is to be ascertained from the language used, giving to the words the meaning commonly attributed to them. The grant is to the trustee, his heirs and assigns, to hold as the absolute property of Elizabeth Fackler. Language more expressive, apt, and suitable to the conveyance of a fee simple could not have been used. "Absolute" is defined to be unrestricted, unlimited, complete. It is as though the grantor had said, I give to my wife the unlimited, the unrestricted, the complete estate in the property hereby conveyed. Had the deed stopped here we cannot suppose that any question would have been raised as to the interest vested in Mrs. Fackler; but it is contended that the residue of the clause, in which the grantor declares that he conveyed it as the absolute property of his wife, Elizabeth Fackler, "by whom he derived the premises, that she may have a permanent home for life and his children by her a pittance after her death," is a defectual to reduce the estate in fee simple, which would otherwise have passed to a life estate in Elizabeth Fackler, and to create remainder in his children by her after her death.

Where an estate has been clearly vested by one portion of an instrument, it can only be divested by language equally ⁵⁶⁸ free from doubt: See opinion of Buchanan, J., in *Gaskins v. Hunter* 92 Va. 528, and authorities cited.

It is far from being clear that the language adverted to

signed by Michael Fackler to reduce the estate given his wife in a fee simple to a life interest. The most that can be said of the language relied upon to vest an interest in their children under the deed from Michael Fackler to Elizabeth, his wife, is that it indicates the motive which induced the execution of that instrument. He gives to his wife the absolute property that "she may have a permanent home for life, and his children by her assistance after her death." The word "that," in the sense here used, is equivalent to "in order that," "to the end that," and was never designed to vest any interest or estate in his children by her.

There is a class of cases beginning with *Wallace v. Dold*, 3 Leigh, 258, and running down to *Mosby v. Paul*, 88 Va. 533, in all of which the language used is far more apt and proper to create an interest in the children than that upon which we are commenting, but in each of those cases it was held that the mother took a fee simple, to the exclusion of any interest whatever in the children, who were named merely as indicating the motive or consideration for the gift.

We are of opinion that the circuit court erred in decreeing that the children of Michael and Elizabeth Fackler had any interest under the deed of October 5, 1852, and in directing a sale of the property for partition among them. The decree must, therefore, be reversed, and this court will enter such decree as the circuit court of Augusta county should have rendered.

DEEDS—CONSTRUCTION OF—WHAT ESTATE PASSES.— Every deed or contract is supposed to express the intention of the parties executing it, and, when its object or purpose is called in question in a court of justice, the first inquiry is, What is the intention of the parties as expressed in the instrument? And it is the duty of the court to so construe it as to carry out the intent of the parties making it, if no legal obstacle lies in the way: *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404. But the intent must be properly expressed, and, if he has failed to use the proper words, no expression of intent, no amount of recital showing the intention will supply the omission: *Adams v. Ross*, 80 N. J. L. 505; 82 Am. Dec. 237, and note. As to the words necessary to the creation of a fee simple estate, see *Gould v. Lamb*, 11 Met. 84; 45 Am. Dec. 187, and note; *Melick v. Pidock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901, and note.

far as it purports to convey anything more than the life estate of Elizabeth Fackler, may be declared null and void; that the property may be partitioned among those interested; and, if found to be incapable of partition in kind, that it be sold for the purpose of partition, and the proceeds of sale divided among those entitled.

F. P. Fackler answered the bill, and the cause came on to be heard before the circuit court which decreed that the deed from Elizabeth Fackler to F. P. Fackler should be declared ⁵⁶⁷ null and void, and "of no effect so far as the same is in conflict with the rights of the children and grandchild of Elizabeth Fackler," and, it being conceded that the land was not susceptible of partition, commissioners were appointed to sell it. From this decree F. P. Fackler applied to one of the judges of this court for an appeal and supersedeas, which were awarded.

The only point necessary to be decided, though others were discussed at the bar, is what estate vested in Elizabeth Fackler by the deed from Michael Fackler to John B. Watts, trustee, for her benefit.

We must, of course, give effect to the intention of the grantor, which is to be ascertained from the language used, giving to the words the meaning commonly attributed to them. The grant is to the trustee, his heirs and assigns, to hold as the absolute property of Elizabeth Fackler. Language more expressive, apt, and suitable to the conveyance of a fee simple could not have been used. "Absolute" is defined to be unrestricted, unlimited, complete. It is as though the grantor had said, I give to my wife the unlimited, the unrestricted, the complete estate in the property hereby conveyed. Had the deed stopped here we cannot suppose that any question would have been raised as to the interest vested in Mrs. Fackler; but it is contended that the residue of the clause, in which the grantor declares that he conveyed it as the absolute property of his wife, Elizabeth Fackler, "by whom he derived the premises, that she may have a permanent home for life and his children by her a pittance after her death," is effectual to reduce the estate in fee simple, which would otherwise have passed to a life estate in Elizabeth Fackler, and to create a remainder in his children by her after her death.

Where an estate has been clearly vested by one portion of an instrument, it can only be divested by language equally ⁵⁶⁸ free from doubt: See opinion of Buchanan, J., in *Gaskins v. Hunton*, 92 Va. 528, and authorities cited.

It is far from being clear that the language adverted to was

designed by Michael Fackler to reduce the estate given his wife from a fee simple to a life interest. The most that can be said of the language relied upon to vest an interest in their children under the deed from Michael Fackler to Elizabeth, his wife, is that it indicates the motive which induced the execution of that instrument. He gives to his wife the absolute property that "she may have a permanent home for life, and his children by her a pittance after her death." The word "that," in the sense here used, is equivalent to "in order that," "to the end that," and was never designed to vest any interest or estate in his children by her.

There is a class of cases beginning with *Wallace v. Dold*, 3 Leigh, 258, and running down to *Mosby v. Paul*, 88 Va. 533, in all of which the language used is far more apt and proper to create an interest in the children than that upon which we are commenting, but in each of those cases it was held that the mother took a fee simple, to the exclusion of any interest whatever in the children, who were named merely as indicating the motive or consideration for the gift.

We are of opinion that the circuit court erred in decreeing that the children of Michael and Elizabeth Fackler had any interest under the deed of October 5, 1852, and in directing a sale of the property for partition among them. The decree must, therefore, be reversed, and this court will enter such decree as the circuit court of Augusta county should have rendered.

DEEDS — CONSTRUCTION OF—WHAT ESTATE PASSES.— Every deed or contract is supposed to express the intention of the parties executing it, and, when its object or purpose is called in question in a court of justice, the first inquiry is, What is the intention of the parties as expressed in the instrument? And it is the duty of the court to so construe it as to carry out the intent of the parties making it, if no legal obstacle lies in the way: *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404. But the intent must be properly expressed, and, if he has failed to use the proper words, no expression of intent, no amount of recital showing the intention will supply the omission: *Adams v. Ross*, 80 N. J. L. 505; 82 Am. Dec. 237, and note. As to the words necessary to the creation of a fee simple estate, see *Gould v. Lamb*, 11 Met. 84; 45 Am. Dec. 187, and note; *Melick v. Pidock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901, and note.

WINCHESTER v. REDMOND.

[98 VIRGINIA, 711.]

A MUNICIPAL CORPORATION POSSESSES NO POWERS EXCEPT THOSE CONFERRED UPON IT EXPRESSLY OR BY FAIR IMPLICATION by the law creating it, or statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It cannot do any act, nor make any contract, nor incur any liability, not thus authorized.

MUNICIPAL CORPORATIONS HAVE NO POWER TO OFFER REWARDS FOR THE APPREHENSION OF PERSONS guilty of incendiarism or other crimes, unless such power is specially conferred by statute. It is not given by a provision in the municipal charter or general law authorizing the municipality to do all such things as it may deem proper for the prosperity, quiet, and good order of the city.

MUNICIPAL CORPORATIONS—UNAUTHORIZED CONTRACTS OF.—The agents and officers of a municipal corporation cannot bind it by any contract which is beyond its powers, and all persons dealing with it or them must, at their peril, ascertain the extent of its powers.

Robert M. Ward, for the plaintiff in error.

Barton & Boyd and William R. Alexander, for the defendants in error.

713 RIELY, J. This case is before us upon a writ of error to a judgment of the circuit court of Frederick county rendered against the city of Winchester, for the amount of a reward offered by its common council for the apprehension and conviction of incendiaries.

The main and important question for our determination is, Did the council have the power under the law to offer the reward, and bind the city for its payment?

A municipal corporation, as well as other corporations, is, in this country at least, the creature of the legislative power of the state, and its charter is its constitution and fundamental law. Upon the provisions of its charter and **714** such other statutes of the state as are applicable to cities and towns depends the powers that are conferred upon the corporation, and that may be exercised by its council, which is its legislative body.

It possesses no powers except those conferred upon it, expressly or by fair implication, by the law which created it and other statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It can do no act, nor make any contract, nor incur any liability, that is not thus authorized. These principles lie at the founda-

tion of the law of municipal corporations, and are the guides in the construction and adjudication of their powers.

"It is a general and undisputed proposition of law," says a distinguished jurist and eminent commentator in his excellent treatise on this subject, "that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied": 1 Dillon on Municipal Corporations, 3d ed., sec. 89.

The city of Winchester is a municipal corporation, chartered by the legislature of the state. An inspection of its charter discloses that no express power was given to the corporation to offer a reward for the detection, apprehension, or conviction of offenders against the criminal laws of the state. Nor does any statute of the state confer upon municipal corporations such authority.

But it is claimed that the exercise of such power is authorized by section 9 of the charter of the city, which, after conferring upon the council a number of particular powers, authorizes ⁷¹⁵ it "to do all such things as it may deem proper for the prosperity, quiet, and good order of the city." This language, though very broad, is yet not without its proper limitation. It is to be construed with reference to the object contemplated by the state in the grant of the charter, and the extent of the power it confers is to be measured and limited by the purposes for which the corporation was created.

A municipal corporation is a local and subordinate government, created by the sovereign authority of the state, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the state. And it is only in regard to the local and internal affairs of the city or town that its council, unless expressly authorized, has the right to legislate. To this end, specific powers are usually given in express words, and when a general and indefinite power, as the one under consideration, is superadded, it is to be confined in its exercise to the ordinary objects and purposes of municipal corporations, and not to be construed to comprehend a matter which is common to the state and affects its people at large. The line of distinction may not always be perfectly clear. Cases doubtless

do sometimes arise when it is not readily perceived whether the power exercised by the council of a city or town is implied in the powers expressly given or is necessary to the accomplishment of the objects and purposes of the corporation, or whether it is wholly a state power, and only to be exercised by its legislature; but, as respects the particular case before us, there is no such difficulty. Here, the line of distinction is clearly and broadly marked.

Crime is an offense against the state, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the state. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the state are concerned ⁷¹⁶ in the punishment and suppression of crime. And the state, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws.

The state constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform, within the corporate limits, duties not strictly or properly local or municipal in their nature. In the performance of such duties, they exercise state powers, and are in that respect state officers. As was said by Judge Staples, in *Burch v. Hardwicke*, 30 Gratt. 24, 34, 32 Am. Rep. 640: "When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city, but against the state. When they are detected and arrested it is by the chief of police and his subordinates, under the authority of the state laws, and as an officer of the state; and when they are tried and convicted, it is by officers representing the state and her sovereign power."

Municipal corporations are chartered, as we have seen, to regulate and administer the local and internal concerns of the people of the particular locality which is incorporated. They are not created to execute the criminal laws of the state. That is a matter for which the state has made ample provision by general statutes, and with which the corporation as such has nothing to do, unless expressly authorized by its charter or by statute.

Hence, the offer of a reward for the apprehension and conviction of an offender against the criminal law of the state is the ex-

ercise of a state power, and is foreign to the objects and purposes of a municipal corporation. It is not an ordinary ⁷¹⁷ corporate power, nor incident to it. Such power was not expressly conferred upon the common council of the city of Winchester; nor is it comprehended by the "general welfare" clause of its charter, heretofore quoted.

When a crime has been committed, and there is reason to fear that the person charged therewith cannot be arrested in the common course of proceeding, or when an offense has been committed, but the person guilty thereof is unknown, the legislature has conferred upon the executive of the state the authority to offer a reward for apprehending and securing, or for the detection and conviction of, such person, as the case may be: Virginia Code, sec. 4197. This is as far as the legislature has deemed it wise or expedient to confer such authority. It might sometimes be convenient and expedient for municipalities and the authorities of a county to possess such power, but it is a power that would be liable to great abuse. However, with its convenience or expediency we have nothing to do. That is a matter solely for the consideration of the legislature. Our duty is confined to the interpretation of the charter of the city and the statutes which confer any powers upon it, and their adjudication. If the power has not been expressly granted, or is not necessarily implied, it does not exist. If it be even doubtful, the doubt must be resolved against the existence of the power.

The legislature has not expressly given such authority to the city of Winchester. It is not necessarily or fairly implied in any express power granted to it. And its possession is not indispensable to the performance of its corporate duties, or the accomplishment of the purposes of its incorporation. Consequently, the offer of the reward by its common council for the apprehension and conviction of incendiaries was beyond its power. It was an act *ultra vires*, and void.

The decisions upon this question have not been uniform. It has been held by some courts (*Crawshaw v. Roxbury*, 7 Gray, 374, and *York v. Forscht*, 23 Pa. St. 391) that municipal ⁷¹⁸ corporations possess the authority to offer rewards for the apprehension and conviction of offenders against the criminal law, but the existence of the power has been oftener, and we think correctly, denied by courts of equal dignity and respectability: *Crofut v. Danbury*, 65 Conn. 294; *Hanger v. Des Moines*, 52 Iowa, 193; 35 Am. Rep. 266; *Abel v. Pembroke*, 61 N. H. 359; *Gale v. South Berwick*, 51 Me. 174; *Butler v. Milwaukee*, 15 Wis. 493; *Patton*

v. Stephens, 14 Bush, 324; Murphy v. Jacksonville, 18 Fla. 318; 43 Am. Rep. 323; and Baker v. Washington, 7 D. C. 134.

The reward claimed by the defendant in error, being a contract in excess of the powers of the counsel of the city of Winchester, constituted no ground of action against the city, and it was not liable for its payment. "The general principle of law is settled beyond controversy," says Judge Dillon, "that the agents, officers, or even city council of a municipal corporation, cannot bind the corporation by any contract which is beyond the scope of its powers." And, again: "It is a general and fundamental principle of law that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation": 1 Dillon on Municipal Corporations, 3d ed., secs. 447, 457. See, also, Bunch v. Fluvanna Co., 86 Va. 457.

The demurrer to the declaration should have been sustained, and the suit dismissed.

This being our conclusion, any consideration of the other interesting questions raised and discussed by counsel is rendered unnecessary.

For the reasons given in this opinion, the judgment of the circuit court must be reversed.

MUNICIPAL CORPORATIONS—WHAT POWERS THEY MAY EXERCISE.—Municipal corporations can exercise only such powers as are expressly granted, and those necessarily or fairly implied in or incident thereto, and those essential and indispensable to the declared objects of the corporation, and they or their officers cannot do any act, make any contract, or incur any liability not authorized by their charter, or by some legislative act applicable thereto: Jacksonville etc. Co. v. Jacksonville, 36 Fla. 229; 51 Am. St. Rep. 24, and note. Municipal corporations have such powers only as are conferred by the statute creating them, and such incidental powers as are implied by, and essential to the accomplishment of, the purposes of their creation, and for their continued existence: Champer v. Greencastle, 138 Ind. 339; 46 Am. St. Rep. 390, and note; Mauldin v. City Council, 42 S. C. 293; 46 Am. St. Rep. 723, and note.

MUNICIPAL CORPORATIONS—DUTY OF PERSONS CONTRACTING WITH TO TAKE NOTICE OF POWERS.—One who contracts with a municipal corporation must at his peril take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby: Gutta Percha etc. Mfg. Co. v. Ogalala, 40 Neb. 775; 42 Am. St. Rep. 696, and note; Smith v. Broderick, 107 Cal. 644; 48 Am. St. Rep. 167, and note.

MUNICIPAL CORPORATIONS.—AS TO GENERAL LIMITATIONS UPON POWER TO PASS ORDINANCES, see extended note to Robinson v. Mayor, 34 Am. Dec. 627-643.

NORFOLK & WESTERN RAILWAY COMPANY v. COMMONWEALTH.

[98 VIRGINIA, 749.]

INTERSTATE COMMERCE—CARS, WHEN DEEMED TO BE EMPLOYED IN.—A train of empty cars, which had been used in the past, and was intended to be used in the future, exclusively in carrying articles of interstate commerce, is nevertheless not to be considered as engaged in interstate commerce until loaded with articles committed to the carrier to be transported to another state.

INTERSTATE COMMERCE AND THE POLICE POWERS OF THE STATES.—A state may, in order to protect the lives and health of its citizens or to preserve good order and the public morals, legislate for such purposes in good faith and without discrimination against interstate or foreign commerce, although such legislation may touch in its exercise the lines separating the respective domains of the national and the state authority, and, to some extent, affect foreign or interstate commerce.

INTERSTATE COMMERCE AND THE SUNDAY LAWS.—A statute prohibiting the running, loading, or unloading, on Sunday, of any trains, cars, or locomotives not used for the transportation of passengers, livestock, the United States mails, or articles of a perishable nature, or for the relief of wrecked or disabled trains, is constitutional, and may be applied as against trains engaged in interstate commerce.

T. J. & F. S. Kirkpatrick and William H. Mann, for the plaintiff in error.

Attorney General R. Taylor Scott, for the commonwealth.

⁷⁵⁰ **BUCHANAN, J.** The plaintiff in error was indicted in the county court of Appomattox county for violating section 3801 of the code, which is as follows:

“Sec. 3801. No railroad company, receiver, or trustee controlling or operating a railroad, shall, by any agent or employé, load, unload, run, or transport upon such road on a Sunday, any car, train of cars, or locomotive, nor permit the same to be done by any such agent or employé, except where such cars, trains, or locomotives are used exclusively for the relief of wrecked trains, or trains so disabled as to obstruct the main track of the railroad; or for the transportation of United States mail; or for the transportation of passengers and their baggage; or for the transportation of livestock; or, for the transportation of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage; provided, however, that if it should be necessary to transport livestock or perishable articles on a Sunday to an extent not sufficient to make a whole trainload, such trainload may be made up with cars loaded with ordinary freight.

"Sec. 3802. 'The word 'Sunday' in the preceding section shall be construed to embrace only that portion of the day between sunrise and sunset; and trains in transitu, having started prior to 12 o'clock on Saturday night, may, in order to reach the terminus or shops of the railroad, run until 9 o'clock the following Sunday morning, but not later.'"

The case was tried upon the following agreed state of facts:
751 "That the train, composed of empty coal-cars, which are used exclusively in the coal business, as described below, passed through Appomattox county and by Appomattox station between 9 o'clock A. M. and 3 o'clock P. M. of Sunday, April 2, 1893, going from Crewe to Roanoke, said points being divisional terminal points on the Norfolk & Western Railway. That when the train arrived at Roanoke it would be broken up in the company's yard, and as soon as practicable would be put into another train, with another engine and crew, and sent by way of Bluefield, in West Virginia, to the coal mines at Pocahontas, in Virginia, and to others in West Virginia. At these mines the cars would be loaded and sent by way of Bluefield, in West Virginia, to Lambert's Point, in Virginia. The coal so shipped would be coal sold to parties out of the state of Virginia before it leaves Bluefield and to be conveyed to the purchasers outside of Virginia by way of Bluefield, West Virginia, and Lambert's Point, Virginia. That said train was not one of those included in the exceptions in section 3801 of the code of Virginia of 1887."

The plaintiff company was found guilty and fined, and the judgment of the county court was affirmed by the circuit court. The action of the circuit court in affirming the judgment is complained of, and is before us for review in this case.

In the case of Norfolk etc. R. R. Co. v. Commonwealth, 88 Va. 95, 29 Am. St. Rep. 705, this court held that the statute under which the indictment in this case was made was inconsistent with the commerce clause of the constitution of the United States in so far as it applied to trains running between different states, or engaged in transporting interstate commerce, and therefore void.

The counsel for the plaintiff company insists that the principle decided in that case is the same that is involved in this case, and conclusive of it. On the other hand, the attorney general, for the commonwealth, contends that the questions 752 involved in the two cases are different, and, if they were the same, that the decision relied on as controlling this is erroneous, and ought not to be followed.

The train which the plaintiff company was indicted for running in violation of section 3801 of the code was made up entirely of empty cars, which it was agreed were used exclusively in carrying articles of interstate commerce.

The fact that they had been so used in the past, and were intended to be so used in the future, does not show that they were, at the time when the act was done for which the plaintiff company was indicted, engaged in interstate commerce.

The supreme court of the United States, in *Coe v. Erroll*, 116 U. S. 517, 525, held: "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only in the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without discrimination, in the usual way and manner in which such property is taxed in the state."

If this be the true rule by which to determine when the products of the mine become articles of interstate commerce, and cease to be controlled entirely by the laws of the state, why is it not the correct rule to determine when the carrier of such products becomes engaged in transporting interstate commerce, and is protected and governed by the laws of the United States? In the one case, the miner may intend to ⁷⁵³ ship a particular product to another state, and may be preparing the article for shipment, yet it is not an article of interstate commerce until it starts upon its final destination to that state, and until that time is subject to the laws of the state alone, and has none of the rights of an article of interstate commerce. In the other case, the carrier may be preparing certain cars upon which to transport the products of the miner to the foreign state, and they may be on their journey to the place from which they are to be shipped, yet why should those cars be considered as engaged in interstate commerce until they are loaded with articles committed to the carrier to be transported to another state?

The reason given for the rule that goods do not become an article of interstate commerce until actually put in motion for

some place out of the state, or committed to the carrier for such transportation, is that until that time the article, though intended for exportation, may never be exported, as the owner has the perfect right to change his mind at any time. The common carrier has the same right to change his mind, and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used.

The rule fixed by the supreme court in the one case seems equally applicable to the other. Applying that rule to the facts of this case, it would seem that the train for which the plaintiff company was indicted for running was not when so running engaged in transporting articles of interstate commerce, and was, therefore, controlled exclusively by the laws of the state. Even if this be not the correct view, and if it be held that the plaintiff, in running the train, was engaged in the business of interstate commerce, was the legislation in question within the powers reserved to the state, and not in conflict with the constitution of the United States?

The right of the state to enact laws to protect the lives, health, and property of its citizens, and to preserve good ⁷⁵⁴ order and the public morals is a matter of so much consequence, and so far-reaching in its effects, that its courts ought not to hold that the statutes made for that purpose are inconsistent with the constitution of the United States unless they are plainly so.

"Questions of this nature," as was said by Mr. Justice Story, in *Houston v. Moore*, 5 Wheat. 1, at an early day in our judicial history, "are always of great importance and delicacy. They involve interests of so much magnitude and of such deep and permanent public concern that they cannot be approached without anxiety. The sovereignty of a state, in the exercise of its legislation, is not to be impaired unless it be clear that it has transcended its legitimate authority, nor ought any power to be sought, much less to be adjudicated, in favor of the United States, unless it be clearly within the reach of its constitutional charter."

And in the very recent case of *Plumley v. Massachusetts*, 155 U. S. 461, the court, speaking through Mr. Justice Harlan (at pages 479, 480), said: "We are not unmindful of the fact, indeed this court has often had occasion to observe, that the acknowledged powers of the states to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains

of national and state authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers, and of enumerated state governments, which retain and exercise all powers not delegated to the Union, the judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social ⁷⁵⁵ order, the health, and morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.'

As the supreme court of the United States is the final arbiter of questions of this nature, we must look to its decisions for guidance in determining the question. Neither the counsel nor the court have been able to find any decision of that court upon the particular question involved in this case. In fact, counsel admit that there is no such decision.

Numerous decisions have been made by that court, however, in which the powers delegated to the United States by the commerce clause of the constitution, and the police powers reserved by the states, have been considered, and whilst these decisions are not altogether consistent and harmonious, yet from them are to be gathered the principles which must govern us in the decision of this case.

Chief Justice Marshall, in the leading case of Gibbons v. Ogden, 9 Wheat. 203, which involved the inspection laws of one of the states, said: "They form a portion of that immense mass of legislation which controls everything within the territory of a state not surrendered to the general government, all of which can be most advantageously administered by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power of these objects is granted to Congress, and consequently they remain subject to state legislation."

Mr. Justice Grier, in the Passenger Cases, 7 How. 457, in discussing the police powers of the state of Massachusetts, said: "This right of the states has its foundation in the sacred ⁷⁵⁶ law of self-defense, which no power granted to Congress can re-

strain or annul. It is admitted by all that those powers which relate to merely municipal legislation, or what may be more properly called internal police, are not surrendered or restrained; and that it is as competent and necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and convicts as it is to guard against physical pestilence which may arise from unsound and infectious articles imported."

In the Slaughter-house Cases, 16 Wall. 62, Mr. Justice Miller, speaking for the court, said: "The power [police] here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the state, however it may now be questioned in some of its details."

Again he says: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

He then quotes with approval the language of Chief Justice Redfield in the case of Thorpe v. Rutland etc. R. R. Co., 27 Vt. 140, 62 Am. Dec. 625, as follows: "It extends," says an eminent judge, "to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state, . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. Of the perfect right of the legislature to do this, no question was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned."

⁷⁵⁷ It was said by Mr. Justice Davis, in Peete v. Morgan, 19 Wall. 581, 582: "That the power to establish quarantine laws rests with the states, and has not been surrendered to the general government, is settled in Gibbons v. Ogden, 9 Wheat. 203. The source of this power is the acknowledged right of a state to provide for the health of its people, and, although this power, when set in motion, may in a greater or less degree affect commerce, yet the laws passed in the exercise of the power are not enacted for such an object. They are enacted for the sole purpose of preserving the public health, and if they injuriously affect commerce, Congress, under its power to regulate it, may control them. Of necessity, they operate on vessels engaged in commerce, and

may produce delay or inconvenience, but they are still lawful when not opposed to any constitutional provision, or any act of Congress on the subject."

In *Sherlock v. Alling*, 93 U. S. 99, 103, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution." Approved in *Kidd v. Peerson*, 128 U. S. 23, and *Nashville etc. Ry. Co. v. Alabama*, 128 U. S. 101.

It was said in *Hall v. De Cuir*, 95 U. S. 488, as quoted with approval by that court in 128 U. S. 23: "As has been often said, 'legislation [by a state] may, in a great variety of ways, affect commerce and persons engaged in it, without constituting a regulation of it within the ⁷⁵⁸ meaning of the constitution,' unless under the guise of police regulations it imposes a direct burden upon interstate commerce, or interferes directly with its function."

In *Railroad Co. v. Heusen*, 95 U. S. 465, 470, 471, it was said by Mr. Justice Strong: "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."

In the same case, page 472, it is said: "While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; whilst it may prevent persons and animals suffering under contagious or infectious disorders, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with the transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

In the case of *Nashville etc. Ry. Co. v. Alabama*, 128 U. S. 96, it was held that a state statute which requires locomotive en-

gineers and other persons employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined in this respect from time to time by a tribunal established for that purpose, and which exacts a fee from the company for the source of examination, does not deprive the company of its property without due process of law; and, so far as it affects interstate commerce, is within the competency of the state to enact, until Congress legislates on the subject.

⁷⁵⁰ And in that case the court cites (page 101), with approval, *Sherlock v. Alling*, 93 U. S. 99, 104, in which it was held that state legislation of that character "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, whether engaged in commerce, foreign or interstate, or in any other pursuit."

In *Kimmish v. Ball*, 129 U. S. 217, the court held that a statute of the state of Iowa which provided that any person having in his possession "Texas cattle," under certain circumstances, should be liable for damages which might accrue from allowing them to run at large and thereby spread the disease known as "Texas fever," was not in conflict with the commerce clause of the constitution of the United States, although the necessary effect would be to interfere with the introduction into that state of the class of cattle to which the statute applied.

And the court, in referring to the case of *Railroad Co. v. Hensen*, 95 U. S. 465, in which the statute of Missouri, in a somewhat similar, though a much broader, statute, was held to be in violation of the interstate commerce clause of the constitution, said that whilst that was true yet that the court in that case said: "At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it."

In *In re Rahrer*, 140 U. S. 545, 554, Chief Justice Fuller, in delivering the opinion of the court, said: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive." ⁷⁶⁰ And this court has uniformly recognized state legislation legitimately for police purposes as not in

sense of the constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government."

In *Plumley v. Massachusetts*, 155 U. S. 461, 471, after discussing former decisions of the court, Mr. Justice Harlan speaking for the court said: "While in each of those cases it was held the reserved police powers of the states could not control the prohibitions of the federal constitution, nor the powers of the government (*New Orleans Gas Light Co. v. Louisiana etc. Co.*, 115 U. S. 50), it was distinctly stated that the grant to Congress of authority to regulate foreign and interstate commerce did not involve surrender by the states of their police powers. . . . In none of the above cases is there to be found a suggestion or intimation that the constitution of the United States took from the states the power of preventing deception or fraud in the sale within their respective limits of articles in whatever state manufactured, or that the instrument secured to any one the privilege of committing a wrong against society."

In *United States v. E. C. Knight Co.*, 156 U. S. 1, 11, Chief Justice Fuller said: "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States and essentially exclusive."

Again, at page 13, in the same opinion, he says: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, ⁷⁶¹ however sometimes perplexing, should always be recognized and observed; for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government."

We think from the decisions of the supreme court of the United States in the cases referred to above and others not cited, this conclusion may be drawn: that the state may, in order to secure and protect the lives or health of its citizens, or to preserve good order and the public morals, legislate for such purposes, in good faith and without discrimination against interstate or foreign commerce, without violating the commerce clause of the constitution of the United States, although such legislation may sometimes touch in its exercise the line separating the respective do-

mains of national and state authority, and to some extent also foreign and interstate commerce.

Was the statute which we are considering passed in good faith for the purpose of protecting the health, and of preserving the morals of the people of the state?

The experience of mankind has shown the wisdom and necessity of having at stated intervals a day of rest for man and beast from their customary labors. It is necessary both for the physical and moral nature of man. The government of the United States, as well as the government of the states of the Union, recognizes this requirement for rest in man's nature, and provides for it in their respective jurisdictions.

In *Ex parte Newman*, 9 Cal. 519, Judge Field, now of the supreme court of the United States, in his dissenting opinion, which afterward became the law of that state (*Ex parte Andrews*, 18 Cal. 678), discussing the necessity and propriety of such a law with much force and learning, among other things, says: "The legislature, in the enactment of such a statute, has given the sanction of law to a rule of conduct which the entire ⁷⁶² civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion among philosophers, moralists, and statesmen of all nations, as of the necessity of periodical cessations from labor. One day in seven is the rule founded on experience, and sustained by science. There is no nation possessing any degree of civilization where the rule is not observed, either from the sanctions of the law, or sanctions of religion. This fact has not escaped the observation of men of science; and distinguished philosophers have not hesitated to pronounce the rule founded upon the law of our race. . . . Its aim is to prevent the physical and moral debility which springs from uninterrupted labor, and in this respect it is a beneficent and merciful law. It gives one day to the poor and the dependent, from the enjoyment of which no capital or power is permitted to deprive them. It is theirs for repose, for social intercourse, for moral culture, and, if they choose, for divine worship."

Judge Thurman, in *Bloom v. Richards*, 2 Ohio St. 391, says: "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regular recurring intervals, are too obvious to be overlooked."

The supreme court of the United States, in *Soon Hing v. Crowley*, 113 U. S. 703, 710, said: "Laws setting aside Sunday

as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops, and in the heated rooms of our cities; and ⁷⁶³ their validity has been sustained by the highest courts of the states."

"There can no longer be any question," says Mr. Cooley, "if any there ever was, that such [Sunday] laws may be supported as regulations of police": Cooley's Constitutional Limitations, 6th ed., 725, note 3, and cases cited.

It cannot be doubted that such laws are police regulations of the greatest utility for the physical and moral well-being of society. Neither is there any question that the statute under discussion was enacted in good faith for the preservation and protection of the health and morals of the people of this state, and without any discrimination whatever against interstate or foreign commerce, and that its only effect upon such commerce would be to delay it a few hours in its journey from the point of shipment to its destination. The statute provides for the uninterrupted shipment of articles of commerce of such a perishable character that one day's delay in their shipment would impair their value. There is nothing in the character of coal and other articles of commerce which are not injured by short delays, or in fact of any article of commerce, that requires that the laws of the state enacted and necessary for the preservation and promotion of the health and morals of its people should be struck down in order that they may have a more rapid shipment.

We are of opinion that the statute which the plaintiff company was indicted for violating is not in conflict with the commerce clause of the constitution of the United States, that the judgment of the circuit court was right and should be affirmed, and the case between the same parties hereinbefore referred to, and reported in *Norfolk etc. R. R. Co. v. Commonwealth*, 88 Va. 95, 29 Am. St. Rep. 705, in which a different conclusion was reached, was not correctly decided, and should be overruled.

Since this opinion was written the supreme court of the United States has decided that a statute of the state of Georgia, ⁷⁶⁴ similar to the one under consideration, was not in conflict with the commerce clause of the constitution of the United States, but

was a valid exercise of the police power of the state: *Hennington v. State of Georgia*, decided May 18, 1896.

Affirmed.

INTERSTATE COMMERCE—POWER OF STATES—POLICE POWER.—While a state cannot interfere with transportation into or through its territory, beyond what is absolutely necessary for its self-protection, it is authorized, in the exercise of the police power, to provide for maintaining domestic order, and for protecting the health, morals, and security of its people: *State v. Southern Ry. Co.*, 119 N. C. 814; 56 Am. St. Rep. 689, and note; *Lacey v. Palmer*, 83 Va. 159; ante, p. 795, and note.

INTERSTATE COMMERCE—POWERS OF STATES—SUNDAY LAWS—CONSTITUTIONALITY OF.—A state statute making it a misdemeanor to run freight trains on Sunday is not unconstitutional, where it contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any other intent than to prescribe a rule of civil conduct for people within the state, although it may affect interstate commerce to some extent, so far as running freight trains from one state to another is concerned: *State v. Southern Ry. Co.*, 119 N. C. 814; 56 Am. St. Rep. 689, and note collecting the cases and notes on this disputed question. Opposed to the principal case, see *Norfolk etc. R. Co. v. Commonwealth*, 88 Va. 95; 29 Am. St. Rep. 705, with dissenting opinion in accord with the principal case.

INTERSTATE COMMERCE—WHAT MAY BE PROTECTED AS SUBJECTS OF.—The fact that articles, or a class of articles, are proper subjects of interstate commerce, or that they are intended to be employed in such commerce, does not relieve them from the authority of the state to make regulations concerning them: Extended note to *People v. Wemple*, 27 Am. St. Rep. 552. The manufacture of that which may become a subject of commerce and ultimately pass into protected trade is not commerce, nor can manufactories of any sort be instruments of commerce within the meaning of the doctrine of interstate commerce: *Standard etc. Co. v. Attorney General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394. From the moment that an article of commerce commences to move from one state to another, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation, and not to the police power of the state: *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 714.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

MAPLE v. JOHN.

[42 WEST VIRGINIA, 80.]

STATUTORY CAUSE OF ACTION—FORM OF REMEDY.—Where a statute gives a right of action without providing the mode of recovery, an action of debt ordinarily lies, but the form of the action may be adapted to the nature of the case and modeled according to the distinctions of the common law, and may, therefore, if the nature of the wrong or injury so requires, be assumpsit, trespass, or case.

EVIDENCE, DEMURRER TO.—Every plaintiff and defendant has a right to demur to the evidence, and his adversary may be required to join therein, unless the object of the demurrant seems to be nothing but delay. He will be treated fairly, and the court will not draw any unreasonable or far-fetched inferences against him or for his adversary, nor restrict him to necessary inferences in his favor, though if there is a conflict of evidence, the fact must be taken against him unless overthrown by a clear and decided preponderance of evidence.

PENALTY—PERSON INJURED, WHO DEEMED TO BE.—If a statute prohibits any owner of land from excavating within five feet of the boundary of any other owner, and declares that every person violating the statute shall forfeit a sum specified to any person injured thereby who may sue for the same, any person may maintain an action for the penalty by proving that the excavation was made within five feet of his lands, without his consent. He need not establish that the excavation was otherwise injurious to him. The term "injury" as used in the statute indicates that the person whose right has thus been violated is the proper one to sue for the penalty.

CONSTITUTIONAL LAW—POLICE POWER.—A statute prohibiting the mining for coal within five feet of the boundary line of another's land, without his consent, and imposing a penalty for so doing, is a valid exercise of the police power of the state.

CONVEYANCE—CONSTRUCTION OF RESERVATION OF RIGHT TO TAKE COAL.—If, in a conveyance of a tract of land, the grantor reserves the right of coal for his family at the bank then in use, this reservation cannot justify the successor in interest of

such grantor in mining on his land at a point distant from the bank in use when the conveyance was made and so as to approach within five feet of his boundary line, when the statute prohibits such mining without the consent of the adjacent landowner.

Okey Johnson and L. V. Keck, for the plaintiff in error.

George C. Sturgiss and Cox & Baker, for the defendant in error.

³² HOLT, P. This is a writ of error by defendant, John, to a judgment rendered in an action of trespass on the case against him by the circuit court of Monongalia county on the twentieth day of June, 1894, in favor of plaintiff, Mapel, on his demurrer to the evidence for the penalty of five hundred dollars prescribed by the following statute: "No owner or tenant of any land containing coal shall open or sink, or dig, excavate, or work in any coal mine or shaft, on such land, within five feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title, to such adjoining lands in possession, reversion, or remainder, or of the guardians of any such persons as may be infants. If any person shall violate this section, he shall forfeit five hundred dollars to any person injured thereby who may sue for the same": Code 1891, c. 79, sec. 7, p. 668.

The defendant, by counsel, assigns the following errors: "1. The overruling the demurrer to the original and amended declaration; 2. In refusing to require the plaintiff to elect whether he would proceed for common-law or statutory damages; 3. In refusing to set aside the verdict and grant a new trial; 4. In refusing to arrest said judgment because the declaration contained no count under the statute for the forfeiture; 5. In entering a judgment for plaintiff on said demurrer to evidence."

As the declaration demurred to is based upon a statute of great practical interest in this state, therefore it may answer a useful purpose to give the last count in full, which is as follows: "And for that the plaintiff heretofore, to wit, on the first day of January, 1892, at the county aforesaid, was possessed and the owner in fee simple of a certain other tract of land in Cass district, in said county, containing ——— acres, more or less, and under and upon which there was and is a large and valuable vein of bituminous coal; and the said defendant during all the time aforesaid was and still is possessed and the owner in fee simple of a certain tract of land in said county and district, and adjoining the said tract of the said plaintiff, and under and upon which said last-mentioned tract the said vein of coal continues ³³ and thereunder remains along and under the boundary and division

line between the said tracts; and the plaintiff and defendant being so respectively possessed of the said tracts, the said defendant, to wit, on the first day of April, 1892, opened the said vein of coal on his said tract, near to the boundary and division line between the said tracts, and then and there unlawfully, wrongfully, and contrary to the statute in such cases made and provided, did open, dig, excavate, work, and remove the said vein of coal up to the said boundary and division line between said tracts without the consent of the plaintiff in writing or otherwise; by reason of which wrongful and unlawful act of the said defendant the plaintiff was injured and damaged five hundred dollars, and the said defendant thereby became and was and is liable to the plaintiff in the said sum of five hundred dollars, and to the damage of the plaintiff five hundred dollars; and therefore he sues," etc.

The declaration contained three counts. The first one may be said to be a common-law count in trespass on the case for the damages sustained, case being used instead of trespass, as authorized by statute (chapter 103, section 8). The second count is like the third count given above, with the additional averment that the opening was extended across the dividing line. By the statute sued on the penalty of five hundred dollars is given to the party injured. No part of it goes to the state, so that the action would not be in the name of the state: See Code, c. 36. The first act was passed on the third day of March, 1834. The action of debt was prescribed: Acts 1833-34, p. 82. No specific mode of recovery is provided by the statute sued on, and therefore an action of debt lies, being the usual remedy: *West v. Rawson*, 40 W. Va. 480; *Sims v. Alderson*, 8 Leigh, 479; 1 Chitty on Pleading, 16th Am. ed., top p. 125, and cases cited. But in such case, where the statute gives a right of action without prescribing the form, the action is to be adapted to the nature of the case, and modeled according to the distinctions of the common law. It may be an action of debt, assumpsit, trespass, or case, as the particular nature of the wrong or injury may require: *Bullard v. Bell*, 1 Mason, 243, 290 (Fed. Cas., No. 2121); Comyn's Digest; 3 Robinson's Practice, 383.

³⁴ Any person injured by the violation of a statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty of forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of damages: Code, c. 103, sec. 7. This, however, does not of itself give the right of joining a suit for such damages

with a count for the penalty. But in this case the court virtually instructed the jury to disregard the first count, and, judgment being given only for the penalty, the question of the addition of the first or faulty count does not arise: Code, c. 131, sec. 13.

The court did not err in refusing to require plaintiff to elect between the two counts for the reason already given. Such election could not be made, as the court instructed the jury to disregard the first count, and to find conditionally the penalty fixed by the statute. In this case, therefore, there was no occasion for the jury to find any verdict at all. All that was needed was for the evidence on each side to be set forth in the demurrer, as it is required to be certified under section 9 of chapter 131; and the court, in deciding the demurrer, would give judgment for defendant or for plaintiff, and, if for the latter, it would be for the penalty of five hundred dollars fixed by the statute. Generally, where the damages are to be assessed, the jury is not discharged, but find a verdict subject to the decision of the court on the demurrer. Either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be required to join therein, unless the case be plainly against the demurrant, and his object in demurring clearly seems to be nothing else but delay. If the court, in considering the demurrer, is of the opinion that plaintiff has cause of action, but that the damages are excessive, the verdict may be set aside, and a writ of inquiry be awarded; and so in every case, where the court, if it followed the hypothetical verdict, must render what the evidence contained in the demurrer shows to be an unjust judgment, it may set the verdict aside, and call another jury to ascertain the quantum of recovery (see 4 Minor's Institutes, pt. 1, pp. 831, 832, and cases cited); or it may, for good cause, set aside the conditional verdict, and award a new trial. I think the ³⁵ practice with us is to treat the party demurring with common fairness; not to draw any unreasonable or far-fetched inferences against him, or for his adversary, nor to restrict him to what may be called "necessary inferences" in his favor: See *Hansbrough v. Thom*, 3 Leigh, 147. Of course, in a case of conflict, the fact must be taken against him, unless overthrown by a clear and decided preponderance of evidence, but, thus treated, he assumes no risk but what is fair in such a case, and what he ought in reason to anticipate; nor is it more than he assumes on a motion for a new trial. It tends to promote the fair and speedy administration of justice without being subject to the charge of encroaching upon the province of the jury; for it is as old as jury trial itself.

It so happened in this action for the recovery of the one definite penalty prescribed by the statute in the given case that there was no room for the verdict of a jury. Such verdict was wholly useless. But, as they followed the statute, it could do no harm; therefore there was nothing for the court to set aside, and there could be no substantial error to the prejudice of either party in refusing to set it aside; yet the court, on proper showing, might have awarded a trial de novo.

The question whether the plaintiff had sustained any injury in the sense in which the term "injury" is used in the statute could not, in the nature of things, have been submitted to or found by the jury. It was a matter of evidence, with which, in this particular case, they had nothing to do. Moreover, the term "injury," as used in the statute, is used to indicate that the person whose right has thus been violated is the proper one to sue for the penalty; not that the amount of damages is to be ascertained by the jury, for the statute itself fixes the sum forfeited at five hundred dollars, and means in this case the violation of his right by reason of the violation of the statute. But it is argued by defendant's counsel that the act is an infringement of the right of private property, transcending the legislature's constitutional power. If the defendant has the right to use his own land and coal mine for all the purposes to which such property is usually applied when, where, and how he may see ³⁶ fit, without limitation or restriction, his neighbor, the plaintiff, has the equal right in his adjoining tract. Upon each one is therefore imposed the correlative duty of so using his own land as not to injure his neighbor's or be hurtful to the commonwealth (see *Haigh v. Bell*, 41 W. Va. 19); for government is instituted for the common benefit, protection, and security of the people, nation, or community: Const., art. 3, sec. 3. The state claims to reserve the exclusive regulation of its own internal government and police, and such power is properly exercised by the legislature. Is this statute a reasonable exercise of the police power? 1. It is intended to secure private right by enforcing the correlative duty of so using your own land as not to injure that of your neighbor; 2. To preserve dividing lines and underground landmarks, and thus avoid uncertainty and confusion of boundaries in coal lands and the disquieting of titles: See Const., c. 60, on fences, c. 145, sec. 27. 3. It tends to prevent strife and litigation; 4. To provide for the safety of those working in coal mines by sufficient pillars of support. Under this head see the many provisions in the coal mine law: Appendix to Code, 991, et seq. This is no undue assump-

tion of the right to apply the police power to a subject which does not fall within it, for regulations on all these subjects have long been recognized as wholesome and reasonable, and as fit subjects for the exercise of the police power, as tending to preserve the rights of the citizen and to promote the welfare of the commonwealth. The mining of coal is one of the largest industries carried on in the state. In mining, proper support and ventilation are necessary, and an ample supply of fresh air is stringently exacted by our law on the subject: See Coal Mine Law (Code, secs. 9, 11, pp. 994, 995). This is necessary for the health and safety of the miner engaged in a dangerous employment, and for that reason the public welfare requires it; but no proper system of ventilation can be maintained by any mineowner unless the area to be worked by him is isolated or bounded by a zone or rib of coal thick enough to support the roof, and thick enough to prevent the escape of the air, with no passways down through his dividing line ⁸⁷ which may prevent the due circulation of the air, and render due ventilation very difficult. The same may be said of keeping his mine properly drained as required by law, and impervious to water from adjoining mines and lands. The act of 1834 fixed this bounding zone between adjoining landowners at fifty feet, the present act ten feet. Thus we see that this rib of solid coal, not to be mined into by either of the adjoining owners, was to be contributed by each in equal parts, was for the mutual benefit of each, for the protection of the surface, to secure independent systems of ventilation, drainage, and workings, and in aid of an industry so great and widely diffused that the state as a whole is interested therein. Besides, the importance of having these unbroken ribs of support throughout the mining region is being realized as a state affair more and more as the mining of coal goes on. This regulation works no hardship on one for the benefit of the other, but is impartial, just, and reasonable, imposing a common burden for the benefit of all such owners. This regulation, in substance, has been in force for more than sixty years without complaint. This is a high degree of evidence that it is not an unconstitutional exercise of police power to require this natural boundary wall to be preserved intact: See 15 Am. & Eng. Ency. of Law, 593, et seq; Cooley's Constitutional Limitations, 3 ed., top p. 578.

This brings us to the evidence. Joshua M. Ross sold and conveyed to Jesse Everly, by deed dated the 16th of February, 1860, the land now owned by plaintiff, Mapel. In it he makes this reservation: "The said Ross excepts the privilege of coal for his

part of the farm at the bank now in use." What Ross did not then sell, which he calls "his part of the farm," is the land now owned by defendant, John. As to the nature and extent of defendant's right to mine coal on plaintiff's land, it is enough for our present purpose to say that the privilege to mine coal at the bank then in use was an easement annexed to defendant's land, the dominant tenement, to mine coal at that open mine on plaintiff's land the servient tenement, which was only a privilege to take coal at a particular place for a particular purpose; that the dominant tenement does not adjoin the ³⁸ servient tenement where the defendant was driving his new entry, but it was out of other land of defendant, which adjoined the servient tenement at that point. This, in my view, is wholly immaterial. Defendant was warned by plaintiff not to excavate or dig into or through this stone-coal division fence, this underground party wall, created and established by law; but he persisted until he had dug across the dividing line and eighteen inches into the five feet left standing on the other side, requiring, as it appears, an injunction to stop him. If we are not mistaken in some of the leading objects to be accomplished which moved the legislature to enact this statute, then defendant was prohibited from mining coal in and through this neutral zone both by the spirit and the letter of the act: 1. By the letter, for the place where defendant had a right to mine coal was an open mine then in use; and if for any reason he had the right to drive a new entry into the coal, it could only be on the land of plaintiff. He had no right to break through the dividing line, the party wall between his land and the land of plaintiff. Defendant was not the sole owner of the coal on plaintiff's land, was not the owner of, or one having title to, such coal in the sense in which these terms are used in the statute. He was interested in Maple's coal bank to the extent of the privilege already mentioned, which, so far from constituting any consent in writing given by anyone for him to dig through the ten foot dividing fence of coal, negatives any such right by confining his right of entry and mining to plaintiff's side of the dividing line. 2. By the spirit of the act, for they were two separate, distinct tracts containing a vein of the Pittsburgh seam of coal ten feet thick, shown to be quite valuable on plaintiff's land. And defendant shows no pretext or color of right to destroy its integrity as a coal property by digging away the dividing wall, and making it one mining property with his own, so far as drainage, ventilation, propping, ingress, and egress, etc., are concerned, to the very serious damage of plaintiff's land as a distinct coal plant.

Such a seam of coal at such a place may be worth five hundred dollars per acre, and in such a case the penalty fixed by the statute cannot by any means be regarded ^{as} as a harsh one. But with that we have nothing to do, for we find the law thus written.

The judgment for plaintiff on his demurrer to evidence was right, and is affirmed.

ACTIONS—COMMON-LAW REMEDY—WHEN APPLIES.—If a duty is imposed by statute, and no remedy is given for its breach, the remedy is by common-law procedure: *Birmingham etc. R. R. Co. v. Parsons*, 100 Ala. 662; 46 Am. St. Rep. 92. But when a new right or the means of acquiring it are given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy: *Hickman v. Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684, and note. When a statute creates a liability without providing the means for its enforcement, it can be enforced by any court having jurisdiction of the subject matter and of the parties: *North Pacific Lumber Co. v. Lang*, 28 Or. 246; 52 Am. St. Rep. 780.

TRIAL—DEMURRER TO EVIDENCE—EFFECT OF—DUTY OF THE COURT.—A demurrer to evidence is an unusual and antiquated practice, calculated to suppress truth and justice, and is allowed by the court in the exercise of a sound discretion: *State v. Soper*, 16 Me. 293; 33 Am. Dec. 665. Such a demurrer admits all that may reasonably be inferred from the evidence given by the adverse party, and waives all evidence in conflict therewith, or the credibility of which is impeached, and all inferences from the evidence of the party demurring which do not necessarily follow from it: *Williamson v. Newport News etc. Co.*, 34 W. Va. 657; 26 Am. St. Rep. 927; *Richmond Ry. etc. Co. v. Garthright*, 92 Va. 627; 53 Am. St. Rep. 839, and note; *Pennsylvania Co. v. Stegemeler*, 118 Ind. 305; 10 Am. St. Rep. 136. On a demurrer to evidence, the court, in its discretion, may compel the party to join in demurrer or abandon his evidence: *Brandon v. Huntsville Bank*, 1 Stew. 320; 18 Am. Dec. 48.

PENALTIES—NATURE OF—WHO MAY SUE.—Penalties are not damages, but are punishments imposed for breach of duty imposed by law: *Harbor Commrs. v. Redwood Co.*, 88 Cal. 491; 22 Am. St. Rep. 821. A claim against a telegraph company for damages and a claim against it for a statutory penalty are separate and distinct: *Mathis v. Western Union Tel. Co.*, 94 Ga. 338; 47 Am. St. Rep. 167. See, also, *Woolverton v. Taylor*, 182 Ill. 197; 22 Am. St. Rep. 521.

POLICE POWER—DEFINED—LIMITS OF.—The police power is that inherent and plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society. All persons possess their rights, whether to things tangible or intangible, subject to the general police power of the state: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447. But the legislature, in the exercise of its police power, does not have absolute power over private property, and cannot, at will, impose upon property burdens so unreasonable as to work a practical confiscation thereof: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549; 53 Am. St. Rep. 557, and note. It cannot invade the rights of persons and property under the guise of a mere police regulation, when such is not the effect: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 815. The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action as manifestly to secure, or to tend to the comfort, prosperity, or protection

the community: *People v. Ewer*, 141 N. Y. 129; 38 Am. St. Rep. 8. See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 2.

DEEDS—RESERVATIONS IN—CONSTRUCTION OF.—A reservation in a deed in favor of the grantor is construed most strongly against him: *Grafton v. Moir*, 130 N. Y. 465; 27 Am. St. Rep. 533. See, also, note to *Bassett v. Budlong*, 18 Am. St. Rep. 409.

HONAKER v. BOARD OF EDUCATION.

[42 WEST VIRGINIA, 170.]

MUNICIPAL CORPORATIONS—INJUNCTIONS AGAINST FORBIDDEN INDEBTEDNESS.—If a statute prohibits a board of education from incurring an indebtedness to be paid out of the funds of a subsequent year, a taxpayer may maintain a suit to set aside any contract made by such board in violation of this prohibition.

SCHOOL DISTRICT, POWERS OF.—A board of education cannot exercise any powers not expressly conferred upon it by statute or fairly arising by necessary implication. All who deal with it are charged with notice of the scope of its authority, and that it can bind the district only to the extent and by such contracts as are authorized by law.

SCHOOL DISTRICTS—BOARDS OF EDUCATION, POWER OF TO ACT INDIVIDUALLY AND SEPARATELY.—The members of a board of education acting separately and individually, and not as a board convened for the transaction of business, cannot make a contract binding on them as a corporation.

SCHOOL DISTRICTS—APPLIANCES FOR WHICH MAY PROVIDE.—An educational appliance is something necessary and useful to enable a teacher to teach school children, but a statute authorizing a board of education to provide such appliances for schoolhouses as the health, comfort, and convenience of scholars may require, refers to appliances which are for the use of the whole school, and not to books or things necessary for individual pupils only.

CRIMINAL LAW.—BRIBERY IS the voluntary giving or receiving of anything of value in corrupt payment of an official act done or to be done. A promise to pay an officer for loss of time is bribery.

BRIBERY.—A CONTRACT GROWING OUT OF AN ILLEGAL ACT will not be enforced. Hence, a contract procured by the bribery of an officer will not be enforced against the contractor nor against the municipal corporation represented by him.

MUNICIPAL CORPORATIONS—ORDERS PASSED BY AN INTERESTED BOARD.—An order adopted by two of the trustees of a school district, one of whom is personally interested in it and therefore incompetent to act, is void for want of the sanction of a competent majority of the board.

BRIBERY—PAYING A MEMBER OF A BOARD OF EDUCATION FOR ATTENDING A MEETING.—If a person, desirous of making a contract with a board of education, procures one of its members to attend a meeting by paying him two dollars and a half for the loss which he claims he will sustain by closing his place of business while so attending, a contract obtained by the vote of such member is tainted with bribery, and therefore is void.

PRINCIPAL AND AGENT—CRIMINAL ACT OF THE LATTER, WHEN AFFECTS THE FORMER.—If an agent procures a

contract by bribing a member of a board of education to attend a meeting, his principal, though ignorant of, and not consenting to this wrongful act, is affected by it to the extent that he cannot enforce the contract so secured.

J. H. Nash, J. B. Menager, and Brown, Jackson & Knight, for the appellant.

Bowyer & Green, for the appellees.

¹⁷² HOLT, P. On an appeal from a decree of the circuit court of Putnam county, pronounced on the twenty-eighth day of February, 1894, perpetually enjoining the Caxton Company from collecting and the school board from paying a debt for seven hundred and fifty dollars which the board contracted in the purchase of school charts. The bill of injunction is based on three distinct grounds:

1. That the members of the board of education, in making this purchase in the year 1893, incurred the debt of seven hundred and fifty dollars, to be paid one-half out of the school money of the subsequent year; and that this was done in violation of section 45 of chapter 45 of the code. The plain and commendable purpose of this provision of the statute is to make the available funds of each year pay the demands of that year, and protect the taxpayer from indebtedness beyond what each year's means will pay: *Davis v. Board of Education*, 38 W. Va. 382, 385. And a court of equity has jurisdiction of a suit by and on behalf of the resident taxpayers of a school district brought to set aside and hold for naught a contract made by the board of education, so far as the same creates and incurs a debt to be paid out of the school money of subsequent years, there being no other plain, adequate, and complete remedy: *Shinn v. Board of Education*, 39 W. Va. 497. This could hardly have been the ground on which the circuit court based its decree, for the written contract for the purchase of the charts as amended and finally executed was entered into on the fifteenth day of ¹⁷³ July, 1893. One half of the seven hundred and fifty dollars—the purchase money—was to be paid on the 1st of December, 1893, and the other half on the 1st of April, 1894, and provision was made for payment out of the school levy of the current fiscal year, that day laid by the board. But there is no question that the contract as first made did create a debt with one-half of it to be paid out of the school money of the subsequent year.

Ground No. 2 is that the school law (Code, c. 45), does not confer upon the board of education the power to buy such things; that they do not come within the meaning of the term "appli-

ances," as used in the statute. The board of education of a school district is a corporation created by statute (Code, c. 45, sec. 7) with functions of a public nature, expressly given, and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication; and in no other mode than that prescribed or authorized by the statute: *Shinn v. Board of Education*, 39 W. Va. 498. It is a public corporation, created for public educational purposes (1 Thompson on Corporations, sec. 25), laying throughout the United States annual levies of more than one hundred and sixty million dollars. All who deal with the board of education are charged with notice of the scope of their authority, and that they can bind their district only to the extent and by such contracts as are authorized by law: See *Honey Creek School Tp. v. Barnes*, 119 Ind. 213. And the members of the board, acting individually and separately, and not as a board convened for the transaction of business, cannot make a contract that will bind them as a corporation: *Pennsylvania etc. Co. v. Board of Education*, 20 W. Va. 360. The evidence shows that this contract of sale as first made was in plain violation of this important rule of law, but was afterward called in, and the present one was put in its place. Whether the law confers upon the board the power to make such purchase depends upon the scope and meaning of section 34 of chapter 45, read in connection with other sections and clauses bearing on the same subject. It reads as follows: "The board of education of every district shall provide by purchase, condemnation, leasing, building, or ¹⁷⁴ otherwise, suitable schoolhouses and grounds in their district, in such locations as will best accommodate the inhabitants thereof, and improve such grounds and provide such furniture, fixtures, and appliances for said schoolhouses as the comfort, health, cleanliness, and convenience of the scholars may require, and keep such grounds, schoolhouses, furniture, fixtures, and appliances in good order and repair." Appliance is anything brought into use as a means to effect some end. An educational appliance is something necessary or useful to enable the teacher to teach the school children. No educational means of imparting instruction to school children is more essential than the proper school books; therefore, according to the argument in this case, it is the duty of the board to provide them. But no one, I believe, contends for the conclusion to which this reasoning leads us. There must be some additional qualifying restriction. The appliance must be something like a blackboard, map, or dictionary, in that one or two may be enough for the use of

the whole school, and can be used by the teacher in giving instruction to the pupils. No person being required to furnish such common but necessary property for the benefit of the whole school, they can only be supplied by the board of education: See Honey Creek School Tp. v. Barnes, 119 Ind. 213, 217. But there are still other necessary restrictions. It must not be a school book in disguise. This is vitally important, for the opening for the sale of school books in the United States is so large, and the pressure brought to bear to make sales, whether the books be needed or not, so great, that it seems to be almost irresistible, and quasi school books are gradually creeping in under the name of appliances. They must not only be genuine appliances, but they must be shown to be suitable and reasonably necessary for the use of the public schools, for the board has no authority to buy any appliance which is not suitable and necessary, for example, an appliance or apparatus suitable to some branch of learning not required to be taught.

There is a distinct charge in the bill that the agent of the Caxton Company succeeded in palming off these charts on the board by false and fraudulent representations, and at a ¹⁷⁵ price fraudulently excessive, viz., thirty-seven dollars and fifty cents for each chart. The testimony of twenty witnesses was taken; and a dozen or more of high character and intelligence, who have had experience in such matters, and occasion and opportunity to observe and to know, testify with great unanimity that object teaching is of prime importance in teaching the young—the very young—and that without some such thing as these charts it could hardly be done. They also say that these charts are not mere school books in disguise, but aids essential to the teacher in teaching and to the pupil in learning; that one or two will answer for the whole school, and that they relate only to such branches as the law requires to be taught. As to the price, two say five dollars would be enough; one says they ought to cost about fifteen dollars; the others, who know them best, say that, as compared with other charts, the agreed price of thirty-seven dollars and fifty cents is not exorbitant. There is a lame and unsuccessful attempt to make good by proof the charge of misrepresentation, nothing more, and it needs no comment.

The third and the last charge in the bill of injunction is that the Caxton Company, by and through its agents and salesmen, offered to the board of education and to the individual members thereof, money and other things of value, and used various other undue, illegal, and fraudulent inducements, with the view and

he express purpose of securing an order and contract for the purchase of the Caxton School Series illegally and for an exorbitant price, to the great detriment of the plaintiffs and all other payers of the school district. Bribery is defined "as the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done": 2 Bishop's New Criminal Law, sec. 85. See Dishon v. Smith, 10 Iowa, 221; State v. Ellis, 33 N. J. L. 103; 97 Am. Dec. 707. The payment or offer of a valuable consideration to a public officer to influence him in the discharge of a legal duty constitutes the offense: See Am. & Eng. Ency. of Law, 532; Anderson's Law Dictionary, 6. See, on the subject, Code, c. 45, sec. 13, c. 147, sec. 4, et al.; Commonwealth v. Callaghan, 2 Va. Cas. 460. A promise to pay for loss of time is bribery: Simpson v. ¹⁷⁶ Yeend, L. R. 4 B. 626; Cooper v. Slade, 6 H. L. Cas. 746; People v. O'Neil, 3 Hun, 36, 43. Every public officer being a guardian of the public welfare, no transaction growing out of his official services in his position can be allowed to inure to his personal benefit; and from such transactions the law will not imply a contract: Davis v. United States, 23 Ct. of Cl. 329. When a contract grows out of an act and is connected with an illegal act, it will not be enforced: Jones v. Surprise, 64 N. H. 243. Courts of justice will not enforce any contract which is injurious to public rights, contravenes public policy, or violates public law. A contract with the state, procured by bribery upon the officers having power to make it, is against public policy and void: State v. Cross, 38 Kan. 696. An order by two of the trustees of a school district, one of whom is personally interested in it, and therefore incompetent to act, is void for want of the sanction of a competent majority of the board, whether the interested trustee has acted fairly or not: Shakespear v. Smith, 77 Cal. 638; 11 Am. St. Rep. 327. The evidence shows, without any attempt at contradiction, that one of the commissioners of the board of education, when notified of the time and place of meeting of the board for the purpose of passing on the proposed contract for the purchase of the Caxton Series, refused to go, on account of the loss he would sustain by closing his place of business. Thereupon the agent of the Caxton Company paid him two dollars and fifty cents in money to reimburse him for his loss, telling him at the time that he did not do this to try to bribe him, or with the intention of influencing his decision in any way. The board is composed of three commissioners; the commissioner who was thus induced to attend and the president of the board signed the contract; the third one

refused to sign it. The state pays the commissioner one dollar and fifty cents per day: Code, c. 45, sec. 6. It was his plain duty to attend the meeting and pass upon this important contract without being influenced in the discharge of such legal duty by requiring or receiving from the party who proposed the contract any pay for his time or his loss in closing his place of business. The people of the state take pride in their public schools, in their growing usefulness and efficiency, and ¹⁷⁷ to that end give of their means without stint and without complaint, until now it has reached the sum of one million six hundred and sixty-four thousand five hundred and twenty-seven dollars a year; and they have a right to feel indignant when they have reason to suspect the pressure of corrupt practices or tampering in any way with the school boards who control the school money of the districts.

This contract was void because made by only two of the board, one of whom had rendered himself incompetent to act by accepting pay from the party contracted with for attending the meeting at which the contract was made. Without his vote in favor of it, it would not have been made; hence, so far from having the sanction of two of the board, the number required by the statute to constitute a quorum, it had under the law the sanction of but one, and therefore had only the semblance of a contract. Besides, it is a plain case of money demanded, given (and received) with intent to influence the commissioner in the discharge of the legal duty of attending the meeting and passing on the question of the acceptance of the proposed contract. I should be reluctant to believe that his signing the contract was also thus induced. The first is enough to require the contract to be held void, and that much is established by the concurrent testimony of both parties to the transaction.

But it is proper to add that there is nothing in this record tending in the slightest degree to bring home to the principal in this contract knowledge or sanction of this conduct on the part of their agent; but, notwithstanding their innocence, when they come into court, and insist upon its validity and enforcement, they are met with the maxim upon which the law of agency rests, "What one does through another, that he does himself," so far as the illegality of the contract itself is involved. The doctrine of ultra vires, in that attitude of the transaction, does not apply: See 1 Am. & Eng. Ency. of Law, 2d ed., 1180. Although the principal may have had nothing to do with this tampering of their agent with a member of the school board in order to influence him in the discharge of his official duty, may not have been

rivy to the transaction in any way, yet the company sent him out to sell and contract in their name and for their benefit; therefore they were bound to see that it was so made as not to be a fraud on the rights of the taxpayers, and as they claim under it they must take it as tainted with these corrupt practices.

In our view of the facts of this case and of the law applicable thereto, the decree complained of is right, and must be affirmed.

MUNICIPAL CORPORATIONS — INDEBTEDNESS—PROHIBITION AGAINST CREATING—INJUNCTION TO ENFORCE.—Under a constitutional provision against incurring any indebtedness by a county which cannot be paid out of the funds on hand and the levy of the current fiscal year, orders issued by the county to a contractor in payment for the construction of a courthouse, payable out of funds to be raised from tax levies to be made in a subsequent year, are void: *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828, and note; monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243, on what is within the meaning of a prohibition against municipal indebtedness. *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191, and note. A court of equity, at the instance of a taxpayer, may restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from making payments of illegal claims: *Stevens v. St. Mary's Training School*, 144 Ill. 336; 36 Am. St. Rep. 438, and extended note.

SCHOOLS—NATURE OF SCHOOL DISTRICTS.—An organized school district, with power to sue and be sued, is merely a quasi corporation created for educational purposes, and is not, strictly speaking, a municipal corporation: *Frans v. Young*, 30 Neb. 360; 27 Am. St. Rep. 412; *Gaskill v. Dudley*, 6 Met. 546; 39 Am. Dec. 750; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521, and note.

MUNICIPAL CORPORATION—DUTY OF PERSONS CONTRACTING WITH, TO TAKE NOTICE OF POWERS—SCHOOL DISTRICTS.—One who contracts with a municipal corporation must at his peril take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby: *Gutta Percha etc. Mfg. Co. v. Ogalalla*, 40 Neb. 775; 42 Am. St. Rep. 696; *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167. See extended note to *Orvis v. Park Commrs.*, 45 Am. St. Rep. 258. Bonds fraudulently issued by a school district in satisfaction of a judgment already paid, create a new liability against the district, and, when they cause its total indebtedness to exceed the limit fixed by constitutional provisions, a purchaser for value before maturity is charged with notice of that fact and cannot recover: *First Nat. Bank v. District Tp.*, 86 Iowa, 330; 41 Am. St. Rep. 489.

SCHOOLS—SCHOOL DISTRICTS—POWERS OF TRUSTEES—ORDERS PASSED BY AN INTERESTED BOARD.—An order for a requisition drawn on the county superintendent of public schools by but two of three trustees of a school district, one of whom is personally interested in the order, and therefore incompetent to act, is void for want of the sanction of a competent majority of the board of trustees, whether the interested trustee has acted fairly or unfairly in the matter: *Shakespear v. Smith*, 77 Cal. 638; 11 Am. St. Rep. 827.

SCHOOLS—SCHOOL DISTRICTS—POWER TO FURNISH NECESSARY APPLIANCES—HOW CONSTRUED.—Under a statute au-

thorizing school district boards to provide "necessary appendages" for schoolhouses during the time that schools are taught, there is no authority to purchase a stereoscope and stereoscopic views: *School Dist. v. Perkins*, 21 Kan. 536; 30 Am. Rep. 447, and note.

BRIBERY—WHAT CONSTITUTES.—Bribery is corruptly offering, giving, or receiving anything of value as an inducement to official action: Extended note to *State v. Ellis*, 97 Am. Dec. 711-718.

CONTRACTS—VOID BECAUSE IN VIOLATION OF LAW.—Business transactions in violation of law cannot be made the foundation of a valid contract: *Buckley v. Humason*, 50 Minn. 195; 36 Am. St. Rep. 637; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note. Contracts which are void at common law because they are against public policy are illegal as well as void, and money expended under them cannot be recovered: *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159.

STEVENSON v. KYLE.

[42 WEST VIRGINIA, 229.]

TRUST, RESULTING.—If a person buys property with the money of another, a trust results in favor of the latter giving him the real ownership, and the property may be followed through any transmigrations as long as it can be traced, unless the rights of a bona fide purchaser for value intervene, in a case where his rights call for protection. No subsequent dealing with the property with the agent of the trustee can remove its stamp as between him and his principal, the beneficiary.

PRINCIPAL AND AGENT.—IF AN AGENT SELLS PROPERTY OF HIS PRINCIPAL TAKING IN PAYMENT AN ORDER IN HIS OWN NAME given by the purchaser upon another person, which the latter had agreed to accept, because the agent owed him, and in the belief that he could satisfy the order by giving credit to the agent for the amount thereof, such order is equitably the property of the principal, and he may recover the amount thereof from the acceptor, though the latter has already credited it upon the obligation due to him from the agent in ignorance of the existence of the rights of the principal.

PRINCIPAL AND AGENT.—If an agent acquires personal property with the funds of his principal, it may be followed into the hands of a third person, though innocent, having no notice of the right of the principal, who purchased for value, because a third person cannot get any better title than the agent had.

Campbell & Holt, for the plaintiff in error.

Simms & Enslow, John S. Marcum, and Herbert Fitzpatrick, for the defendant in error.

230 BRANNON, J. Bolin, as agent for Stevenson, sold a horse of Stevenson to Hayslip, taking in payment an order from Hayslip on Kyle. Before taking the order, Bolin asked Kyle if he would accept the order, and was informed that he would. At that time, Bolin owed Kyle a note for a larger amount than the order. Before the order was drawn, Hayslip also asked Kyle if he would accept an order drawn by him in favor of Bolin for the

horse, and Kyle told him that he would, as Bolin owed him, and he could thus utilize the order. Neither Hayalip nor Kyle knew that the horse was not Bolin's, or of any interest of Stevenson in the transaction. Bolin assigned and delivered the order to Stevenson. When Bolin informed Kyle that he had the order, Kyle credited its amount on Bolin's note to him, but never had possession of the order. When Stevenson presented the order to Kyle for payment, Kyle told him he had applied it on Bolin's note, and refused to pay to Stevenson; and Stevenson sued before a justice, and, on appeal to the circuit court, there were a verdict of a jury and judgment in favor of Kyle, and Stevenson brings the case here.

It is clear that when Bolin, as agent for Stevenson, sold his horse to Hayalip, and for its price took the order in his own name, that order was Stevenson's, though the legal title to the order vested in Bolin, because of the relation of principal and agent; and it falls under that ordinary rule that where one, especially in trust relation, buys property ²²⁸¹ with the funds of another, a trust results for him whose money acquired it, giving him the real ownership, and this no matter whether property be turned into notes or other securities, or vice versa; and it will be followed through any transmutations as long as it can be traced, unless the right of a bona fide holder for value intervene in those cases where his rights call for his protection: Story on Agency, sec. 229; Mechem on Agency, sec. 780; Pumphry v. Brown, 5 W. Va. 107; Hamilton v. Steel, 22 W. Va. 348; Farmers' etc. Bank v. King, 98 Am. Dec. 215. Where the subject is money current or negotiable paper going into the hands of one for value, without notice, it is different: Mechem on Agency, sec. 786; Story on Agency, sec. 228. Where once the character of trust is stamped upon the property, no subsequent dealing with it by the agent or trustee can remove its stamp as between him and the principal or beneficiary: Heiskell v. Powell, 23 W. Va. 717. And, where an agent acquires personal property with funds of his principal, it may be followed into the hands of third persons, though innocent, having no notice of the right of the principal, who purchase for value, as that third person can get no better title than has he from whom the third person derives title: Mechem on Agency, sec. 784; Story on Agency, sec. 229. This doctrine avails at law: 2 Story's Equity Jurisprudence, secs. 1258, 1259. The agent cannot apply it to pay his debt. If he does, the principal may follow and recover it. The agent cannot apply it to his debt, nor release a debt of his principal: Mechem on

Agency, secs. 789, 790. Therefore this order was Stevenson's, and Kyle could not, even with Bolin's knowledge or consent, apply it on Bolin's note. But it was Kyle's own act, and, when he credited the amount of the order, Bolin had not delivered it to Kyle, but either Bolin or Stevenson had it. He did not buy the order, but, on his own motion, credited its amount on Bolin's note to himself. The order given by Hayslip to Bolin was an assignment for so much of any indebtedness of Kyle to Hayslip: *First Nat. Bank v. Kimberlands*, 16 W. Va. 555. So this order gave Stevenson an assignment of so much of any fund that might be in Kyle's hand belonging to Hayslip, and Kyle could not effectually apply it to Bolin's debt to him.

But next the question comes up: Was there such a fund ²³² in Kyle's hands of Hayslip as was capable of being assigned by the order? The thing assigned must have a real or potential existence: *Wiant v. Hays*, 38 W. Va. 681, 685; *Field v. Mayor etc.*, 57 Am. Dec. 440. Who, if anybody, owed Hayslip? That corporation called the county court of Cabell county—not Kyle, the sheriff; for that court was to pay Hayslip, who was assessor. It was to allow or disallow his compensation, and issue a draft on the sheriff to pay, but never until that draft issued would Kyle, the sheriff, be under any obligation to pay, and then not as an individual, but officially, as sheriff and ex officio county treasurer. It does not appear that the county court had even allowed Hayslip's salary, or issued a draft for it on this sheriff. Therefore, there was not yet in his hands anything which we could say had either a real or potential existence. As the assessor was in the employ of the public, we may say that his demand upon the county had such an existence that an order to the county court from Hayslip would have passed it; but we cannot say the same of an order on Kyle, when it does not appear there was a cent in his hands. And there is another reason against the efficacy of that order as an assignment of Hayslip's salary as an assessor, and that is that the salary or compensation of a public officer is not assignable,, because this would permit the public service to be prejudiced and undermined by the transfer to strangers of funds appropriated to salaries. If it were allowed, the assignee, by notice to the government or its subagents, would be entitled to receive pay directly, and take the place of their assignors in respect to the emoluments, leaving the duties yet to be performed as a barren charge to be borne by the assignors. Needy officers, under present pressure, would assign their future pay, and then neglect the public service. They would assign away the bread

from their mouths. So that the behests of the public service and of the officers both concur in branding assignments of compensation for future service as contrary to public policy, as detracting from efficiency. And is the government or the county court or other subagency of the state government to be embroiled in conflicting claims to salary or compensation? Where would its complications ²³³ end? If such an assignment is tolerated, we must tolerate it for fractions, and compel the county treasurer to pay part to one, parts to others. Of course, this would never do. Public policy and the orderly dispatch of public business would forbid this. We do not know whether the order was for past or future service of the assessor, but from its date of the 14th of July, I take it that it was for then continuing service, and may as well be said to apply to future as to past service; and I understand that no assignment of quarterly, annual, or other compensation, payable at stated intervals, can be made in the middle of the quarter or year for services continuing, and not then complete. As only past service is assignable, the plaintiff must show that the service had been performed at the date of the assignment. The allowance is annual to an assessor, and some of the service was not yet performed. I do not see clearly why public policy should not prohibit the assignment of pay for past as well as future service, but the books do draw this distinction: *Mechem on Public Offices*, 874; *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507; *Field v. Chipley*, 79 Ky. 260; 42 Am. Rep. 215; *Robertson v. Robinson*, 65 Ala. 610; 39 Am. Rep. 17; *Story's Equity Jurisprudence*, sec. 1040 d; *Schloss v. Hewlett*, 81 Ala. 266; note to *Skipper v. Stokes*, 94 Am. Dec. 650; *Bangs v. Dunn*, 66 Cal. 72. So, I conclude, both for the reason that there was in Kyle's hand no fund, and also because its assignment was invalid, that the order in question vested nothing on which recovery could be had.

If it be said that before Bolin took the order he asked Kyle if it would be good, and Kyle said "Yes," it is to be said that Kyle understood that his debtor, Bolin, who owed Kyle much more than the order, was to be its payee, and it was not hinted to Kyle that Stevenson was to be its beneficiary. He had a reason for running the risk that Hayslip would get an order from the county court on him, and that was that he might get so much as the order called for on Bolin's note to him; and he stated to Hayslip, when asked by Hayslip if he might draw the order, that Bolin owed him and he could thus utilize the order; but he

had no such reason for agreeing to pay the order to another who did ²³⁴ not owe him. His assent to the order would estop him from allowing it to Bolin, but would not deprive him of right to protest it against Stevenson, for he was guilty of no conduct which would estop him from denying payment to Stevenson.

Affirmed.

TRUSTS—RESULTING—PURCHASE OF PROPERTY WITH FUNDS OF ANOTHER.—When land is purchased and paid for by one person, but the conveyance is made to another, the law ordinarily implies a trust in favor of the former: *Deck v. Tabler*, 41 W. Va. 332; 56 Am. St. Rep. 837, and note; *Kiley v. Martinelli*, 97 Cal. 575; 33 Am. St. Rep. 209, and note. Implied or resulting trusts arise when land is purchased in the name of one person with the money of another, or when a purchase of land is made by a trustee, in his own name, with trust money; or when such purchase is made by a partner in his own name with partnership funds; or when a conveyance has been obtained by fraud or in similar cases: *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678.

TRUSTS—RIGHT TO TRACE TRUST FUNDS.—A cestui que trust has the right to follow trust funds and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the funds can be clearly ascertained, traced, and identified, and the rights of bona fide purchasers do not intervene: *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463. See extended notes to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125-130, and *Ferchen v. Arndt*, 46 Am. St. Rep. 608-610.

PRINCIPAL AND AGENT—UNAUTHORIZED DISPOSITION BY AGENT OF PRINCIPAL'S PROPERTY—EFFECT OF.—One who intrusts the possession and control of personal property to an agent, who sells it without authority, and without the knowledge of his principal, is not estopped from claiming it in the hands of an innocent purchaser without notice, though the agent was a dealer in property of like character: *Gilman Linseed Oil Co. v. Norton*, 80 Iowa, 434; 48 Am. St. Rep. 400, and note. See note to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 922, and extended note to *Velsian v. Lewis*, 3 Am. St. Rep. 201. Sale or disposal by agent, without authority, of property of principal, other than money, may be disavowed and set aside, even in the case of a bona fide purchaser: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 286. See, also, *Overseers v. Virginia Bank*, 2 Gratt. 544; 44 Am. Dec. 399.

JORDAN v. BENWOOD.

[42 WEST VIRGINIA, 312.]

PRACTICE—VARIANCES, WHEN NOT MATERIAL.—The fact that the plaintiff in a complaint to recover damages for injuries to a lot describes his estate as that of a reversioner, when it was that of a remainderman, is an immaterial variance.

MUNICIPAL CORPORATIONS—LIABILITY OF FOR NOT FURNISHING DRAINS.—A municipality is not bound to furnish drains to relieve a lot upon a street of surface water, whether its own or that flowing from other premises. It has discretion whether to make drains or sewers or not.

MUNICIPAL CORPORATION—LIABILITY FOR DAMMING UP WATER IN GRADING STREETS.—Though a change in the grade of a street prevents surface water from flowing away from a lot, or, in other words, dams it up, the municipality is not answerable to the owner, if the work was done without negligence, and with reasonable skill, and in the usual way of doing such work and the damage is a mere incident thereof.

MUNICIPAL CORPORATIONS—LIABILITY FOR THROWING SURFACE WATERS UPON A LOT BY GRADING STREETS. Though, by a change in the grade of a street, surface water is thrown upon a lot from such street, the municipality is not liable if the water flowing from such street is merely surface water, and is not collected in large quantities and thrown upon the lot by means of a gutter or other artificial channel.

CONSTITUTIONAL LAW—DAMAGING PROPERTY.—The provision in a constitution providing that property shall neither be taken nor damaged for a public use without just compensation does not render a municipality liable to a lotowner whose property is damaged by a change in the grade of a street whereby surface waters are thrown upon it, if a private individual or corporation might have inflicted a like injury to a lotowner without being answerable to him therefor. In other words, this provision of the constitution was not designed to make municipal corporations liable to make compensation in damages when an individual would not have been liable for causing injuries or damages of the same character.

REVERSIONER AND LIFE TENANT—RESPECTIVE RIGHT TO RECOVER FOR INJURIES TO PROPERTY.—If there is a tenant for years or life in the actual possession of real property, he can sue and recover damages for any trespass affecting his immediate interest, and the reversioner or remainderman, if the act does a permanent injury to the inheritance, may sue as to that. The claims, however, of the tenant and the reversioner or remainderman are separate and distinct, and the damages sustained by both cannot be recovered in an action brought by one of them only.

REVERSIONER OR REMAINDERMAN—WHEN DEEMED DAMAGED BY INJURIES TO PROPERTY.—If the injury is of a permanent nature, deteriorating the market value to property, so that if the remainderman or reversioner were to sell, it would fetch less money in the market, there is damage to the reversion or remainder for which he is entitled to recover. If the same act affects both his estate and that of the tenant in possession, the damages are apportionable between them, the tenant recovering only for damage to his present enjoyment during his term if it affects the entire term, and the remainderman or reversioner only for the damages to his remainder or reversion.

MUNICIPALITY—EVIDENCE TO CHARGE.—If it is claimed that injury has been done to real property by a city, and it ap-

pears that the work, instead of being done by the city, was done by a railway company under its general authority, the records of the common council must be produced, if accessible, to show such authority on the part of the railway company.

MUNICIPALITY--WHEN NOT LIABLE FOR A CHANGE IN THE GRADE OF A STREET.—If the grade of a street is changed by a street railway company under authority conferred by a municipality, the granting of such authority or license does not render the municipality liable for the action of the railway. The license thus granted by the railway does not deprive the abutting property owner of his proprietary right in the street nor of his remedy to recover from the railway company any damages inflicted by it.

JURY TRIAL.—A PARTY HAS A RIGHT TO HAVE AN INSTRUCTION given in his words, if it is correct in law and unambiguous.

APPELLATE PRACTICE—PRESUMPTION AGAINST ERROR.—If an instruction complained of has been lost or does not appear in the record, it will be presumed to have been free from error.

Caldwell & Caldwell, for the plaintiff in error.

William H. Hearne, for the defendant in error.

§14 BRANNON, J. This was an action by Sabina Jordan against the city of Benwood to recover damages for injury to her lot of land by reason of change of grade of a street and alley on which the lot abuts, resulting in judgment against the city, which took this writ of error and supersedeas.

One question is, whether there is a material variance between declaration and evidence, in the fact that the declaration states the plaintiff's estate in the lot to be one in reversion, whereas the evidence shows it to be one in remainder. The declaration alleges the plaintiff to be owner of a messuage, in possession of "James McAuliff, as tenant to Bridget Clark, who then was and still is the owner of a life estate for her own life in said messuage and premises, the reversion thereof, after the termination of said life estate of said Bridget Clark, then and still belonging to the plaintiff." Here is a statement of a reversion after the termination of a given life estate, whereas the evidence discloses a will giving the lot to Bridget Clark for life, with remainder to Sabina Jordan. The pleader has only misnamed the estate of Sabina Jordan in calling it a "reversion" instead of a "remainder," but he has stated the plaintiff's estate to be an estate in fee after the termination of a given life; and what is there in the mere misnaming, the substance appearing? No surprise results to the other side. "Reversion" and "remainder" mean different things as regard the manner of derivation of title; and, in certain instances, the omission to distinguish between them accurately might be material; but they both mean an estate after the termination of a particular estate, and failure to discriminate in

this case hurts no one; the defendant being told just what right in the plaintiff has been injured. Courts must look at substance.

³¹⁵ The claim of the plaintiff for recovery is, that a street and alley had been raised in grade, and that, owing to this, surface water of her own lot and some from other lots and streets, cast upon her lot by reason of the change of grade, was kept on her lot, whereas, before, this water had gone into a drain on McMechen street. The case presents the question, Is a town or city bound to furnish drains to relieve a lot upon a street of its surface water, whether its own or that flowing upon it from other premises? I answer, "No." It has discretion whether to make drains or sewers or not: *Mendel v. Wheeling*, 28 W. Va. 233, 243; 57 Am. Rep. 664; 24 Am. & Eng. Ency. of Law, 942; 2 Dillon on Municipal Corporations, 4th ed., secs. 949, 1041, 1046.

Another question is: Suppose the change of grade of a street prevents the surface water from flowing away from land—dams it up even—is the municipal corporation liable for damages to the landowner? Answering this question, we meet with a volume of legal authority, and apparently very variant. There are two rules—one called the "civil-law rule," the other the "common-law rule," though it seems it did not originate in England. Most of our states have adopted, as the basis of decision in the main, the common-law rule, but some have adopted the civil-law rule as the more just and logical. The civil-law rule is expressed in the Code Napoleon thus: "The owner of the lower ground is bound to receive from the higher ground the water which naturally flows down without the human hand contributing to its course. The owner of the lower ground is not permitted to make a dike to prevent such flowing. The owner of the higher ground can do nothing to aggravate the servitude or easement of the lower ground." Under this law, neither of these owners can stop surface water. Very different is the common-law rule. It says each owner may fight surface water as he chooses. He may use it all, divert it away from the lower land, may prevent its invasion of his own land, and thus dam it up on his neighbor's land. He may, in the use of his land, cause it to flow differently upon his neighbor's from what it did before. Gould on Waters, section 263, very clearly states the basic principle thus: "Water spread over the surface of land, or gathering in ³¹⁶ natural depressions, or into swamps or bayous, or percolating the soil beneath the surface, if flowing in no definite channel, does not constitute a watercourse, and is not subject to the law regulating riparian owners. By the common-law, no rights can be claimed

jure naturae in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others": 24 Am. & Eng. Ency. of Law, 907, 917; extended notes to *Gray v. McWilliams*, 98 Cal. 157; 35 Am. St. Rep. 163; 21 Law. Rep. Ann. 593; 2 Dillon on Municipal Corporations, sec. 1039; 3 Minor's Institutes, 18; *Bowlsby v. Speer*, 86 Am. Dec. 216; Washburn on Easements, 489, 495, 499; *Martin v. Jett*, 32 Am. Dec. 120, and valuable full note on page 123; *Mayor etc. v. Sikes*, 94 Ga. 30; 47 Am. St. Rep. 132. The common-law rule recognizes the old maxim respecting ownership of real property, and is based on it, "*Cujus est solum, ejus est usque ad coelum.*" Any other rule would be a restraint upon ownership. Without it a man building houses, wall, or fences, or even in works of agriculture, would be open to constant assault. Of course, it is to be so applied as not to violate reason. The common-law rule has been recognized as applicable in the mother state of Virginia in *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587. There is no pointed West Virginia case. *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763, and *Knight v. Brown*, 25 W. Va. 808, recognize the general rule inferentially. By some cases it has been more rigidly applied to the exemption of the lotowner using his lot as he pleases, and municipal corporations, than as to country lands; but the better thought is, that the rule is the same in both cases. Therefore the city of Benwood would not be liable for obstructing the flow of surface water from this lot in raising the street grade, if the work was done without negligence, and doing its work with reasonable skill, in the usual way of doing such work, and the damage a mere incident of the work: 2 Dillon on Municipal Corporations, sec. 1051, cl. 1.

Another question is, Is the city liable for surface water which its work for the first time brought upon the plaintiff's lot from other premises than hers? Here we meet with some trouble. There are various and variant decisions, even where the common or civil-law rule prevails. The ³¹⁷ city is engaged in lawful work on its own ground, and it happens that, from it, some surface water is changed in its course, and thrown on another's lot, thus increasing the quantity on that lot. This is not actionable, but *damnum absque injuria*, where the common-law rule holds, just the contrary to the civil-law rule, which, as above quoted, says that "the owner of the higher ground can do nothing to aggravate the servitude or easement of the lower ground." If you logically apply the common-law rule, you must say that if, in the use of his land, one stops surface water in its natural course, and turns

in another direction, whereby it goes upon land of another as it never had done before, yet there is no right of action for this, because the letter of the common-law rule is that surface water is, like waters of the sea, an enemy, which each may fight, and which he may consume, repel, or expel, without regard to any injury thereby occasioned to another proprietor: *Mayor etc. v. Sikes*, 94 Ga. 30; 47 Am. St. Rep. 132; note to *Kansas City etc. R. Co. v. Smith*, 48 Am. St. Rep. 588; *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205; 49 Am. St. Rep. 249, and note 253. Here we meet two fundamental maxims of the law, old as the centuries, in regarding which the courts have given a wilderness of conflicting decisions, often governed by the particular cases before them, and, indeed, in presence of these maxims, courts can do little better. The effect of one of these maxims is, "He who owns the soil owns it down to the center of the earth and up to the skies"; that is, he has complete and perfect dominion. The effect of the other maxim is, "So use thine own that thou dost not injure another." I repeat, that if one, in using his own land, diverts surface water from its usual course, and it runs upon another's land, where it never before has gone, no action lies, where the common-law rule prevails. He has the right to shut out surface water, thus casting it back on his immediate neighbor, and, if it goes from him to visit another whom he never knew before, it is no matter: 24 Am. & Eng. Ency. of Law, 907, 917; authorities last above cited; *Gould on Waters*, sec. 267, 268; *Washburn on Easements*, 4th ed., 494; *Angell on Watercourses*, sec. 108a; *Lynch v. Mayor etc.*, 76 N.Y. 60; 32 Am. Rep. 271; *Gannon v. Hargadon*, 10 Allen, 318 106; 87 Am. Dec. 25, and note; *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763; 18 Am. Rep. 216; *O'Connor v. Fond Du Lac etc. Ry. Co.*, 52 Wis. 16; 38 Am. Rep. 753. But this rule seems harsh, applied without mitigation, and, even where the common-law rule was the basis of standard of decision, an exception was recognized. While recognizing the right of the owner of the higher field or lot to throw his surface water upon the lower, even if, in the use of his land, it changed or increased the flow upon the lower field or lot, yet it must not be collected in a body, and in such body or mass as to rest upon that lower field or lot. So say our cases of *Gillison v. Charleston*, 16 W. Va. 283, 37 Am. Rep. 763, and *Knight v. Town*, 25 W. Va. 808. So says the civil law, as we have seen. So say many authorities, even where the common law is adopted: *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587 (opinion), and cases cited. If, from one's own use of his land, surface water natur-

ally flows in different directions or quantity upon another's land, as a mere consequence or result of such use, no actionable injury is done; but he has no right to "collect the water in artificial channels, and discharge it on an adjacent proprietor. This is *aliter* the rule of the common and civil law. And a municipal corporation has no greater right in this respect than a private landowner"—is the rule stated in Gould on Waters, section 271. In *Field v. Inhabitants of West Orange*, 36 N. J. Eq. 118, admitting the general common-law rule as to surface water, it was held that a town cannot, "discharge water drainage from the surface of its streets on private lands in such quantities as to impair value and use of them." There they conducted the water by new channels in unusual quantity. "Cities and towns have no greater rights than individuals to collect in artificial channels upon their streets and highways mere surface water, distributed in rain and snow over large districts, and precipitate it upon the premises of a private owner, or construct ditches upon private lands for public use without compensation."

"A municipal corporation is liable for throwing water, collected in large quantities in a street, or in the gutter of a street, upon the land of a private owner," says Gould on Waters, section 272, on the authority of many cases. Judge Cooley, in his work on Torts, page 580, cited in *Gillison v. Charleston*, 16 W. Va. 302, 37 Am. Rep. 763, says the same—that while towns are not compelled to make gutters to protect owners against surface water from public ways, yet if they actually construct such as must carry water on adjacent lands, they are as much liable as if they had sent their servants upon them. "One proprietor has no right to cause a flow of surface water from his own land over that of his neighbor by collecting it in drains, culverts, or artificial channels," say Angell on Watercourses, sec. 108; 24 Am. & Eng. Ency. of Law, 549; 2 Dillon on Municipal Corporations, sec. 1042, and note; opinion in *Lynch v. Mayor etc.*, 76 N. Y. 60; 32 Am. Rep. 271. See, specially, 2 Dillon on Municipal Corporations, sec. 1051, cl. 3. This exception needs to be emphasized, because it is a logical exception to the generality of its application, and essential to bar it from sheltering many instances of injustice. These doctrines apply where the water goes to other land, where it did not go before, as will be seen from some of the authorities: Angell on Watercourses, sec. 108, et seq. I do not understand this case as falling under this exception. The same rules apply to a municipal or railroad corporation as to an individual: Opinion in *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 592; Gould on

Waters, sec. 272; *Lynch v. Mayor etc.*, 76 N. Y. 60; 32 Am. Rep. 271; 2 Dillon on Municipal Corporations, sec. 1051, cl. 3. If a city, in changing grade, causes water collecting on its streets, flowing therefrom merely as surface water, to go on adjoining land, it is not liable for damages: Gould on Waters, sec. 269.

Another question in this connection has been argued and calls for decision. It is this: Though a municipal corporation may be not liable for such injury from surface water at common law, there is the clause of the constitution that private property shall be neither taken nor damaged for public use without just compensation; and does not this alter the case? This clause originally provided against only what was a "taking" of property for public use, and not against what only damaged it consequentially, and was not a taking; and the word "damaged" was first put in the constitution of 1872 to cure this hardship. It was not designed to put on the state, or upon counties or municipal corporations as subordinate parts of state government, a burden not resting on private corporations or individuals ³²⁰ under the same circumstances. If an individual or private corporation were, in lawful work, to hurt a citizen's land, as, for instance, by an embankment rendering access to it dangerous or inconvenient, the corporation would have been liable; but a town or city would not, because of its being a city or town, engaged in a governmental operation. This clause meant to make the public equally liable for that act of injury. If, however, an individual or private corporation, in lawful use of property, were to injure another by repelling surface water, it would not be liable; and it cannot be thought that the clause in the constitution was designed to make a city liable in such case, where others would not be. In *Mayor etc. v. Sikes*, 94 Ga. 30, 47 Am. St. Rep. 132, the court says, of just such an amendment to the Georgia constitution, that it designed to make municipal corporations "liable to make compensation in damages if an individual would be liable for causing injuries or damages of the same kind." That the house injured was built prior to the establishment of a street is immaterial. It is not like the case of *Hutchinson v. Parkersburg*, 25 W. Va. 226, as there the act of the city was actionable, not one of surface water.

Other questions touching evidence refused are made in the case, but, not being made the subject of bills of exception, or specification in the motion for new trial, are not considered: *Hughes v. Frum*, 41 W. Va. 446.

Another question is, whether the verdict should be set aside

because it appears that the plaintiff recovered as for the entire damage to the premises, instead of only for damage to her remainder. The declaration counted only on damage to the reversion, and we do not know how the jury reached the sum it did reach. We do not know whether it deducted for the life estate of Mrs. Clark, then in possession as life tenant; but, as there is no evidence of any discrimination, it may be said to cover the entire estate for life and in remainder. If there be a tenant for years or life in actual possession, he can sue for any trespass affecting his immediate residential interest; and the reversioner or remainderman, if the act does a permanent ³²¹ injury to the inheritance, may sue as to that; but they are separate claims. Where the injury is of permanent nature, deteriorating the market value of the property, so that if the remainderman or reversioner were to sell, it would fetch less money in the market, there is damage to the reversion or remainder, for which the reversioner or remainderman may sue. Where the same act affects both the limited estate and remaining fee, the damages are apportionable between the tenant of the particular estate and him of the fee. The particular tenant recovers for damage only to present enjoyment, covering his entire term, if it affects the entire term, and the remainderman or reversioner only for damage to the remainder or reversion: Sutherland on Damages, 1033; 1 Addison on Torts, 407-409 (marginal); California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216; Sedgwick on Damages, sec. 74. This discrimination of right between the two is plain in the law books, and must be carried out in practice. How? The books do not just say. But they say, as reason says, that the damage to the reversion or remainder is the amount that estate is diminished in value: Sutherland on Damages, 1034; 1 Addison on Torts, 408. But that is only the market value of the remainder after the end of the particular estate, and it is difficult to get at that, unless we ask the market value of the property before and after the injury, regardless of the two estates, and then seek the value of the estate for years or life on the basis of the annual rental value multiplied by the number of years remaining of the term of years, or by the number based on the expectation of life of the life tenant: Sedgwick on Damages, sec. 72.

Another question: Whether the court erred in refusing to reject all the evidence as insufficient to sustain the action, particularly that mere oral evidence tending to show authority from the city to make the fills. The work was done by a railway company under alleged authority from the city. Childrey v. Huntington,

34 W. Va. 457, holds that the records of council must be produced if accessible; and there is error under this head.

Another question: 'The change of grade on the street was made by a street railroad company under authority from the city. Is the city liable at all? I have found no ³²² law asserting the liability of the city. It grants authority, a mere license, under sanction of the legislature, for the construction of railroads in the street, but does not become guarantor for all damages resulting to abutting owners. The railroad is not its work, nor performing as officer or agent of the city the functions incumbent on it, whether an ordinary or street passenger railway. It makes no difference that city officers overlook the work to see that no violation of public interest occurred. I have found no law holding the city liable, and none is cited; but several cases show the reverse. *Burkam v. Ohio etc. Ry. Co.*, 122 Ind. 344, held that the city, in such grant, does not deprive the adjoining owner of the proprietary right in the street, but grants only a privilege under power given by the sovereign, and is not liable for merely exercising this right; and where there is any right to compensation, it is against the railroad company, not the city. To same effect are *Frith v. Dubuque*, 45 Iowa, 406; *Denver v. Bayer*, 7 Colo. 113; *Green v. Portland*, 32 Me. 431. It would be different as to defects in the street causing injury to a traveler, as the city would be liable for injury from actionable defect caused by railroad, as it is under statute to maintain a good street. The city is primarily liable and the company liable to indemnify it: 2 Dillon on Municipal Corporations, sec. 1037. Under these principles, plaintiff's instructions Nos. 2 and 3 are wrong, and the refusal of defendant's instructions Nos. 2 and 4 was wrong, and also the refusal of the court to give an instruction, not numbered, that "the law does not require the city to furnish a drain or sewer to carry away water from the cellar on the premises or from the premises." That instruction propounded the law correctly, and a party has a right to an instruction in his own words, if correct in law and unambiguous: *State v. Evans*, 33 W. Va. 417. The court added to the instruction, against the defendant's objection, the words, "such as collected in said cellar or upon said premises before May, 1893." The declaration was for injury from surface water on the — day of May, 1893, and afterward. The effect of this amendment was to tell the jury that, as to water in the cellar or on the premises after May, the city ³²³ was bound to furnish a drain or sewer, no matter in what manner or from what cause such water was there.

An instruction that is lost is mentioned. It is not necessary for me to mention it, further than to say that, as it is not in the record, we must presume it was free from error, as the court held as to a lost writ in *Turberville v. Long*, 3 Hen. & M. 309.

Judgment reversed, verdict set aside, and new trial awarded.

PLEADINGS—VARIANCES—WHEN NOT MATERIAL—Variance between allegation and proof is not material unless it misleads the adverse party to his prejudice: *Deakin v. Underwood*, 37 Minn. 98; 5 Am. St. Rep. 827, and note. For instances where such variances have been deemed immaterial see *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877; *Phillips v. Herndon*, 78 Tex. 378; 22 Am. St. Rep. 59. In the latter case, it was held that a complaint alleging that a vendor obligated himself to convey land "in fee simple by warranty deed" may be supported by title bonds reciting that he would convey the land "by good and valid deed or deeds in common form," the variance being immaterial. In an action by a government patentee to cancel a subsequent patent to part of the same, a complaint which describes this land as a "sandbar" or "piece of ground," and as a "piece of middle ground," is sufficient to include the term "island," when the proofs show that the land in dispute is an island: *Butler v. Grand Rapids etc. R. R. Co.*, 85 Mich. 246; 24 Am. St. Rep. 84. Although the complaint in an action avers an express promise, a recovery may be had upon proof of an implied promise: *Pence v. Beckman*, 11 Ind. App. 263; 54 Am. St. Rep. 505, and note.

MUNICIPAL CORPORATIONS—IMPERFECT DRAINAGE AND DEFECTIVE SEWERS—LIABILITY FOR.—A sewer controlled by a city, which is so negligently constructed or altered as to cause water and excrement to flow into the cellar of a private owner, is a nuisance for which the city is liable in damages, after notice to abate it: *Chalkley v. Richmond*, 88 Va. 402; 29 Am. St. Rep. 730, and extended note. But a city is not liable to the owners of private premises within its boundaries for failing to provide a system of sewerage to carry away surface water and the water of perennial streams naturally accumulating thereon: *St. Paul etc. R. R. Co. v. Duluth*, 56 Minn. 494; 43 Am. St. Rep. 491, and note. This conclusion flows from the sound rule that a municipality is not liable for damages resulting from a lawful exercise of its discretionary power to plan and construct sewers: Note to *Chalkley v. Richmond*, 29 Am. St. Rep. 731. The acts of a city in cutting ditches along streets and in building dikes are ministerial acts, for which it may be held liable in case of negligent omission to provide sufficient outlets for surface water: *Beatrice v. Leary*, 45 Neb. 149; 29 Am. St. Rep. 546. See, also, *Kansas City v. Brady*, 52 Kan. 297; 50 Am. St. Rep. 349.

MUNICIPAL CORPORATIONS—CHANGE OF GRADE OF STREETS—DAMAGES RESULTING FROM—LIABILITY FOR—SURFACE WATER.—A city while properly improving its streets is not liable to an owner of land indirectly injured thereby, when such injury is the necessary result of the improvement: *Bush v. Portland*, 19 Or. 45; 20 Am. St. Rep. 789, and note. A municipality is not responsible for inconvenience or damages consequent upon the improving or grading of its streets, when such grading is done with diligence and care: Note to *Davis v. Crawfordsville*, 12 Am. St. Rep. 362. So a city is not liable for damages for so altering the grade of its streets as to turn the surface water upon adjacent lots, thereby injuring them: *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645. Though it is liable in damages for collecting water in artificial channels and casting it in a body upon the property of another: *Davis v. Crawfords-*

ville, 119 Ind. 1; 12 Am. St. Rep. 361. See, also, *Sievers v. San Francisco*, 115 Cal. 648; 56 Am. St. Rep. 153, and note; *City Council v. Schrameck*, 96 Ga. 426; 51 Am. St. Rep. 146.

EMINENT DOMAIN—TAKING PROPERTY FOR PUBLIC USE—CONSTITUTIONAL PROVISIONS CONCERNING.—The provision in the constitution that private property shall not be taken or damaged for public use without just compensation is self-enforcing. Any party injured may resort to any common-law action which will afford him adequate and appropriate means of redress: *Hickman v. Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684. An actual physical taking of property is not necessary to entitle its owner to compensation. A man's property may be taken within the meaning of this constitutional provision although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it: Extended note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 610. Property is "damaged for public use," within the meaning of the constitutional provision when an abutting proprietor is damaged by the grade of a street being raised or lowered: *Sheehy v. Kansas City Ry. Co.*, 94 Mo. 574; 4 Am. St. Rep. 396, and extended note. See, also, extended note to *Fellowes v. New Haven*, 26 Am. Rep. 457-462.

ESTATES—REVERSIONER AND LIFE TENANT—RESPECTIVE RIGHTS OF, TO RECOVER DAMAGES FOR INJURIES TO THE PROPERTY.—Many of the acts resulting in injuries to the inheritance are also injuries to the tenant in possession. Where this is the case, each of the parties injured may maintain a separate action to recover compensation for the injuries suffered by him. The defendant is not thereby compelled to respond in damages twice for the same injuries, but simply to compensate each of the parties injured for the consequence of his tortious act: Extended note to *Allen v. De Groodt*, 14 Am. St. Rep. 630.

INSTRUCTIONS.—IN ORDER TO ENTITLE ONE TO HAVE THE JURY INSTRUCTED AS REQUESTED, the request must not only be correct in point of law, but also applicable to the evidence: *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; 55 Am. St. Rep. 620. Requests to charge should be given in the language in which they are presented, when they state the law correctly, and in such a clear, terse, and comprehensive manner as to be easily understood by the jury: *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870. But the court is not required to give instructions in the very terms asked, though proper: *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503.

APPEAL—PRESUMPTION IN FAVOR OF REGULARITY BELOW.—Where none of the testimony is incorporated in the "case," the supreme court cannot assume that instructions given to the jury were either inapplicable to the case made, or calculated to mislead the jury; on the contrary, it is bound to assume that they were applicable: *State v. Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799; *Heinrich v. St. Louis*, 125 Mo. 424; 46 Am. St. Rep. 490. As to the general presumption in favor of regularity in the trial court see *Adams v. Main*, 8 Ind. App. 266; 50 Am. St. Rep. 266; *Arneson v. Spawn*, 2 S. Dak. 269; 39 Am. St. Rep. 783; *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209; 80 Am. St. Rep. 50.

ROWE v. SHENANDOAH PULP COMPANY.

[42 WEST VIRGINIA, 551.]

COTENANTS—SURVIVORSHIP OF CAUSE OF ACTION.—Whenever a cause of action is joint, it survives to the remaining cotenants on the death of either of them, or, if all die, it vests in the personal representative of the last survivor.

COTENANTS—ABATEMENT OF ACTION ON THE DEATH OF ONE.—If, after the bringing of an action of trespass on the case by several cotenants to recover for injuries to their real property by backing water thereon, one of them dies, the survivors are entitled to recover the whole damages, and the action therefore does not abate as to the moiety of the decedent. An order of court subsequently entered directing that the suit proceed as to his moiety in the name of his administrator is therefore erroneous, and entitles the defendant to a reversal.

DAMAGES—MEASURE OF FOR INJURY TO REAL PROPERTY.—In an action to recover for injuries to real property resulting from the construction and maintenance of a dam backing water thereon, the measure of damages is the difference between the value of the property at the time the damages were inflicted and its value before such damage was done.

JURY TRIAL—MISCONDUCT OR PREJUDICE OF JURY.—If, after a jury has been sworn, it is shown that improper influences were brought to bear upon its members or some of them, or that any of them were guilty of improper conduct, which might have resulted prejudicially to the losing party, a presumption arises against the purity of the verdict, entitling him to a new trial, unless such presumption is met by testimony showing that the verdict was not due to such influence or conduct. The same presumption arises when it appears that one of the jurors had a feeling of prejudice against the losing litigant.

W. H. Travers and J. D. Butt, for the plaintiff in error.

Forrest W. Brown and Frank Beckwith, for the defendants in error.

551 ENGLISH, J. This was an action of trespass on the case brought by Charles O. Rowe, Nellie A. Batchelder, R. D. E. Rowe, 552 and James E. Rowe against the Shenandoah Pulp Company, a corporation, in the circuit court of Jefferson county. The plaintiffs, in their declaration, say that they were lawfully possessed in fee of a certain tract of land in Jefferson county, West Virginia, containing about one acre and two roods, and known as a part of Thorp's Island, by the Shenandoah river, situated between the Shenandoah river and the old government race or canal, which tract of land was improved by a dwelling-house, and was of great value, to wit, the value of one thousand dollars, and that the defendant, on the first day of October, 1889, wrongfully and unjustly erected, and caused to be erected, maintained, and kept, and still does maintain and keep, a high dam at its pulpmill a short distance below the plaintiffs' premises, across

its millrace, and dams back the water in so careless and negligent a manner that from the day and year last aforesaid to the commencement of this suit the water in said race flows over and covers entirely the said land and premises of the plaintiffs, and permanently covers and occupies the same, etc., by reason of which, etc., they are damaged to the amount of one thousand dollars. The defendant demurred to the declaration, and, nothing being alleged by the demurrant in support of the demurrer, the same was overruled, whereupon the defendant pleaded not guilty, and issue was therein joined. On the twenty-fourth day of February, 1894, the death of the plaintiff Charles O. Rowe was suggested, and, his estate having been committed to the sheriff of said county, the suit was directed to proceed in the name of J. G. Hurst, administrator of said Charles O. Rowe, and the suit was continued until the next term. On the first day of December, 1894, it was ordered that, the suit having been revived on account of the death of one of the plaintiffs, it proceed separately; and thereupon the defendant pleaded not guilty in the last-named suit, and issue was joined thereon. On the first day of December, in the case of R. D. E. Rowe and others, Plaintiffs v. The Shenandoah Pulp Company, the cause was submitted to a jury, who heard the evidence, and were adjourned until the third day of December, 1894, when the case was argued and submitted, resulting in a verdict for the plaintiffs for six hundred ⁵⁵³ dollars, whereupon the defendant, by its attorney, moved the court in arrest of judgment and for a new trial, which motion on a subsequent day was considered by the court and overruled, and judgment rendered upon said verdict, to which judgment the defendant, by its counsel, excepted and took several bills of exceptions. Bill of exception No. 1 sets forth instructions Nos. 1 and 2 which were asked for by the defendant and were rejected by the court, which instructions read as follows: Defendant's instruction No. 1: "The court instructs the jury that, under the pleadings in this case, the plaintiffs are entitled only to such damages to the property in question as were inflicted upon it by the defendant between the 1st day of October, 1888, and ——— October, 1892, the commencement of this suit. (The above instruction rejected by the court)." Defendant's instruction No. 2: "The court instructs the jury that they will find, in assessing damages, if they believe from the evidence any were inflicted upon the property in question by the defendant, only such difference in the value of the said property at the time the said damages were inflicted and the value of the said property before the said

damage was so done. (Rejected by the court).” Another bill of exceptions was taken, setting forth the evidence, and the defendant applied for and obtained this writ of error.

The first error assigned and relied on by the defendant is claimed to be that the case should have abated, as to Charles O. Rowe, when his death was suggested, and should have proceeded in the name of the survivors only, and that, instead of this, two suits have been created and are still pending, one in the name of R. D. E. Rowe and others, and the other in the name of J. G. Hurst, sheriff, committee and administrator of Charles O. Rowe, deceased. Is this assignment of error well taken? Our statute (Code, c. 127, sec. 2) provides, in speaking of the death of a party, that: “Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive ⁵⁵⁴ at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.” Hogg, in his valuable work on Pleading and Forms, on page 30, section 43, states the law thus: “Where there are two or more persons who should join in an action ex delicto (subject to the rule, however, stated in *Clarkson v. Booth*, 17 Gratt. 501) and one should die pending the suit, the action abates as to him.” The case of *Clarkson v. Booth*, 17 Gratt. 501, was an action of detinue for some slaves. The slaves belonging to some children of B., and, one of the children having died, the personal representatives and surviving children were held to be tenants in common of the slaves, and must join in the action, and, the personal representative dying after action brought, it abates as to him, and cannot be revived in the name of another personal representative, but must proceed in the name of the survivors in the action. Moncure, P., in delivering the opinion of the court, on page 501, says: “The court is further of opinion that the plaintiff Robert C. Jones, executor of Francis Porter, having died pending the action, it was properly abated as to him, and further proceeded with in the name of the other plaintiff.” So, in the case of *Henning v. Farnsworth*, 41 W. Va. 348. Brannon, Judge, delivering the opinion of the court, says: “At common law, when a sole plaintiff or defendant died, the action abated, if before verdict, and the plaintiff, if the defendant died, or the plaintiff’s representative, if it was the plaintiff that

ied, must bring a new suit. So in the case where there were two or more plaintiffs or defendants: Archbold's Criminal Pleading, 1203; 2 Tidd's Practice, 1170. To remedy this, Statute 8 c. 9 William III, chapter 11, was passed, saying that if one of two or more plaintiffs or defendants died, and the cause of action survive to or against the survivor, the action shall not abate, but go on for or against the surviving party. This statute was enacted here and is found in section 2, chapter 127 of the code of West Virginia. This act was not designed to say what liabilities would or would not follow the estate of the dead party, as it has no relation to the rule that a personal action dies with the person." The ⁵⁵⁵ language of our statute (Code, c. 127, sec. 2) is as follows: "Where such fact [meaning the death of a party] occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

Now, when the death of Charles O. Rowe, one of the plaintiffs, occurred and was suggested, did the cause of suit survive to the other three plaintiffs, to wit, Nellie A. Batchelder, R. D. E. Rowe, and James E. Rowe? Upon this question, Freeman on Cotenancy and Partition, section 364, under the head of "Death of Cotenant Pendente Lite," says: "In the two preceding sections we have considered the effect of the death of one cotenant after the accruing of a joint cause of action, and before the commencement of a suit thereon, and have found the rule to be universal that all joint causes of action survive to the last survivor, irrespective of the nature of the cotenancy, and further, that when the cause of action survives after the decease of all the cotenants, it vests in the personal representative of the last survivor. We shall now consider the effect of the death of one of the cotenants pendente lite, for the purpose of ascertaining whether such death operates as an abatement of the suit. The general rule upon this subject is thus stated by Mr. Jickling: 'If the whole interest of a party dying survive to the other party, so that no claim can be made by or against the representatives of the party so dying, the proceedings do not abate. Survivorship is a characteristic of joint tenancy, and hence, on the death of a joint tenant party to a suit, either as plaintiff or defendant, the suit does not abate.'

It is therefore certain that, if the plaintiffs are joint tenants, the death of one does not occasion an abatement of the action." In section 362 the author says: "When the cause of action is joint, it survives to the remaining cotenants on the death of either of them. This is true in every ⁵⁵⁶ form of cotenancy. 'It is to be observed that where damages are to be recovered for a wrong done to tenants in common, or parceners in a personal action, and one of them die, the survivor of them shall have the action; for, albeit the property or estate be several between, yet, as it appeareth here by Littleton, the personal action is joint': Citing Coke on Littleton, 198 a; 3 Robinson's Practice, 164, where it is said: "But if one of two or more mortgagees or other tenants in common shall die after there is possession adverse to them, and consequently after their cause of action accrues, then the right of action for this cause survives to the surviving mortgagees or tenants in common": Citing Townsend v. Morris, 6 Cow. 123, where it is held that "the damages for an eviction of two tenants in common to whom lands are granted with warranty are personal and an action will lie for them by the survivor." Also citing Nichols v. Campbell, 10 Gratt. 560, where it was held: "Two trustees having brought an action of detinue to recover the trust property, and one of them dying, the right of action survives to the other, and he may carry on the suit." Robinson further says: "This is according to Lord Coke; for he observes that where damages are to be recovered for a wrong done to tenants in common, or parceners in a personal action, and one of them dies, the survivor of them shall have the action": Coke on Littleton, 198 a. Again, in the case of Tyler v. Mather, 9 Gray, 177, it was held that "on the death of some of the complainants pending a complaint on Revised Statutes, chapter 116, for flowing land, the survivors alone may prosecute the suit, though some of the deceased complainants were tenants in common with some of the survivors." Again, in the case of Watrous v. McGrew, 16 Tex. 506, it was held that: "Where one of several tenants in common, who are coplaintiffs in an action of trespass to try title against a stranger, dies, it is not necessary to make the heirs or representatives of the deceased parties to the action. The right of action of the survivors is not affected by the death of their coplaintiff." And, in the case of Shale v. Schantz, 35 Hun, 622, it was held: "An action brought by the members of a firm to recover damages for an alleged slander relating to the financial condition and the credit of the firm does not abate by the death of one of ⁵⁵⁷ the plaintiffs during its pendency. The entire cause of action vests

in the surviving plaintiffs, and the action may be prosecuted by them."

From these authorities my conclusion is, that the cause of action in the case under consideration and the entire cause of action survived to R. D. E. Rowe, Nellie A. Batchelder, and James E. Rowe, plaintiffs, and that they had the right to prosecute the suit for the entire damages sustained, and not for any aliquot part thereof; but as the jury were instructed at the instance of the defendant that they should assess only three-fourths of said damages in favor of the plaintiffs, this is an error of which the defendant cannot complain, although, in my opinion, it would have been the duty of the jury to have found the entire damages to which the original plaintiffs were entitled, and then the plaintiffs could have settled with the estate of the deceased plaintiff.

Did the trial court err in its order of the twenty-fourth day of February, 1894, wherein it states that the death of Charles O. Rowe is suggested, and his estate has been committed to the sheriff, and directs that the suit proceed in the name of J. G. Hurst, committee and administrator of said Charles O. Rowe, and in the order of December 1, 1894, wherein it was ordered that said suit in the name of the administrator of Charles O. Rowe do proceed separately from the suit in the name of the surviving plaintiffs? And, if error, is it such as the defendant could complain of? I regard it as plainly error, for the reason that under the law, as we have seen, the suit should have abated as to Charles O. Rowe, and should have proceeded in the name of the surviving plaintiffs; and I consider it error of which the defendant could complain, for this reason: It entails upon the defendant the defense of a suit which is unauthorized by law, as the action should have abated as to said Charles O. Rowe. And this error is more apparent from the fact that, if another one or two of the plaintiffs had died pending the suit, the defendant would have been required to defend two or three suits for the same cause of action.

Did the court err in rejecting instruction No. 2 asked for by the defendant in regard to the measure of damages, in which the court was asked to instruct the jury that, if ⁵⁵⁸ they should find from the evidence that any damages were inflicted upon the property in question by the defendant, they should find for only such difference in the value of said property at the time the said damages were inflicted and the value of said property before the said damage was so done? Upon this question this court laid down the rule in the case of *Stewart v. Ohio River R. R. Co.*, 38 W. Va. 438, as follows: "The measure of the damages is such a sum as

will make the owner whole; that is, the depreciation of the market value of the abutting property caused by the railroad company laying their track and running their trains in the street. In such case, if the fair market value of the abutting property is as much immediately after the construction of the railroad as it was immediately before such improvement was made, no damages are sustained for which a recovery can be had." This instruction No. 2 was in accordance with the rulings of this court upon the measure of damages upon a case such as is presented by this record, and should have been given to the jury, to aid them in coming to a proper conclusion. It is claimed that the court erred in overruling the motion to set aside the verdict as contrary to the weight of evidence, and contrary to the law and the facts, but by reason of the fact that the above instruction was improperly excluded from the jury, which would have properly presented the law as to the manner of determining the amount of damages, we are relieved from going into an analysis of the testimony.

It is further claimed as error that the court refused to set aside the verdict on account of the misconduct of the juror Jacob Kephart. Now, the fact cannot be disguised that this juror, in speaking to the two witnesses, and using the expression, "The pulpmill ought to be sunk," meant and intended the pulpmill that was defendant in this action, and it manifested a feeling and prejudice that a juryman ought not to entertain who is about to try a cause. The county of Jefferson is large, and we must presume that many qualified men free from prejudice could have been obtained to try this cause, and we think the courts cannot be too careful in guarding the purity of verdicts and securing juries free from prejudice. In the case of *Flesher v. Hale*, 22 W. Va. 44 (second point of syllabus), it was held that: "If, after the jury has been sworn, facts are established which show that improper influences were brought to bear upon it, or that its members, or any of them, were guilty of improper conduct, such as might have resulted prejudicially to the losing party, a presumption arises against the purity of the verdict, and, unless there is testimony which shows the verdict was not affected by such influences or conduct, it will be set aside; and the burden of producing such testimony is upon the party claiming the right to keep the verdict." Now, it is true that Jacob M. Kephart, the juryman who was accused by the affidavit of two witnesses of using the above expression in regard to the defendant in this case, states in his affidavit that he was not acquainted with the plaintiffs or defendant, and was not aware of any prejudice or bias in said suit which would prevent him

from giving an impartial verdict in said case, and that in rendering the verdict he acted according to the law and the evidence; that he knew Shrewbridge and Dittenger, who made affidavits to what was said by him, but had no conversation with either of them on the subject of the suit during the progress of the trial, or at any other time. This jurymen seems to have been selected as foreman, and to have signed the verdict, and two witnesses swear that he used the expression that "the pulpmill ought to be sunk"; and it is fair to presume that, if this indication of feeling and prejudice toward the defendant had been brought to the attention of the learned judge who presided at the trial of this case, said jurymen would never have been allowed to return a verdict in this case.

The judgment complained of must be reversed, the verdict set aside, and a new trial awarded, with costs to the appellant.

BRANNON, J., dissenting. I dissent from the opinion by Judge English reversing the judgment because of the refusal to abate the attachment. I am clearly of the opinion that the court ought to have abated the action as to the dead coplaintiff, and have ⁵⁶⁰ ordered the case to proceed in the name of the survivors, as two suits could not be made out of one, especially as the whole cause of action remained with the survivors, leaving nothing in the administrator of the dead man on which to prosecute the suit. Code chapter 127, section 2, does save the action from death under the common law, but only in favor of the survivors. But the court has not yet tried that branch of the suit standing in the name of the administrator. If that be tried, and judgment given for plaintiffs, a writ of error would remedy the error of persisting in that branch of the suit. That bridge cannot be crossed until it shall be reached. The court tried the action as to the surviving plaintiffs just as it ought to have done if a proper order of abatement had been entered. Then how can you reverse a judgment for that cause in that branch of the suit, so to call it, but really the suit proper? The defendant is not injured in this present trial by the refusal to abate as to the dead man. If even there had been recovery of the whole—not merely three-fourths—of the damages, that would have been no ground of complaint. The only error in this case is the limiting to the recovering of three-fourths, but that is an error in favor of the defendant. I agree to reverse for the refusal of instruction No. 2. I see no error in refusing No. 1. The action was for permanent injury: *Watts v. Norfolk etc. Ry. Co.*, 39 W. Va. 196; 45 Am. St. Rep. 894.

COTENANCY—SURVIVORSHIP OF CAUSE OF ACTION.—At common law in all actions where there were two or more plaintiffs, the death of one of them, pending the action, was an abatement of it: *Hanson v. Barnes*, 3 Gill. & J. 359; 22 Am. Dec. 322. But since statute 8 & 9 William III, chapter 11, section 7, it is certain that if plaintiffs are joint tenants the death of one does not occasion an abatement of the action: *Freeman on Cotenancy and Partition*, 2d ed., sec. 364. Upon the death of one of the parties entitled to a joint action, the whole right of action not only accrues to the survivor during his lifetime, but, if not prosecuted to judgment by him, vests, at his death, in his executor or administrator: *Freeman on Cotenancy and Partition*, 2d ed., sec. 363.

DAMAGES—INJURY TO REAL PROPERTY—MEASURE OF.—The measure of damages recoverable for the destruction of shade trees on the plaintiff's premises is the difference between the value of such premises before and after such destruction: *Evans v. Keystone Gas Co.*, 148 N. Y. 112; 51 Am. St. Rep. 681. If land is wrongfully overflowed, and the owner thereby deprived of its use, the true measure of damages is its fair rental value, and not the contingent profits of crops which might have been raised on it had it not been overflowed: *Chicago v. Huenerbein*, 85 Ill. 594; 28 Am. Rep. 626. When an owner of property is in actual possession and use of it, he is entitled to recover all damages flowing directly from the tort complained of, whether the injury is permanent or temporary: *Seely v. Alden*, 61 Pa. St. 302; 100 Am. Dec. 642.

NEW TRIAL—MISCONDUCT OF JURORS AS GROUND FOR.—Misconduct of a juror not occasioned by the prevailing party, not indicative of improper bias, and which, in the judgment of the court, could not have had an unfavorable effect, is not a sufficient ground for a new trial: *Pettibone v. Phelps*, 13 Conn. 445; 35 Am. Dec. 88; *Dent v. King*, 1 Ga. 200; 44 Am. Dec. 638. See monographic note to *Hilton v. Southwick*, 35 Am. Dec. 254-260. The acceptance of drink by a juror, furnished at the expense of the prevailing party, or his attorney, will turn the scale against the verdict, unless it is shown that it was not intended to influence his action, and had no influence on his mind: *Bradshaw v. Degenhart*, 15 Mont. 267; 48 Am. St. Rep. 677. See, also, *State v. Broussard*, 41 La. Ann. 81; 17 Am. St. Rep. 396; *Wright v. Abbott*, 160 Mass. 395; 39 Am. St. Rep. 499.

CUNNINGHAM v. BUCKY.

[42 WEST VIRGINIA, 671.]

APPELLATE PROCEDURE—ERRORS, WHEN MAY BE DISREGARDED.—Though the instructions given to the jury were erroneous, the judgment will not be reversed if the conclusion reached by the verdict was sustained by the decided or plain preponderance of the testimony.

AN INNKEEPER IS ANSWERABLE TO HIS GUESTS for the theft of the latter's money committed by the former's employé.

INNKEEPERS—NEGLIGENCE OF GUESTS.—The fact that the guest was drinking and was careless of his money, exhibiting it freely and refusing to give it into the care of the innkeeper's wife does not establish such negligence on the part of the guest as to relieve the innkeeper from liability for the loss of such money through the theft of one of his employés.

C. H. Scott and L. D. Strader, for the plaintiff in error.

E. D. Talbott, for the defendant in error.

671 DENT, J. W. A. Cunningham obtained a judgment for two hundred and fifty-four dollars and forty cents on the eighteenth day of May, 1895, in the circuit court of Randolph county against Alpheus Bucky, who obtained a writ of error therefrom to this court.

The errors assigned are for the refusal of the court to give certain instructions for the defendant, and the giving of certain instructions for the plaintiff, and the overruling of the motion for a new trial.

The cause of the action is the loss of two hundred and forty 672 dollars on the part of plaintiff, by theft, while stopping at defendant's hotel, in the town of Beverly, Randolph county. The evidence is all certified. Hence it becomes the duty of the court, in accordance with its former rulings, to first determine whether the verdict of the jury is sustained by a plain preponderance thereof, and, if so, to disregard all errors of law, if any were committed, which do not in a material degree tend to produce the result reached: *Bank v. Napier*, 41 W. Va. 481; for, if the court finds, on an examination of the evidence, that the conclusion reached is sustained by a decided or plain preponderance thereof, and is in accordance with law, although errors may have been committed in the giving of instructions or otherwise, the judgment will not be reversed. A reversal in such case would be abortive and injurious to both parties, as prolonging useless litigation. A result having been reached plainly in accord with the evidence and the law cannot be overthrown by the rulings of the court, however erroneous, for such errors would not be to the prejudice of the party complaining: *Plate v. Durst*, 42 W. Va. 63.

The circumstances of the case are as follows, to-wit: Plaintiff went to the defendant's hotel, called the "Valley Hotel," to stop for a few days at the most. His home was in Virginia. He had an arrangement with defendant to board the mail carrier at reduced rates, and, when stopping there, was accorded these rates himself. On this occasion, he had received payment of a draft; was drinking, and slightly intoxicated; exhibited his money freely; was arrested, fined, and paid the same. Mrs. Bucky, during the day, asked him to let her take charge of his money. This he declined to do, saying he was able to take care of his own money. At night he was assigned to a room which had two out-

side doors, both of which were locked and bolted. Another door opened in another small room, which communicated with the office through another door. There was no way of fastening the door between the rooms on plaintiff's side, but the door of the outer room, which communicated with the office, had a lock on, with a key in it. The son of the proprietor says he gave the key of this ⁶⁷³ door to plaintiff, but plaintiff says that he simply told him that the door between the rooms could not be fastened, but that he would see that the office door was properly fastened, and relying on this statement, he (plaintiff) paid no more attention to the matter. He examined his pocketbook, to see that his money was in it, and then placed it down in his coat pocket, and hung his coat on the bedpost, and retired for the night. On awakening in the morning, he noticed the pocketbook had been disturbed, and, on examining it, found his money gone. He got up, went out, found the colored porter, and acquainted Mr. Bucky with his loss. The money could not be found, and has never been restored, and amounted to two hundred and forty dollars.

W. H. Franklin, a colored servant, employed about the hotel, testified, in substance, as follows, to wit: That he got up as usual, the morning of the theft, about daylight, and was busy about his customary duties sweeping out the office and hall, when Mrs. Bucky, wife of the defendant, came into the office where he was sweeping, and told him to stop a while, and stand still, and then she went in through the doors into Mr. Cunningham's room, and in a short time returned, with a pocketbook in her hand, and went around behind the counter, and says, "Now, Franklin, never say anything about what you see me do." She then opened the pocketbook, and took several bills out of it, and then handed the pocketbook to him, and told him to take it back, and put it in Mr. Cunningham's coat pocket. He slipped in, and did as she told him. Mr. Cunningham was asleep. She then called him around to a side door, and told him not to say anything about what he saw her do, and gave him two five dollar notes, a two dollar note, and a one dollar note. That afterward he went on with his sweeping, until Mr. Cunningham came out and told him to call Mr. Bucky. After a few days, hearing that he was going to be arrested, he left, and went to Barbour county, where he was arrested, and brought back, and lodged in jail. As to this witness' implication in this theft there is no contradiction. That he knows how and when and by whom the money was stolen is plainly evident. That he was in Mr. Cunningham's room, and

had Mr. Cunningham's ⁶⁷⁴ pocketbook in his hands, cannot be denied. The only evidence against Mrs. Bucky is the very peculiar statements of a self-confessed accomplice, who is uncorroborated, but contradicted by Mr. and Mrs. Bucky, and by his own preposterous story, for it is beyond belief that Mrs. Bucky would make up her mind to rob the plaintiff in the manner narrated, and take a colored man into her confidence, with whom she had only been acquainted five weeks. When she defended his good name, she was warming a snake in her bosom. But its bite, on account of its fangless condition, was not poisonous. But Mr. Bucky can hardly escape so well. It is plainly evident who committed this theft; and the sole question is, On whom does the law fix the loss? We have no statute on the subject, and must be governed by the common law.

By the common law of England, an innkeeper is responsible for the loss of the goods or money of a traveler, who is his guest, whenever the loss is not occasioned by the fault of the traveler himself, the act of God, or the queen's enemies: Saunders on Negligence, 212. "An innkeeper, like a common carrier, is an insurer of the goods of his guests, and he can only limit his liability by express agreement or notice": 2 Kent's Commentaries, 594. "The common law, as is well known, upon grounds of public policy, for the protection of travelers, imposes an extraordinary liability upon an innkeeper for the goods of his guest, though they have been lost without his fault": 11 Am. & Eng. Ency. of Law. "If an innkeeper fails to provide honest servants and honest inmates, according to the confidence reposed in him by the public his negligence in that respect is highly culpable, and he ought to answer civilly for their acts, even if they should rob the guests who sleep in his chambers": Jones on Bailments, 94-96. "Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within or unexplained, whether committed by guests, servants, or strangers." "The general principle seems to be that the innkeeper guarantees the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guaranty": Cutler v. Bonney, 30 Mich. 259; 18 Am. Rep. 127. "Proof of the loss by the guest ⁶⁷⁵ while at the inn is presumptive evidence of negligence on the part of the innkeeper or of his domestics. It is the duty of the innkeeper to provide honest servants, and keep honest inmates, and to exercise exact care and vigilance over all persons who may come into his house, whether as guests or otherwise. By the common law,

he is responsible, not only for the acts of his servants and domestics, but also for the acts of other guests": *Jalie v. Cardinal*, 35 Wis. 118. "Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or week, deprives a person of his character as a traveler and guest if he retains his status as a traveler in other respects": *Jalie v. Cardinal*, 35 Wis. 118.

There is no question that the plaintiff was a guest at the defendant's hotel, and that while there he was robbed in his room while asleep, from within the defendant's family including his servants. That he had been drinking, was careless with his money and trusted in the honesty of defendant's household, and refused the services of Mrs. Bucky as to the care of his money, will not excuse the defendant from the dishonesty of those admitted to his employment. It was his duty to surround himself with honest servants, for the protection of the public; and he cannot excuse himself from liability by showing that the servant was a stranger, and hired on recommendation as to good character. He should have exercised care and vigilance over wandering servants admitted to his house, and see that they did not have the opportunity to steal from his guests. As Judge Dixon says in *Jalie v. Cardinal*, 35 Wis. 118: "If drunk, the plaintiff might still be claimed the protection of his host, as did Falstaff when he was asleep 'behind the arras,' and might say with him: 'Shall I take mine ease in mine inn, but I shall have my pocket picked?'" The plaintiff was taking his ease in his inn under the protecting aegis of his host when he had his pocket picked, evidently by a member of the defendant's household, for whose good conduct he was guarantor, and for whose malfeasance he was liable to his guests. Such being the plain conclusion of the law, any error that the circuit court may have committed in the giving or refusing instructions was not prejudicial to the defendant, and it becomes unnecessary to consider them.

From an examination of the instructions, it is apparent that the defendant received greater consideration therein than the law justifies. For instance, the court gave the following instruction in his behalf: "Instruction No. 1. The court instructs the jury that, although they may believe that the plaintiff was robbed in the hotel of the defendant while he was abiding therein as a guest, still, if the jury further believe that the negligence of the plaintiff in displaying his pocketbook or money contributed to the robbery in a material way, then the jury shall find for the defendant, unless they further believe from the evidence that the vil

of the defendant stole the said money." An innkeeper is not only responsible for the misconduct of his wife, but also of all those connected with the hotel service; and no display of a guest's money will relieve the landlord from the dishonesty of his servant in stealing it, for, as heretofore shown, he is a guarantor of his honesty.

The right of the plaintiff to release part of the verdict is settled in the case of *Ohio River R. R. Co. v. Blake*, 38 W. Va. 718.

For want of prejudicial error, the judgment is affirmed.

APPEAL—ERRONEOUS INSTRUCTIONS AS GROUND FOR REVERSAL.—An instruction stating the law too strongly as against the defendant does not entitle him to a reversal, if under no proper instructions judgment could have been given in his favor: *Lake v. Hancock*, 38 Fla. 53; 56 Am. St. Rep. 159. If the result reached by the trial is correct, errors in giving or denying instructions must be treated as harmless on appeal: *Fox v. Windes*, 127 Mo. 502; 48 Am. St. Rep. 648; *Brandon v. Carter*, 119 Mo. 572; 41 Am. St. Rep. 673.

INNKEEPERS—LIABILITY FOR THEFT OF GUEST'S PROPERTY.—An innkeeper is bound to pay for goods stolen in his house from a guest, unless stolen by the servant or companion of the guest; and, however vigilant the landlord may have been, he is responsible to the party losing the property: *Shultz v. Wall*, 134 Pa. St. 262; 19 Am. St. Rep. 686, and note. See, also, *Bowell v. De Wald*, 2 Ind. App. 303; 50 Am. St. Rep. 240. If a regular boarder who has lived in a hotel for several months, deposits money in the hotel safe, the proprietor, who has used ordinary care and diligence in the selection and employment of his hotel clerk, is not liable for the theft of such money by the latter: *Taylor v. Downey*, 104 Mich. 532; 53 Am. St. Rep. 472.

INNKEEPERS—LIABILITY—NEGLIGENCE OF GUEST.—The failure of a guest to inform an innkeeper, or his servant, that his baggage contains valuables, for the loss of which he seeks to recover, is not negligence on his part: *Bowell v. De Wald*, 2 Ind. App. 303; 50 Am. St. Rep. 240; *Fay v. Pacific Imp. Co.*, 93 Cal. 253; 27 Am. St. Rep. 198, and note. It is not negligence in law for a guest at a hotel to retain four hundred and ninety-five dollars in his belt while sleeping in a room by himself, although the bolt of the door to his room could be opened by a wire from the outside: *Smith v. Wilson*, 36 Minn. 834; 1 Am. St. Rep. 669; *Spring v. Hager*, 145 Mass. 186; 1 Am. St. Rep. 451.

MANSFIELD v. DAMERON.

[42 WEST VIRGINIA, 791.]

VENDOR'S LIEN—NOTE FOR PURCHASE MONEY.—The taking of a note of a third person for the purchase price of real property where the vendor does not convey the legal title, but stipulates that he will convey it when payment is made or secured, is not equivalent to payment, and cannot deprive him of his right to enforce a vendor's lien on the land for the payment of such price.

PAYMENT—WHEN NOT PRESUMED FROM THE TAKING OF A NOTE OF A THIRD PERSON.—If the seller of real property takes the note of a third person for the amount of the purchase price, but retains the legal title, such note will not be presumed to have been accepted as payment, and will not deprive the vendor of the right to hold the land as security for the payment of the note.

Simms & Enslow and Herbert Fitzpatrick, for the appellant.
Campbell & Holt, for the appellee.

⁷⁹⁴ BRANNON, J. Mansfield sold Dameron an interest in real estate in Wayne county, the contract stating the consideration as five hundred dollars, and then saying, "And the said Mansfield ⁷⁹⁵ agrees to take the note of said Dameron, with interest and security, due in , for said five hundred dollars, or the note of S. S. Vinson; and the said Mansfield further agrees that when said payment is made or secured he will make a general warranty deed," etc. No deed was made. Dameron did not give his note, but Vinson gave his note to Mansfield for said purchase money, payable in one year, and Vinson became insolvent, and Mansfield brought a suit to sell the land for the purchase money, and obtained a decree subjecting it to sale, and Dameron appeals.

The single question is: Was the Vinson note, in and of itself, payment of the purchase money, entitling Dameron at once, upon its execution, to a clear deed for the property sold? It is a clear principle of justice and of courts of equity that a vendor of real estate retaining title shall never be required to surrender it without payment, unless he clearly agrees otherwise. Does this contract show that Mansfield agreed otherwise? That depends on its construction. But it is important, before deciding on its construction, to look at some law showing how averse the courts are to compelling a man to yield his property to a purchaser until he gets his pay for it, as it will guide us in construing this contract. *Dunlap v. Shanklin*, 10 W. Va. 662, held that giving a receipt for notes on a third person, specifying that it is for purchase money, will not, while the title remains in the vendor, be an

extinguishment of the lien. In *Knisely v. Williams*, 3 Gratt. 265, 46 Am. Dec. 193, a vendor retained title and took a bond for purchase money, and later accepted an order on a third person, and gave up the bond, and it was held the lien remained valid. In *Yancey v. Mauck*, 15 Gratt. 300, land was sold to be conveyed when the first payment was due, and before that an arrangement was made by which the purchaser gave his bond with the vendor as surety to a third person for a debt due from the vendor, and the purchase money bonds were surrendered. The purchaser became insolvent, and did not pay the bond to the third party. The seller, not having parted with the legal title, was allowed to subject the land to the purchase money, as his lien had not been waived. Judge Allen said the arrangement did not change the character of the debt; it was ⁷⁹⁶ still purchase money. Under the old law giving an implied lien for purchase money on conveyance of the legal title, as under the present law, where a lien is reserved, it is a difficult matter to show a waiver of a lien; it must be clear. But it is more so where the title is reserved: 1. Because the very retention of title plainly manifests an intent to still hold the land liable; and 2. A court of equity is so unwilling to make a man give up his land for nothing. The force of this fact—the retention of the legal title—will be found often emphasized as of controlling influence: See *Coles v. Withers*, 33 Gratt. 186, 193; *Lewis v. Caperton*, 8 Gratt. 148; *Hess v. Dille*, 23 W. Va. 90; *Warren v. Branch*, 15 W. Va. 38; Judge Allen's opinion in *Yancey v. Mauck*, 15 Gratt. 300; *Barton's Chancery Practice*, 936; 1 *Lomax's Digest*, 2d ed., 266. Where the vendor has a lien and a bond, he has two securities, as in this case, and could resort to either; the lien being a security, not for the note, but for the very debt: *Coles v. Withers*, 33 Gratt. 195. So long as that debt exists, the courts will not presume that the chief security has been surrendered, unless upon the clearest and most convincing testimony: 1 *Hilliard on Mortgages*, 448-453. Same in *Yancey v. Mauck*, 15 Gratt. 310. Even where personalty is sold, and a note given, which passes title, and gives purchaser right to possession, if not paid, and the chattel happens to be yet in seller's hands, he may retain it until paid: 2 *Daniel on Negotiable Instruments*, sec. 1280. Now, take the contract. It specifies, first, a price to be paid, and then says Mansfield for it agreed to take either the note of Dameron or Vinson, and next says that time shall be given for their payment, and then says that Dameron should make a deed. When? It answers, "When said payment is made or secured." Payment means the discharge of a

debt in money, *prima facie*. The clause did not mean that the note was payment. "When said payment is made," meaning the five hundred dollars before mentioned as the price. Surely, it would mean that as readily as it would import the mere execution of a note; and, if so, why say it meant merely the note, not payment of the five hundred dollars in money? But I say it means the five hundred dollars not merely or probably as the note, but rather than the note. It cannot be supposed that Mansfield meant to give up his land on mere personal security, especially as he still kept title. "When payment is made or secured," that is, when payment is secured. The word "secured" strikes me as helping this construction. It does not refer to security in Dameron's note, if he should give one. It would be unnecessary, if that be its meaning, as former language provided for that security. It imports that actual payment must either be made or secured before a deed was demandable. The contract in *Dunlap v. Shanklin*, 10 W. Va. 662, sold realty, saying that the price was "to be paid in bonds," describing them; and later the vendor gave a receipt for them "as a payment for purchase money of Red Sulphur Springs." The mere contract was plainer to discharge the lien than this one, because of the words that the purchase money was "to be paid in bonds"; but the lien was held still existing.

Counsel for appellant, admitting that the mere taking of a new note is not payment of an antecedent debt, ingeniously draws the distinction that such rule does not apply here, because there is no antecedent debt, but it is a contemporaneous debt; and quotes 2 Daniel on Negotiable Instruments, sec. 1264, saying that where a debtor transfers the note of a third party for a contemporaneous debt there is strong reason for saying it is an exchange of that note for the thing sold the debtor, the debtor parting with his note, the other party with his goods. They cite 18 American and English Encyclopedia of Law, 182, for the proposition that, "where a note of a third person is taken in payment for goods sold at the time, and not for a precedent debt, it is taken at the risk of the vendor." That applies to goods in terms, not land. Where chattels are sold, there is no lien; the legal title passes. But in sales of realty there is an equitable and there is a legal title. That doctrine does not apply to sales or realty by executory contract. To so apply it would overrule decision after decision: *Dunlap v. Shanklin*, 10 W. Va. 662, and others. Besides, in sales of personalty on credit there is only one security; in realty, two—the personal security and the lien besides. It can-

not be said it is a hardship on Dameron. So it would be on Mansfield. The right of one to be exempt from loss is as strong as that of the other. But, construing the contract as we do, Dameron assumed that risk.

Affirmed.

VENDOR AND PURCHASER—PAYMENT—NOTE OF THIRD PERSON AS.—Whether or not the taking of the note of a third person from a debtor without the latter's indorsement is conclusive evidence of payment depends upon the intent of the parties, and if it appears that at the time such note was taken it was not the intent of the parties that it should be received as an absolute payment, then upon nonpayment of the note, the original indebtedness can be enforced: *Duggan v. Pacific Boom Co.*, 6 Wash. 593; 36 Am. St. Rep. 182. When the note of a third person is received by a creditor, the burden of proving that it was accepted in payment of a debt is upon the debtor: *Shepherd v. Busch*, 154 Pa. St. 149; 35 Am. St. Rep. 815, and note. In general, the acceptance of a note for the amount of a debt is not a payment thereof unless the parties expressly so agree: *Johnston v. Barrilla*, 27 Or. 251; 50 Am. St. Rep. 717, and note.

STATE v. MYERS.

[42 WEST VIRGINIA, 822.]

CONSTITUTIONAL LAW—OLEOMARGARINE.—A statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink is constitutional, though applicable to that manufactured without, as well as within, the state. Such a statute has for its object the prevention of fraud on the public, and is therefore within the police power of the state.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—OLEOMARGARINE IN ORIGINAL PACKAGES.—The fact that oleomargarine is imported into one state from another in original packages does not exempt it from the operation of a statute prohibiting its sale in the latter state unless colored pink as by such statute required.

W. W. Arnett, for the plaintiff in error.

T. S. Riley, attorney general, and White & Allen, for the defendant in error.

⁸²³ **ENGLISH, J.** On the fifth day of September, 1891, Elgie Myers was arrested on the warrant of a justice of the peace of Ohio county charging him with being a vendor of oleomargarine, artificial or adulterated butter, and that he did, on the fifth day of September, 1891, in said county, offer for sale within the limits of this state oleomargarine, artificial or adulterated butter, without the same being colored pink. On the seventh day of October, 1891, a judgment was rendered by said justice assessing

a fine of twenty dollars against said Myers, and taxing the costs against him at twelve dollars and seventy cents.

From this judgment an appeal was taken to the circuit court of said county, which appeal was heard on the 21st of January, 1893, by the court in lieu of a jury, and the defendant, Elgie Myers, was found guilty as in said warrant was charged, and the judgment of said justice was affirmed, and judgment rendered for the sum of twenty dollars assessed as aforesaid, and for the costs of the appeal in the circuit court as well as for the costs that accrued before the justice. On the twenty-first day of January, 1893, the defendant moved the court to set aside its finding and the judgment rendered therein, and grant him a new trial, which motion was overruled by the court, and the defendant excepted.

The facts agreed were: "That the defendant was a vendor of oleomargarine, and that about September, 1892, received from Chicago, Illinois, certain packages containing oleomargarine; that he broke these packages, offered for sale and sold in small quantities in the markets of the city of Wheeling, Ohio county, West Virginia, the oleomargarine therein contained; and that no portion thereof was colored pink."

It is claimed on the part of plaintiff in error that the court erred in finding him guilty, and rendering judgment against him, upon the facts agreed, because the legislature exceeded its constitutional power in enacting the statute which requires that oleomargarine shall not be sold, etc., until or unless the said oleomargarine should have been colored pink; and that said statute is unconstitutional, null, and void, because ⁸²⁴ the legislature has no police or other power to enact said statute. Sections 1, 2, and 3 of chapter 8 of the acts of 1891, the constitutionality of which are brought in question, read as follows:

"Section 1. That from and after the passage of this act, it shall be unlawful for any manufacturer or vendor of oleomargarine, artificial or adulterated butter, to manufacture or offer for sale within the limits of this state any oleomargarine, artificial or adulterated butter, whether the same be manufactured within or without the state, unless the same shall be colored pink.

"Sec. 2. Any person violating any provision of this act shall be guilty of a misdemeanor, and, upon conviction thereof, be fined not less than twenty nor more than one hundred dollars for each offense.

"Sec. 3. Any penalty arising under this act may be enforced by any magistrate within the county in which the offense occurs."

Now the evident intention of this statute is to protect the citizens of the state and the public generally from imposition and fraud in the manufacture and sale of an article of everyday use and consumption. We have on our statute books provisions for the prevention of fraud in the sale of fertilizers to the farmer requiring that its chemical qualities shall be tested before it is thrown upon the market; also as to the quality of petroleum which is required to be inspected, graded, and measured before the same is transported, with a view of ascertaining its quantity and grade or gravity before it is allowed to go into the markets, with a view of preventing injury from its ignition or explosion; and, indeed, it is difficult to conceive of any higher object or more imperative duty which devolves upon the legislature than to guard the citizens of the state from impositions occasioned by the adulteration of articles of food or other articles of everyday use. Tiedeman, in his valuable work on Limitations of Police Power, on page 207, section 89, under the caption "Regulation of Sale of Certain Articles of Merchandise," says: "The regulations which would fall under this heading are very numerous, and most of them are free from all doubt in respect to their validity under our constitutional ⁸²⁵ limitations. They are instituted either for the purpose of preventing injury to the public, or thwarting all attempts of the vendor to defraud the vendee. A regulation, whatever may be its character, which is instituted for the purpose of preventing injury to the public, and which does tend to furnish the desired protection, is clearly constitutional." The object of the manufacturer of oleomargarine is to produce an article as near as possible in appearance like genuine butter of good quality, with a view of disposing of the same in the market for the same price as butter manufactured from milk; and the object of the legislature in requiring it to be colored pink, instead of yellow, is to prevent this imposition. Cooley's Constitutional Limitations, third edition, page 186, speaking of inquiry into legislative motives says: "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits, and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that the legislative discretion has been properly exercised.

If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding."

The question presented by this record was before the supreme court of New Hampshire in the case of *State v. Marshall*, 64 N. H. 549, in which it was held that "a statute prohibiting the sale of imitation butter unless colored pink has for its object the prevention of fraud on the public in the sale of provisions, and is, therefore, within the purview of the police power of the state." This question was also before the United States supreme court in the case of *Powell v. Pennsylvania*, 127 U. S. 678, in which it was held that "the fourteenth ⁸²⁶ amendment to the constitution was not designed to interfere with the exercise of the police power by the state for the protection of health, the prevention of fraud, and the preservation of the public morals," and that "the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk, or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream, or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale or having in possession with intent to sell the same as an article of food, is a lawful exercise by the state of the power to protect by police regulations the public health." The question was also before the court of appeals of New York in the case of *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, and it was there held that: "The producers of butter from animal fats or oils, although the product may be wholesome, nutritious, and suitable for food, and so the manufacture and sale thereof may not be prohibited, have no constitutional right to resort to devices for the purpose of making their product resemble dairy butter, and the legislature has power to enact such laws as it may deem necessary to prevent the simulated article being put upon the market in such form or manner as to be calculated to deceive." In the case of *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, the court, in its opinion, says upon this question: "In 1881 the legislature passed an act entitled 'An act to regulate the traffic in oleomargarine': Laws of 1881, c. 133. This act provides that any person who shall knowingly sell, or offer for sale, any article or substance in semblance of butter, not the

legitimate product of the dairy, made exclusively of milk and cream, but into the composition of which the oil or fat of animals, or melted butter, or any oil thereof, enters as a substitute for cream, in tubs, firkins, or other original packages, not distinctly, legibly, and durably branded, . . . shall be guilty of a misdemeanor, etc. It cannot be doubted ⁸²⁷ that the act of 1881 was a legitimate exercise of police power. The public may be protected by appropriate legislation against imposition in the purchase of articles of consumption; and if, as we may assume, the prevalent compounds resembling butter in appearance and flavor, and put on the market as a substitute for it, and generally known as 'oleomargarine,' 'butterine,' etc., are liable to deceive and mislead purchasers and consumers as to the real nature of the product, and especially if such preparations are made of unwholesome ingredients, then we think there may be sufficient reason why the legislature may, in its discretion, meet the evil sought to be remedied by provisions for the suppression of the manufacture and sale of such artificial compounds altogether." So in the case of *People v. McGann*, 34 Hun, 358, it was held that the legislature had power, by virtue of the police power vested in it, to pass an act prohibiting absolutely the manufacture and sale as an article of food, of any articles designed to take the place of butter or cheese produced from pure, unadulterated milk or cream of the same, and that such act was constitutional and valid.

If, then, the legislature has the power, under the police power vested in it, to prohibit the manufacture and sale of oleomargarine entirely, we can but conclude that under the same power it may place (as it has done in this state) some distinguishing mark upon it, to prevent deception and imposition in the sale of the same, even though it should have the effect of injuring the sale of the same in the markets; and we cannot regard the act in question in this state as inhibited by any clause of the constitution. The judgment complained of must be affirmed, with costs.

ON REHEARING.

The plaintiff in error, in his brief filed upon the rehearing of this case, seeks to show that the part of the act of our legislature which has reference to and affects importers into the state as to unbroken bulks or "original packages" is clearly unconstitutional, and, if unconstitutional as to these, it is unconstitutional as to all the parties to whom it applies; in other words, that the sections of the act are not ⁸²⁸ severable; if a part is unconstitutional, the whole is unconstitutional, for the reason that no one

could know that the legislature would have given their sanction to the part of the act that affects the citizens of the state without the clause or part of the act that denounces the penalty against importers of "original packages," and seeks to show that the case of *Plumley v. Massachusetts*, 155 U. S. 461, does not affect the case. In that case, however, this question is exhaustively considered by Justice Harlan, and the authorities fully collated. The first section of the syllabus in that case reads as follows: "The act of August 2, 1886, chapter 840 (24 Stats. 209) does not give authority to those who pay the taxes prescribed by it to engage in the manufacture or sale of oleomargarine in any state which lawfully forbids such manufacture or sale, or to disregard any regulations which a state may lawfully prescribe in reference to that article; and that act was not intended to be, and is not, a regulation of commerce among the states"; and that the statute of Massachusetts of March 10, 1891, chapter 58, 'to prevent deception in the manufacture and sale of imitation butter,' in its application to the sales of oleomargarine artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, is not in conflict with the clause of the constitution of the United States investing Congress with power to regulate commerce among the several states; also restraining the case of *Leisy v. Hardin*, 135 U. S. 100, 124, in its application to the case there actually presented for determination, and held not to justify the broad contention that a state is powerless to prevent the sale of articles of food manufactured in or brought from another state, and subjects of traffic or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import. The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, the health, and the morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon ⁸²⁹ the authority delegated to the United States for the attainment of objects of national concern. In *Plumley v. Massachusetts*, 155 U. S. 474, Justice Harlan, in delivering the opinion of the court, says: "The language we have quoted from *Leisy v. Hardin*, 135 U. S. 100, must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce,

if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import."

In the case of *Plumley v. Massachusetts*, 155 U. S. 461, Plumley was arrested for selling in the original package oleomargarine in Illinois, and brought to the state of Massachusetts colored so as to resemble butter manufactured from milk, in violation of the Massachusetts statute. The attempt was made to show that this statute was unconstitutional, but the court sustained the statute, and held it to be constitutional. So, also, in the case of *Bahzer, Petitioner*, 140 U. S. 545, it was held that the act of August 8, 1890 (26 Stats., c. 728, p. 313), enacting that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is a valid and constitutional exercise of legislative power conferred upon Congress; and, after that act took effect, such liquors or liquids introduced into a state or territory from another state, whether in original packages or otherwise, became subject to the operation of such of its then existing laws as had been properly enacted in the exercise of its police powers.

Having held in the opinion that the legislature had the right, under its police powers, to require parties offering ^{\$30} for sale oleomargarine to color the same pink in order to identify it and distinguish it from ordinary butter, and the above-quoted cases holding that the fact that the same is offered for sale in original packages does not prevent it from being subject to the effect of our statute requiring the same to be colored pink, which is a police regulation, we see no cause to change our opinion expressed in the original opinion, and must therefore hold the statute to be constitutional, and affirm the judgment, with costs.

POLICE POWER—STATUTES REGULATING SALES OF COMMODITIES—VALIDITY OF—OLEOMARGARINE.—A statute intended to restrain or suppress the manufacture and sale of oleomargarine, and like compounds resembling and intended as a substitute for butter, is valid as a legitimate exercise of the police power of the state. Such legislation is justified upon the ground that the use of the inhibited compounds is injurious to the public

health: *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 688, and extended note. The state may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious: *People v. Wagner*, 86 Mich. 594; 24 Am. St. Rep. 141.

INTERSTATE COMMERCE—POWER OF STATE OVER—OLEO-MARGARINE IN ORIGINAL PACKAGES.—A sale of oleomargarine, otherwise in violation of state law, is not protected as a part of interstate commerce by proof that it was made, stamped, and printed in another state, for use as an article of food, weighed eighty pounds, and was sold in the form in which the maker put it up at his factory in such other state, and that the person making the sale was his agent in this state, having and maintaining a store here for the purpose of effecting such sales: *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 82. See extended note to *People v. Wemple*, 27 Am. St. Rep. 547-568, on the general subject of the constitutionality of state regulations of interstate commerce.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

SIMONDS v. BARABOO.

[93 WISCONSIN, 40.]

NEGLIGENCE—FORGETFULNESS.—One who knew of a defect in a highway, but temporarily forgot it, is not necessarily guilty of contributory negligence, and, if injured through such defect and his forgetfulness of it, the question whether he was guilty of contributory negligence should be submitted to the jury.

NEGLIGENCE.—A TRAVELER ON A HIGHWAY HAS THE RIGHT TO PRESUME it is in a safe condition, though he knew of a defect therein a week before, if it was in a conspicuous place and of such a character that very little time and expense would safely repair it.

NEGLIGENCE—CUSTOM.—EVIDENCE of the customary way of loading and hauling wood is not admissible for the purpose of aiding a jury to determine whether negligence was contributory.

EVIDENCE OF THE CUSTOMARY WAY OF DOING THINGS is not admissible if it is a matter of common knowledge.

Action to recover for personal injuries received by the plaintiff from being thrown from his wagon through a defect in the street. He had seen this defect about a week before, but forgot it on the occasion of his injury. A plank in a crosswalk had been broken, leaving a drop of eight inches. The plaintiff was sitting on a load of wood, and, on crossing the defective part of the street, the wagon dropped therein and a part of the wood fell off, starting the horses and causing them to run away and the plaintiff to be thrown from the wagon and injured.

R. D. Evans, for the appellant.

Bentley & Bentley and H. Grotophorst, for the respondent.

42 MARSHALL, J. The plaintiff testified that he knew, prior to the accident, of the existence of the defect; and, based on such evidence, a motion was made at the close of plaintiff's

case for a nonsuit. It is insisted here that the denial of such motion was error, citing Beach on Contributory Negligence, *supra* 37; Bruker v. Covington, 69 Ind. 33; 35 Am. Rep. 202; Gilman v. Deerfield, 15 Gray, 577. Beach lays down the rule (Beach on Contributory Negligence, 1st ed., sec. 12), in effect, that where one knows the danger, but temporarily forgets it, and in consequence suffers an injury, his forgetfulness will not avail him as an excuse; that what he knows he must remember at his peril, and that a failure to remember constitutes contributory negligence if it occasions injury. But this is not supported by reputable authorities anywhere, and has been expressly repudiated by this court: Wheeler v. Westport, 30 Wis. 392. No stronger case, probably, can be found to support the text in Beach on Contributory Negligence than Gilman v. Deerfield, 15 Gray, 577. There plaintiff was well acquainted with the defect; he had passed over it several times within a short period prior to the accident; the last time he observed its character particularly, and so fully appreciated the danger that he deemed it necessary to drive over the defect at a walk and with care. It was so situated as to be in plaintiff's view for several rods before he reached it. His horse was a quick, high-spirited animal, accustomed to start quickly. He approached the defect on a trot, going at the rate of five or six miles an hour, so carelessly that he could not afterward remember whether he was driving with a⁴³ slack or tight rein. He was a doctor, on the way to visit a patient, and his thoughts were on that business. He did not think of the defect in the road till it was too late to stop his horse. Held, under these facts, that failing to remember constituted contributory negligence as a matter of law. Yet in Wheeler v. Westport, 30 Wis. 392, this court held that the Massachusetts court in that case "carried the doctrine of forgetfulness of the existence of a defect or obstruction as conclusive evidence of contributory negligence to the very extreme of reason and sound policy"; and, as there shown, that court has not extended the rule, but has often since held that previous knowledge was not of itself conclusive evidence of contributory negligence. In fact, the rule of Gilman v. Deerfield, 15 Gray, 577, has been so fenced in by subsequent decisions as to be practically overruled: Whittaker v. West Boylston, 97 Mass. 273; Smith v. Lowell, 6 Allen, 39; Blood v. Tyngsborough, 103 Mass. 509; Brigham v. Worcester Co., 147 Mass. 446. To the same effect are Weed v. Ballston Spa, 76 N. Y. 329; Bassett v. Fish, 75 N. Y. 303; Driscoll v. New York, 11 Hun, 101; Dorsey v. Phillips

etc. Const. Co., 42 Wis. 583; Cuthbert v. Appleton, 24 Wis. 383. In this case, the defect was not in view of the plaintiff till it was too late to stop his horses; he had seen it but once before; it was on a main thoroughfare in a city of considerable size, where one might reasonably presume such a defect would be promptly repaired. Certainly, in view of these facts, notwithstanding previous knowledge, the question of contributory negligence was for the jury.

It is said the court erred in failing to charge the jury on the subject of notice, but the fact of notice to the defendant was conclusively established by the evidence; therefore there was nothing to submit to the jury on that subject.

The charge of the court that the traveler on a highway has a right to presume it is in a safe condition was excepted to as erroneous, in view of plaintiff's knowledge of the condition ⁴⁴ of the street; but, in view of the facts, the charge was proper: Weed v. Ballston Spa, 76 N. Y. 329. That such is ordinarily the rule is not questioned, and notwithstanding the fact that plaintiff had seen the defect about a week previous to the date of his injury, it being in a conspicuous place and of such a character that a very little time and expense were sufficient for its repair, he well might reasonably have assumed that the repairs had been made.

It is claimed that the court erred in instructing the jury on the subject of damages recoverable for future disability. The charge in that respect is subject to criticism, but no objection was taken; hence the error cannot be reviewed on this appeal.

In respect to the question of contributory negligence, the court, against defendant's objection, admitted evidence of the customary way of loading and hauling wood. The general rule, subject to many limitations and exceptions, is that evidence of custom bearing on the fact of negligence, when such fact is in issue, is admissible: Wharton on Negligence, sec. 46; Black on Proof and Pleading, sec. 36; Bailey on Master's Liability, 527, and cases cited.

There is considerable conflict of modern judicial authority on the subject, though the trend of decisions has been rather in favor of a liberal application of the general rule, yet preserving rigidly the exceptions thereto. Such general rule has been followed in this court: See Jochem v. Robinson, 72 Wis. 199; Nadau v. White River etc. Co., 76 Wis. 120; 20 Am. St. Rep. 29; where the evidence was held admissible. And the exceptions to and limitations of the rule have been recognized as well:

See *Dorsey v. Phillips etc. Const. Co.*, 42 Wis. 583, where proof of custom was held immaterial, and *Hinton v. Cream City Ry. Co.*, 65 Wis. 323, *Mulcairns v. Janesville*, 67 Wis. 24, and *Coll v. Chicago etc. Ry. Co.*, 87 Wis. 273, where the evidence was held not admissible. At the foundation of the rule lies the idea that the act constituting the ⁴⁵ subject of the custom is one in respect to which the manner of doing it is not a matter of common knowledge. If this were lost sight of, and evidence allowed to prove the customary way of doing anything, however common, a rule which, restricted within reasonable limits, promotes the due administration of justice, would be quite likely to have the very opposite effect.

It is the judgment of the court that the admission of evidence of the customary way of doing an act so common, so ordinary, and so usual as that of loading and hauling wood is within the exceptions to the general rule admitting such evidence, or, to state it more accurately, is a departure from the rule itself; that the evidence in that regard, freely admitted in this case by the trial court, may probably have influenced the jury to defendant's prejudice; and therefore that such admission constitutes error, for which the judgment must be reversed.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

NEGLIGENCE—FORGETFULNESS AS EVIDENCE OF—QUESTION FOR JURY.—To forget a danger is not negligence, unless it shows a want of ordinary care, and that is a question for the jury. *Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 48 Am. St. Rep. 114, and note; *Russell v. Monroe*, 116 N. C. 720; 47 Am. St. Rep. 823, and note.

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS — RIGHTS OF PERSONS USING THEM.—A person walking upon a sidewalk has a right to expect and to act upon the assumption that the municipal authorities have properly discharged their duty by keeping the streets in good repair: *Russell v. Monroe*, 116 N. C. 720; 47 Am. St. Rep. 823, and note.

EVIDENCE—CUSTOM—ADMISSIBILITY OF — WHEN MUST BE PROVEN.—A general usage in a particular business need never be alleged in pleading: *State v. Morton*, 27 Vt. 310; 65 Am. Dec. 271; *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374, and note. A usage to be admissible, must be proved to be known to the parties, or to be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform: *Baltimore Baseball Co. v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 304, and note. One charged with negligence will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or owing similar duties: *Columbus etc. Coal etc. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 528, and note.

MELMS v. PABST BREWING COMPANY.

[93 WISCONSIN, 153.]

EXECUTORS AND ADMINISTRATORS—SALES OF ARE VOIDABLE BUT NOT VOID.—Under a statute forbidding executors, administrators, and guardians from purchasing, directly or indirectly, the real property of the estates of their wards or decedents, and declaring such sales to be void, they are not absolutely void, but are voidable only at the instance of persons prejudiced thereby.

EXECUTOR'S SALES—CREDITORS AND HEIRS, WHEN MAY IMPEACH.—If the property of the estate of a decedent was purchased for the benefit of an executor or administrator, the sale may be avoided by creditors or heirs at law of the decedent who were prejudiced thereby.

EXECUTORS' SALES — INNOCENT PURCHASERS.—Though an executor's sale was made for his benefit, and was therefore subject to be attacked and set aside by heirs or creditors prejudiced thereby, innocent purchasers who have acquired title under such sale without notice of the vice therein are protected.

EVIDENCE TO PROVE NOTICE.—The fact that purchasers of land which had been sold at an executor's sale are told by the executrix, who was also the widow of the decedent, that the purchaser would give the property back to her is not sufficient to charge them with notice that the purchase was made for her benefit.

NOTICE TO A PURCHASER, AFTER HE HAD COMPLETED HIS PURCHASE and received a conveyance of the property, of facts entitling other persons to avoid an executor's sale cannot defeat the title of such purchaser.

NOTICE TO AN ATTORNEY IS NOTICE TO HIS CLIENT in regard to any matter in which he is engaged, and, where the purchaser employs the same attorney as his vendor, he will be affected with notice of whatever such attorney acquired notice of in his capacity of attorney for either the vendor or purchaser in the transaction in which he was so employed.

NOTICE TO AN ATTORNEY—WHEN NOT NOTICE TO HIS CLIENT.—If an attorney, while conducting a transaction, acquires knowledge which it would be a breach of professional confidence for him to disclose, and he is subsequently employed by another person, the latter is not chargeable with the knowledge thus acquired and possessed by the attorney.

VENDOR AND PURCHASER EMPLOYING THE SAME ATTORNEY—WHEN NOT CHARGED WITH HIS KNOWLEDGE.—If a person, intending to purchase real property, employs the attorney of his vendor to act as his attorney, and such attorney has, in his previous employment by the vendor, obtained knowledge of facts on account of which the title of the latter may be impeached, it is not to be expected that he will disclose such knowledge to the purchaser, and the latter is not chargeable therewith.

NOTICE.—A CLIENT IS NOT CHARGED with notice of a fraud or wrong to which his attorney was a party while employed by another, because it is almost certain that the attorney will conceal such fraud or other wrong.

LACHES AND NEGLECT ARE DISCOURAGED IN EQUITY, and a delay of less than the period of limitation fixed by statute may be regarded as laches, and prevent the interposition of equity.

LACHES WILL NOT BE IMPUTED to a person while under disability.

LACHES—NOTICE.—Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put a man of ordinary prudence upon inquiry.

LACHES—PLEADING.—If the delay of the complainant in seeking relief is such as to apparently charge him with laches, he must aver and prove when he discovered the fraud or mistake of which he complains and what the discovery is, so that the court may judge whether, by the exercise of ordinary diligence, the discovery might have been made before.

LACHES IN SEEKING TO AVOID AN EXECUTOR'S SALE
If the property of a decedent was purchased at an executor's sale for the benefit of the executor, and was afterward sold to a stranger the heirs are chargeable with laches and precluded from setting aside the sale, though the statute of limitations has not run against them, if, by the exercise of ordinary diligence, they might have discovered that the sale was made for the benefit of such executor, as they failed to exercise such diligence or to take any proceeding to avoid the sale for nearly twenty years and until the youngest of the heirs was more than four years past her majority.

Suit by the heirs at law of Charles T. Melms, deceased, against Leopold Melms and Marie Melms, their mother, surviving executor and executrix of the deceased, Frederick Pabst, Lisette Schandain, executrix of Emil Schandain, deceased, and the Pabst Brewing Company, to set aside a conveyance of certain property of the deceased, executed May 25, 1870, by his executor and executrix to Jacob Frey, and also a deed of the same property from Frey and Marie Melms to Pabst and Schandain, dated November 1, 1870, also a sheriff's deed to Pabst and Schandain based upon foreclosure sale, and a subsequent conveyance from them to the Philadelphia Best Brewing Company under which the Pabst Brewing Company claimed title to the property. At the time when the property was directed to be sold by the executor and executrix it was subject to four mortgages, covering the property and also the homestead of the deceased, made to secure a debt of sixty-five thousand dollars and interest, and also subject to the right of dower of the widow of the deceased. At the sale, the premises were struck off to Frey, a brother in law of the executor and executrix for the sum of ninety thousand dollars, subject to the mortgage. At that time, it was expected that a corporation would be formed in which creditors of the deceased and others would take stock and that moneys would be advanced so as to enable the terms of the sale to be complied with. This scheme failed, and Frey did not make good his bid, nor was the sale ever reported to the court. Instead thereof, a sale was reported to the court as having been made for the sum of three hundred and seventy-nine dollars and fifty cents, subject to the mortgages. This sale was confirmed, and the executrix paid the sum named, and as

her deed was thereupon made to Frey, but it was in fact for her benefit and benefit. The final accounts of the executor and executrix were filed and settled. They showed that they had charged themselves with the said amount of three hundred and seventy-nine dollars and fifty cents, and that the property, exclusive of the homestead, had been appraised at one hundred and ten thousand dollars. The sale made in November, 1870, by Frey and Mrs. Melms to Pabst and Schandain was conducted mainly by the executor, Leopold Melms, but Mrs. Melms was present and assented thereto. This sale included the brewery property, including the dower right of Mrs. Melms, and was subject to a mortgage of thirty thousand dollars to one Baker, trustee, which the purchasers agreed to pay. They executed a mortgage for forty thousand dollars of the purchase money to Leopold Melms, as trustee, to secure bonds issued to him for the benefit of divers persons, and the balance of twenty-five thousand dollars was agreed to be paid by extinguishing certificates of two certain foreclosure sales on mortgages covering the whole property, and deeds upon which would be due in June or July following the sale. Whatever should be due on these certificates above twenty-five thousand dollars the vendors agreed to pay. The other mortgage on the premises was to be paid by the vendors exchanging for the same bonds secured by the forty thousand dollars mortgage or otherwise as they might elect. Mrs. Melms afterward paid this mortgage with and out of the bonds. There was included in the sale of the real estate, machinery, apparatus, and personal property pertaining to the brewery and malthouse business conducted on the premises. Pabst and Schandain, instead of redeeming from one of the foreclosure sales, took an assignment from the holder of the certificate of purchase, and thereon obtained a sheriff's deed to themselves, including the property in dispute and the homestead. They employed as their attorney one of the attorneys who acted as attorney for the executors in the administration of the estate and in making the sale here sought to be questioned. Such attorney acted for both parties in preparing the agreement and other documents, and it was claimed that at the time Pabst and Schandain agreed to purchase, the executor and executrix disclosed to them that Frey held the title to the brewery premises for her benefit. She was entitled to a dower interest therein and to a life estate in the homestead. She testified that she said, in the presence of the intending purchasers, that Frey would give the property back to her, that he had bid it off for ninety thous-

and dollars; and the executor testified, in general terms, that Pabst and Schandein were well informed about the matter, that he explained to them that the property had been transferred to Frey, that he was Frey's agent, that the widow had a dower interest in the property, and that she had paid interest on the encumbrances so as not to lose her dower right. Pabst, on the other hand, testified that he had no recollection of such conversation with either Mr. or Mrs. Melms. The purchasers and their successors in interest had been in actual possession of the property since November 1, 1870, claiming the title thereto. The entire consideration of the sale to Pabst and Schandein in excess of the sixty-five thousand dollars agreed to be paid on encumbrances by them was received by Mrs. Melms. The executor, Leopold Melms, acted in her behalf during the entire period of administration, because she was not familiar with business, and did not speak the English language. He also acted as her banker, and on or about April 15, 1871, rendered her an account in detail of all receipts and disbursements, giving her credit for the amount received from a sale of the brewery, describing it as sold for ninety-five thousand dollars, less mortgages of sixty-five thousand dollars, leaving a balance to her credit of thirty thousand dollars, and he debited her with "costs of brewery, three hundred and seventy-nine dollars and fifty cents," and the account as thus rendered showed a balance in her favor of twenty-six thousand five hundred and seventy-five dollars and forty-three cents. She testified that this account was shown by her to the plaintiffs, who were her children, and that they had all seen it when they were at home; that she thought all saw it, and that she did not keep anything secret from them; that about ten years before the trial she gave this account to her son in law, Mr. Bechtel, the husband of her daughter Elise, and that she showed the same account to the defendant Pabst in 1871. At the death of the deceased, Charles T. Melms, and at the date of the transfer in question, his estate was hopelessly insolvent. Creditors proved claims against it amounting to more than a hundred thousand dollars, upon which they received only twelve per cent, and the brewery could not have been sold for sufficient to have paid the claims of the creditors. At the commencement of the action, the respective plaintiffs were aged as follows: Franz Melms, forty years; Carl J., thirty-nine; Johanna, thirty-four; Elise, thirty-two; Richard, thirty-one; Gustave J., twenty-eight, and Hertha, twenty-five. The plaintiffs, in June, 1881, executed powers of attorney to Bechtel, authorizing him to take such steps as he might deem

ecessary to secure any interest any of them had in or to the estate of their deceased father and to institute actions for the purpose of recovering such interest. In 1881, Leopold Melms delivered a copy of the account which he had rendered to Mrs. Melms to Bechtel at the request of his attorney. The money received by Mrs. Melms was used very largely in maintaining herself and her children and in their education, and was their only resource for that purpose. The plaintiffs attempted to explain their delay by asserting "that, until within a few months before the action was begun, they were all in entire ignorance of the character and nature of the conveyance under which Pabst and Schandein and their grantee were in possession of the said premises, and of all the proceedings before the county court, and of the facts set out attending the administration and of said sales," but they made no statement as to how or when they made any discovery of fraud or other improper conduct. The trial court found that Pabst and Schandein were bona fide purchasers for a valuable consideration, and that the plaintiffs were not entitled to any relief. Judgment was therefore entered dismissing their complaint with costs, and they appealed.

Bloodgood, Bloodgood & Kemper, for the appellants.

Winkler, Flanders, Smith, Bottum & Vilas, for the respondents.

163 PINNEY, J. 1. The statute (Rev. Stats., sec. 8914) provides that, in sales of real estate made by an executor, administrator, or guardian, the executor, administrator, or guardian making such sale, or guardian of the heir of the deceased, "shall not directly or indirectly purchase, or be interested in the purchase, of any part of the real estate so sold. All sales made contrary to the provisions of this section shall be void." The sale to Jacob Frey, reported to the county court, of the premises in dispute, and the executors' deed of the same to him, and which were made for the use and benefit of the executrix, Mrs. Melms, she having paid the entire consideration, fall within the condemnation of this statute. This sale was fraudulent in law, as against the creditors of the estate and the plaintiffs as heirs at law of Charles T. Melms, deceased. The sale, in the first instance, was to Jacob Frey for ninety thousand dollars; but he failed to make good his bid, and the sale was reported to the court as made for three hundred and seventy-nine dollars and fifty cents, and it was confirmed, and the executors' deed to him was executed accordingly. Whether a deed made upon

¹⁰⁴ a sale thus declared void is absolutely void or only voidable, and so would pass the legal title, and whether a bona fide purchaser for value, without notice, from the grantee in such a deed would take a valid title, is an important question and, in this state, a new one.

In *McCrubb v. Bray*, 36 Wis. 333, the question was suggested, but the court expressly declined to give any opinion in respect to it. In *Forbes v. Halsey*, 26 N. Y. 65, and *Terwilliger v. Brown*, 44 N. Y. 241, under a statute in the same terms, the objection was held fatal to the title as against innocent purchasers for value; but, in *Roulston v. Roulston*, 64 N. Y. 652, 654, it was said, in substance, that such a sale and purchase was valid as to all except those prejudiced by it, and as to them not void, but voidable. And *People v. Open Board etc.*, 92 N. Y. 98, is to the same effect. The question is whether the word "void" in the statute may not be fairly held, in the connection in which it is used, to mean voidable. Such a construction would seem to better accord with sound policy and the purpose of the statute than one which, for a secret defect, would defeat the title of an innocent purchaser for value; and in *White v. Iselin*, 26 Minn. 487, upon a statute in the same words, the word "void" was given only the force and effect of voidable, and this view is sustained in *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146. The words "void" and "voidable" are not always used in statutes and reports with entire legal accuracy, and the word "void" is often construed as meaning only voidable: *Endlich on Interpretation of Statutes*, sec. 270; *Allis v. Billings*, 6 Met. 415; 39 Am. Dec. 744; *Jackson v. Henry*, 10 Johns 185; 6 Am. Dec. 328; *Dix v. Van Wyck*, 2 Hill, 522; *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169; *Reading v. Weston*, 7 Conn. 409. If the statute should be so constituted as to avoid sales by executors, administrators, and guardians on the ground stated, or for secret frauds, as against innocent purchasers for value, titles founded upon them would be so doubtful and uncertain that few would care to purchase or pay a fair price for ¹⁰⁵ them. We think that the word "void" was used in the statute in the sense of voidable, and that the legal title to the premises passed to Frey by the executors' deed, subject to be questioned or impeached on the ground that his purchase was in trust for the use and benefit of Mrs. Melms, the executrix, and therefore fraudulent as against creditors of the estate whose claims had been proved, then remaining unsatisfied to the amount of

not less than one hundred thousand dollars, and as against the plaintiffs as heirs at law.

2. The evidence is wholly insufficient to show that Pabst and Schandain, at the time they purchased the premises from Mrs. Melms and Frey, had notice, in fact, of the fraud and illegality which entered into the executors' sale and deed to the latter, or that they had notice, in fact, that the sale and executors' deed had been made to Frey for the use and benefit of Mrs. Melms, who was the real purchaser. Mrs. Melms was lawfully interested in this sale to the extent of her life estate in the homestead and her dower interest in the brewery property, and as to these subjects it was, in fact, for her benefit. The purchasers would naturally so understand it. Leopold Melms testifies that he explained to them that Frey held the title, and that he was Frey's agent; that she had a dower interest and homestead right, and had paid the interest on the encumbrances so as not to lose her dower right. But all this had no tendency to show that there was any objection existing to the title they were about to purchase. True, he adds that Pabst and Schandain "were well informed about the matter, and had seen the attorney of the executors"; but this is a matter of conclusion or inference on his part and gave no facts of any materiality or significance. It was probably a mere surmise on his part. The fact that Mrs. Melms, as she testifies, said in their presence that Frey would give the property back to her, and he had bid it off for ninety thousand dollars, was not calculated to excite suspicion or lead them to doubt Frey's title. Pabst testifies that he ¹⁰⁰ does not remember any such conversations. Schandain, who was present, is dead, and the transaction took place more than twenty-three years before the trial. The actual payment of what was then considered a fair price is cogent evidence of good faith.

It is claimed that Pabst and Schandain had notice of the facts from an inspection by Pabst of the account rendered to Mrs. Melms by Leopold Melms, showing that she paid the consideration for the executors' deed, and received the proceeds of the sale after paying certain sums on the encumbrances; but the evidence leaves it extremely doubtful whether he examined the account with sufficient care to ascertain what it showed in these respects. A conclusive answer to this claim is that the account was not made up, nor was it shown to Pabst, until several months after the sale was completed and the rights of the parties had become fixed. It came too late.

The only other ground for imputing notice to the purchasers requiring consideration is that the attorney who had theretofore acted for the executors and executrix and Jacob Frey in making the executors' sale to Frey, reporting it to the court, and getting it confirmed, and in the preparation and execution of the executors' deed, and who was clearly cognizant of the illegality of the same, was chosen by Pabst and Schandein to act for them in the matter of the completion of the sale to them by Mrs. Melms and Frey, and to examine the title to the premises, with the understanding that he was to represent the latter in the same manner. Each party paid one-half of his charges for such services. It is argued that the knowledge which such attorney had acquired of the illegality of the executors' sale and deed to Frey, while he had so acted for the executors and executrix and Frey, is to be imputed to Pabst and Schandein, and rendered them purchasers mala fide.

Notice to an agent or attorney is notice to his principal¹⁰⁷ or client in regard to the matter in which he is engaged; and where a purchaser employs the same attorney as the vendor, he will be affected with notice of whatever such attorney acquired notice of, in his capacity of attorney for either vendor or purchaser, in the transaction in which he was so employed. Notice to the attorney which will bind the client must be notice in the particular transaction in which the client has employed him. So, where one of two matters transacted by the same attorney, though the former was for another client, follows so soon after the other that it clearly appears that the earlier transaction cannot have been out of the mind of the attorney when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction, but he will be affected with notice of both. The authorities bearing upon this proposition are considered in *Brothers v. Bank of Kaukauna*, 84 Wis. 395, 36 Am. St. Rep. 932, where it was held that, if an agent acquires his knowledge of a prior transaction so recently as to make it incredible that he has forgotten it, his principal will be affected by it, although not acquired while transacting the business of his principal. In the case of *Constant v. University of Rochester*, 111 N. Y. 607, 611, 7 Am. St. Rep. 769, the modification of the rule to the effect stated, as recognized in the case of *The Distilled Spirits*, 11 Wall. 356, was quite fully considered, and it was held that "the farthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not re-

ceived or the knowledge obtained in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction and at another time and for another principal, was present to his mind at the very time of the transaction in question": *Slattery v. Schwannecke*, 118 N. Y. 547; *Constant v. University of Rochester*, 133 N. Y. 642.

¹⁶⁸ There is very strong reason for holding, from the facts and circumstances of the case, that all the facts within the knowledge of the attorney, acting in the present instance for both parties, and acquired about five months before while acting as the attorney for the executors and the vendors, in respect to the illegality of the executors' deed, were present to his mind when acting for Pabst and Schandain, though there is no direct evidence on the subject; but the rule under consideration is subject to a most material qualification decisive of the present case. The rule itself is based upon the duty of the attorney or agent to disclose to his client or principal all knowledge and information he possessed at the time, in relation to the subject-matter of the employment or agency, and the presumption is, that he communicates it accordingly; but he cannot be expected to communicate what he has forgotten, or what it would be his legal duty to conceal, or information which, from his relation to the subject matter or his previous conduct, it is certain that he would not disclose. Whatever knowledge the mutual attorney had acquired in respect to the character and validity of the executors' deed and sale five months before was acquired under circumstances which would render it a breach of professional confidence to disclose it to another, or to take advantage of such knowledge to serve or promote the interests of another client; and therefore such second client would not be affected or bound by it: *Wade on Notice*, sec. 692; *Mechem on Agency*, secs. 721, 722. As was said by Mr. Justice Bradley in the case of *The Distilled Spirits*, 11 Wall. 367: "When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases, and in such case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not be bound by his agent's secret and ¹⁶⁹ confidential information": *Hood v. Fahnestock*, 8 Watts, 489; 34 Am. Dec. 489; *Bracken v. Miller*, 4 Watts & S. 111; *McCormick v. Wheeler*, 36 Ill. 116; 85 Am. Dec. 388; In-

nerarity v. Merchants' Nat. Bank, 139 Mass. 333; 52 Am. Rep. 710; Allen v. South Boston R. R. Co., 150 Mass. 205, 206; 15 Am. St. Rep. 185; Herrington v. McCollum, 73 Ill. 476; Ford v. French, 72 Mo. 250; Martin v. Jackson, 27 Pa. St. 504; 67 Am. Dec. 489; Cave v. Cave, 15 Ch. Div. 639, 644. This limitation of the general rule was declared in Kennedy v. Green, 3 Mylne & K. 699; and in Waldy v. Gray, L. R. 20 Eq. 252, Bacon, V. C., said: "I take it to be very clearly established that if a person employed as a solicitor has done things which, if disclosed, would prevent the perfection of the security on which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client."

The whole doctrine of imputed notice to the client or principal rests upon the ground that the attorney or agent has knowledge of something, material to the particular transaction, which it is his duty to communicate to his principal: Wyllie v. Pollen, 3 De Gex, J. & S. 601. And notice of it will not be imputed to the client where it would be a breach of professional confidence to make the communication; and where the interest in, or the relation of the attorney to, the previous transaction is such as would be sufficient to induce him to withhold the information, the presumption of its communication is rebutted. The client will not be charged with notice of a fraud or wrong to which his attorney was a party while employed by another, and which it is quite certain he would conceal: Kettlewell v. Watson, 21 Ch. Div. 707. The object of the executors' sale and deed to Frey for the use and benefit of Mrs. Melms was to secure to her the brewery property or its proceeds as against the rights of creditors and heirs of her deceased husband, and the scheme would have been utterly defeated if, upon the eve of success, ¹⁷⁰ the attorney for the vendors had disclosed the real nature of the transaction which he had conducted for the executors and such vendors. To impute to the purchasers, under such circumstances, notice of the real nature of that transaction, through the same attorney then acting for them as well as the vendors, would be gross injustice.

We hold, therefore, that Pabst and Schandain were bona fide purchasers for value, without notice of any fraud or illegality in the executors' sale, and that the claim of title of the plaintiffs cannot prevail.

3. We think that, under the facts and circumstances disclosed,

the relief sought by the plaintiffs was properly denied for the reason that they had been guilty of laches in failing to investigate and bring forward their claims within a reasonable time. This property was subject at the time to encumbrances and to the claims of creditors, allowed against their father's estate, amounting in all, with accrued interest, to not less than one hundred and seventy-five thousand dollars, all of which would have to be paid before they could obtain any part of the estate. Their rights, therefore, as heirs, were technical rather than substantial, and they had no rational hope of realizing anything in due course of administration, because the estate was hopelessly insolvent. While, in contemplation of law, the executors' sale and deed to Frey for the use and benefit of their mother, executrix, etc., was fraudulent and voidable as to them, it is evident that the creditors were the parties intended to be, and who were really, defrauded. The transaction, however, resulted indirectly for the benefit of the plaintiffs, as it was probably intended it should, in securing to their mother, out of the estate, the means to rear, support, and educate her children; and they have thus received from the estate benefits which could not have been secured to them by a legal and complete administration. Although, upon their technical legal title as heirs, they would have been entitled, within the authorities, to a resale ¹⁷¹ of the property at executors' sale, irrespective of the question whether it would have resulted in a price which would have secured to them any really substantial benefit, still these facts are entitled to consideration on the question of acquiescence and laches.

The plaintiffs knew that the large and valuable property in dispute, including the homestead, had been sold to Pabst and Schandein, and that they and their grantees had held, used, operated, and improved it to a considerable extent, paying taxes upon and claiming it as their own for a period of nearly twenty years before they brought their action. This, of itself, was notice to them, as heirs of their father's estate, to promptly investigate and ascertain, as soon as they were competent, what right, if any, they had or expected to assert to this property. The purchasers had paid ninety-five thousand dollars for the property, and the almost phenomenal growth and development of the city had largely increased its value. All the facts were known at the time to their mother, and between her and the plaintiffs the most intimate and affectionate relations existed and remained undisturbed, and the evidence shows that she had no secrets to keep from her children. Their uncle, Leopold

Melms, knew all the facts, and had a feeling of friendship and interest in their welfare; and he seems to have been ready and willing to assist them in the recovery of the estate, ever since the question was mooted in 1881, when the powers of attorney were executed by the plaintiffs to Bechtel for that purpose. At that time a thorough investigation was had, which resulted in the production of documents which were sufficient to show the real character of their mother's title to the brewery property; certainly sufficient to induce inquiry, which could not have failed to disclose, beyond dispute, the real nature of the transaction. Mrs. Melms had in her possession her account with Leopold Melms, showing that she had bought the brewery property for three hundred and seventy-nine dollars and fifty cents, and that the entire consideration ¹⁷² received for it and the homestead and her dower right, after paying certain sums on encumbrances, was paid to her. It was set down in the account as "Profit realized on sale of brewery sold at \$95,000, less mortgages \$65,000,—\$30,000." The plaintiffs testified that they did not see this account. It was where they might have seen it at any time, had they wished, though, in their great interest in the litigation, they may not have been able to remember the fact; but their mother did. It was never concealed from them. Their uncle, Leopold Melms, had a copy, which, with the checks and papers relating to it, were put into the hands of the attorneys acting under Bechtel, where they remained until almost the day when the action was commenced. All other facts appeared upon the records of the county court and register of deeds. In brief, the entire case could have been developed by a short and apparently obvious line of investigation. There was no concealment on the part of the purchasers. Indeed, it does not appear to have been understood that there was cause for any concealment. When the investigation was had under Bechtel, all the plaintiffs were of full age except two, aged nineteen and sixteen years, respectively; and when this action was commenced the youngest, who had lived continuously with her mother, was four years and three months past her majority, and an action at law for the recovery of her interest in the land would have been barred within nine months thereafter by the Revised Statutes, section 3918. The plaintiffs appear to have been fairly well educated, and all testify that they were ignorant of the facts in the case until about the time the action was brought. Some of them testified at the trial that they did not know its real nature or the ground for it, although the action

had been pending three years; that they supposed it was brought to get the property back for their mother. One of the sons, the oldest heir, had been absent on long voyages much of the time since his father's death.

¹⁷³ Laches and neglect are always discountenanced in equity, which always refuses relief in favor of stale demands. Long delay, and even, sometimes, a delay of less than the period of limitation by statute, will be regarded as laches, and will prevent the intervention of equity; but laches will not be imputed to one while under disability, and there must have been knowledge, actual or imputable, of the facts, which should have prompted investigation and action, and, if there was actual ignorance, that must have been without just excuse: *Beach on Modern Equity Jurisprudence*, secs. 18, 19. This rule applies where the fraud is known or ought to have been known, where the facts and circumstances are such as to have made it the duty of a reasonably prudent person to investigate, and which, if pursued, would have led to a discovery: *Pomeroy's Equity Jurisprudence*, sec. 917. The entire subject was fully considered in *Rogers v. Van Nortwick*, 87 Wis. 414, where a failure to act with reasonable diligence, upon knowledge of facts and circumstances which would have led to a discovery of the facts, was held to have amounted to laches such as would bar relief. The failure or delay to investigate must have been blamable, and what constitutes a reasonable time within which the action must be brought depends upon the facts and circumstances of each particular case; the court applying the rule of laches according to its own ideas of right and justice: *Wood v. Carpenter*, 101 U. S. 140, 141; *Brown v. Buena Vista Co.*, 95 U. S. 157, 160; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

It is said in *Hammond v. Hopkins*, 143 U. S. 224, 250: "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable ¹⁷⁴ where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be gov-

erned by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like: *Halladay v. Land etc. Co.*, 18 U. S. App. 308, 338; 57 Fed. Rep. 774; *Marsh v. Whitmore*, 21 Wall. 178; *Landsdale v. Smith*, 106 U. S. 391; *Norris v. Haggin*, 136 U. S. 386; *Mackall v. Caslen*, 137 U. S. 556; *Hanner v. Moulton*, 138 U. S. 486.

Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry: *Kennedy v. Green*, 3 Mylne & K. 699, 722; *Erlanger v. New Sombrero etc. Co.*, 3 App. Cas. 1231, 1280; *Carr v. Hilton*, 1 Curt. 390, 394; *Wood v. Carpenter*, 101 U. S. 141; *Johnston v. Standard etc. Co.*, 148 U. S. 370. Hence, the party in such case must state in his bill, and prove at the hearing, "the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been made before": *Stearns v. Page*, 7 How. 819, 829. "Otherwise," as was held in *Badger v. Badger*, 2 Wall. 87, 95, "the chancellor may justly refuse to consider the case, on his own showing, without ¹⁷⁵ inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." Tested by this rule, the complaint and case made by the plaintiffs are radically defective. There is no specific averment or proof of the discovery or time of discovery of any material fact.

The courts look with disfavor upon the claims of those who have failed to investigate and act upon sufficient cause, and have waited to decide, after large sums have been invested, when the danger is over that has been at the risk of others, to come in and claim the profit of the event; and so, too, where the delay has been great, and parties to or witnesses familiar with the transaction, as in this case, have died in the mean time. We think that the plaintiffs have been guilty of blamable delay. Knowledge of all the material facts was within their own family from the time of the purchase by Pabst and Schandain, and

In 1881 we find, in the hands of the plaintiffs' attorneys, the account between Leopold Melms, one of the executors, and Mrs. Melms, who was executrix, which clearly disclosed facts which, when taken in connection with the record and the proceedings in the county court, made out their entire case. It matters not that their attorneys failed to discover what was really quite plain. The case falls within the principles stated, and we must hold that the plaintiffs have not shown reasonable diligence in investigating their rights and bringing them before the court.

For these reasons the judgment of the circuit court must be affirmed.

By the Court. The judgment of the circuit court is affirmed.

EXECUTORS AND ADMINISTRATORS—SALES OF, WHEN MAY BE IMPEACHED AND BY WHOM.—Purchase by administrator at his own sale is voidable at the option of the party interested in the property, whether the sale be made directly to him or through the interposition of another person: *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252, and note. If an executor purchases indirectly of himself through a third person, the estate is held in trust by such executor for the heirs at law or other persons interested, who may have the trust declared upon proper application: *Comegys v. Emerick*, 184 Ind. 148; 39 Am. St. Rep. 245, and note. Sale by executor without order of court, under a will containing no power to him to so sell is void: *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232, and note; *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560.

EXECUTORS AND ADMINISTRATORS—SALES BY—RIGHTS OF BONA FIDE PURCHASERS.—Purchaser at invalid sale of decedent's land for payment of debts is entitled to be subrogated, to the extent that the money paid by him was applied to the payment of such debts, to the rights of the creditors of the decedent, and to have the amount due him charged upon the land: *Perry v. Adams*, 98 N. C. 167; 2 Am. St. Rep. 326, and extended note. See, also, *Citizens' etc. Ry. Co. v. Robbins*, 128 Ind. 449; 25 Am. St. Rep. 445; *Sherwood v. Baker*, 105 Mo. 472; 24 Am. St. Rep. 399.

EXECUTORS AND ADMINISTRATORS—SALES BY—LACHES IN PROCEEDINGS TO AVOID.—Where an administrator becomes interested by purchase, in the land of the estate, after his sale thereof but before its confirmation, the sale may be set aside by the heirs within a reasonable time, without proof of actual fraud or injury. This right may be lost by acquiescence or laches: *Gibson v. Herriott*, 55 Ark. 85; 20 Am. St. Rep. 17, and note; *Lindsay v. Cooper*, 94 Ala. 170; 83 Am. St. Rep. 105.

NOTICE—PUTTING ON INQUIRY.—Whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 40 Am. St. Rep. 299, and note; *Carneal v. Lynch*, 91 Va. 114; 50 Am. St. Rep. 819, and note; *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373, and note.

EQUITY—LACHES DISCOURTENANCED IN.—Laches and neglect are always discountenanced in equity, which always refuses relief to stale demands: *Walet v. Haskins*, 68 Tex. 418; 2 Am. St. Rep. 501, and note. The defense of laches is in equity only permitted to defeat an acknowledged right on the ground of its affording evidence

that the right has been abandoned: *Cottrell v. Watkins*, 89 Va. 801; 87 Am. St. Rep. 897.

EQUITY—LACHES—PLEADING.—If complainant is charged with laches on account of delay in seeking relief, he must distinctly aver when the fraud, mistake, concealment, or misrepresentation was discovered and how discovered, and what the discovery is; so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been made before: Extended note to *Bell v. Hudson*, 2 Am. St. Rep. 807. See, also, note to *Neppach v. Jones*, 23 Am. St. Rep. 149.

EQUITY—LACHES—STATUTE OF LIMITATIONS.—Ordinarily courts of equity adopt the time fixed by the statute of limitations for barring claims, but this rule is not inflexible, and may depend upon the allegations and proof: Note to *Neppach v. Jones*, 23 Am. St. Rep. 149. See, also, *Thorndike v. Thorndike*, 142 Ill. 450; 34 Am. St. Rep. 90, and note.

EQUITY—LACHES—PERSONS UNDER DISABILITIES.—Infancy and coverture generally constitute a valid excuse for laches: Extended note to *Bell v. Hudson*, 2 Am. St. Rep. 806.

Notice to Attorney as Notice to Client.

General Rule.—In a previous note in this series we have considered the general question of notice to an agent as notice to his principal: Note to *Trentor v. Pothen*, 24 Am. St. Rep. 228-233. The principles there stated are generally applicable to the relation of attorney and client, and yet we think the decisions applicable solely to that relation are worthy of further consideration here. There is no doubt that notice given to, or knowledge gained by, an attorney while acting for his client is imputed to the latter. It is deemed to be the duty of the attorney to communicate it to him; such communication is presumed to have been made; this presumption is conclusive and the client therefore must be deemed to have had actual knowledge of the information thus acquired by his attorney, and cannot be permitted to disprove such presumption for the purpose of obtaining the rights and equities of a purchaser without notice: *Watson v. Sutro*, 86 Cal. 500; *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172; *Jones v. Lamon*, 92 Ga. 529; *Coryell v. Klehm*, 157 Ill. 462; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 56; *Grimes v. Bowerman*, 92 Mich. 258; *Edwards v. Hillier*, 70 Miss. 803; *Hedrick v. Beeler*, 110 Mo. 91; *Lyons v. Wait*, 51 N. J. Eq. 60; *Barnes v. McClinton*, 3 Penr. & W. 67; 23 Am. Dec. 62; *American etc. Co. v. Felder*, 44 S. C. 479; *Rogers v. Palmer*, 102 U. S. 263; *Wyllie v. Pollen*, 3 De Gex, J. & S. 601.

Firm of Attorneys.—If a client has employed a firm of attorneys consisting of two or more members, he is charged with notice given to, or knowledge acquired by, any of such members, though that particular member was not at any time engaged in transacting business for the client, and the member who did, in fact, have charge of such business did not receive notice or acquire knowledge of the fact with notice or knowledge of which it is sought to charge the client: *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172; *Smith v. Wilson*, 1 Tex. Civ. App. 115.

If a Person or Corporation has Several Attorneys, each having charge of a particular department of business, and a general attorney having supervision of all, the knowledge of this general attorney

will not be imputed to the corporation so as to affect it respecting a transaction or business which was not committed to his care, but, on the contrary, was under the charge of an attorney who acted as the head of a particular department, and did not have any notice or knowledge of the fact with which his client is sought to be affected. This rule was applied where it was claimed that a railway corporation ought to be charged with knowledge of facts known to its general attorney, but not known to the attorney who transacted the business in question. The court said: "Any matters requiring legal attention or advice are referred to the general attorney by the department having special charge thereof, or by the president or general manager; but prior to the commencement of an action in a court against the company notice to the general attorney of matters solely under the control of another department is not notice to that department or to the company, unless, prior to such notice, the attorney has been directed to take charge of the subject matter of the notice": *Atchison etc. Ry. v. Benton*, 42 Kan. 698.

Attorney Representing Both Parties.—The same attorney may be employed by, and to some extent represent, both parties in the same transaction, as where it consists of the sale and purchase of real property, and the same attorney is employed both by the vendor and the vendee. In such a contingency it was held in the principal case that knowledge acquired from either party must be regarded as given by him to the other, and that the purchaser "will be affected with notice of whatever such attorney acquired notice of in his capacity of attorney for either vendor or purchaser in the transaction in which he was so employed": *Melms v. Pabst etc. Co.*, 93 Wis. 153; ante, p. 899.

Knowledge Acquired by Attorney in Other Transactions.—The chief subject of judicial dissension upon the topic we are now considering is whether a client is chargeable with notice of facts known to his attorney, the knowledge of which was not acquired by the latter in the transaction in which he was employed nor during its progress. The nature of the business of an attorney or solicitor is such that he must necessarily be employed by divers persons, and in the course of such employment acquire knowledge of a vast variety of transactions. Upon being employed by another person whose interests may be affected by the previous knowledge of the attorney, the latter may fail to communicate it to the client either because he has forgotten it or it is temporarily absent from his mind, or because he could not disclose it without a breach of professional confidence, or because it is against his interest to disclose it, or he is himself a participant in a scheme to defraud others, and for that reason cannot be expected to reveal the fraud.

Professional Communications.—If the knowledge acquired by an attorney in another transaction was of such a character that he could not disclose it without a breach of professional confidence, it will be presumed that he did not commit this breach, and knowledge of the fact will not be imputed to his client in another transaction. "The general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting

the subject matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. The difficulty presented itself to Lord Hardwicke's mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases, it would have been entirely unexceptionable": *The Distilled Spirits*, 11 Wall. 367; *Littauer v. Houck*, 92 Mich. 162; 31 Am. St. Rep. 572; *Melms v. Pabst etc. Co.*, 93 Wis. 153; ante, p. 899.

Fraud Known to and Participated in by an Attorney.—Where an attorney has sought to perpetrate, or to aid in the perpetration of, a fraud either for his own benefit or for that of his client, and whether or not the circumstances were such that he could not disclose the fraud or the facts connected with it to his subsequent client without a breach of professional confidence, it is unreasonable to expect that he would make such disclosure, and therefore no presumption can arise that it was made. A client employing him in a subsequent or different transaction is not, therefore, chargeable with notice of the fraud nor of any facts, knowledge of which came to his attorney in another transaction and while seeking to aid in the consummation of a fraud: *Melms v. Pabst etc. Co.*, 93 Wis. 153; ante, p. 899; *Kennedy v. Green*, 8 Myne & K. 699; *Kettlewell v. Watson*, 21 Ch. Div. 707; *Waldy v. Gray*, L. R. 20 Eq. Cas. 251; *Cave v. Cave*, L. R. 15 Ch. Div. 639.

Information Acquired in Other Transactions.—The weight of authority, at least in the United States, sustains the proposition that a client is not chargeable with notice of facts known to his attorney from information acquired prior to the employment of the latter, nor, though obtained during such employment, if communicated to the attorney while acting for another client in an independent transaction. In other words, the attorney is not presumed to have communicated his information unless it came to him in the course of the transaction in which he was employed by the client whom it is sought to charge with notice: *McCormack v. Joseph*, 83 Ala. 401; *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172; *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388; *Herrington v. McCollum*, 73 Ill. 476; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319; *Ford v. French*, 72 Mo. 250; *Wardell v. Eden*, 2 Johns. Cas. 121; *Bracken v. Miller*, 4 Watts & S. 111; *Hood v. Fahnestock*, 8 Watts, 489; 34 Am. Dec. 489; *Akers v. Rowan*, 33 S. C. 451; *Spaight v. Cowne*, 1 Hen. & M. 359; *Furnald v. Green*, 64 Fed. Rep. 49; *Warrick v. Warrick*, 3 Atk. 294. In some of the states, however, the question wheth-

the knowledge acquired by an attorney in another transaction was present in his mind at the time he acted for a client sought to be charged therewith is a proper subject of inquiry, and knowledge may be imputed to the client of facts proved to have been in the mind of his attorney at the time of acting for him, though such knowledge was acquired previous to his employment or in another transaction. After reviewing the cases upon the subject, the court of appeals of New York said: "From all these various cases it will be seen that the farthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received, or the knowledge obtained, in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had and which he had obtained in another transaction, at another time, and for another principal was present in his mind at the very time of the transaction in question": *Constant v. University of Rochester*, 111 N. Y. 604; 7 Am. St. Rep. 769. This decision was reaffirmed by the same court and applied in a case in which it was sought to charge the plaintiff in a foreclosure suit with knowledge of an unrecorded conveyance, upon evidence that such knowledge had been communicated to the attorney of the plaintiff. The court said: "This knowledge was not acquired in any matter or proceeding relating either to the making of the loan or the foreclosure of the mortgage, nor while engaged in the transaction of any business for Mr. Hulett, but the information was received from the plaintiff's husband upon a visit by him to the attorney's office to inquire about an abstract of title to the property, a matter which concerned neither the attorneys nor Hulett, but the plaintiff alone. The question how far a principal is chargeable with notice communicated to, or knowledge acquired by, his agent in another transaction, at another time, when not acting 'or his principal has received consideration in this court in the case of *Constant v. University of Rochester*, 111 N. Y. 604; 7 Am. St. Rep. 769, and the principle was there settled that the knowledge of the agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration by the court": *Slattery v. Schwaneck*, 118 N. Y. 543. In the case of *Brothers v. Bank of Kaukauna*, 84 Wis. 395, the court reached the conclusion that if an agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound, although his information was not acquired while transacting his business. In the principal case the court assumed that this rule of law was applicable to the relation of attorney and client. It should be remembered in the cases to which we have referred indicating that a client might be bound by knowledge communicated to his attorney in another transaction where such knowledge was shown to have been in the mind of the attorney when acting for the client sought to be charged, or to have been communicated so recently that it must be presumed to have been so in his mind, the question was not involved, for in none of the cases was there evidence before the court calling for the application of the rule thus announced. Probably, however, *Mountford v. Scott*, 1 Turn. & R. 274; *Dresser v. Norwood*, 17 Com. B., N. S.,

466, and *The Distilled Spirits*, 11 Wall. 637, may be regarded as necessarily supporting the proposition that a client is charged with the knowledge of his attorney, though acquired in another transaction, if such knowledge was shown to have been present in the mind of the attorney when acting for the client sought to be charged therewith.

If an agent or attorney acts without authority, but his action is subsequently ratified by his principal or client, the latter will be charged with notice of all facts communicated to the agent or attorney while the latter was conducting the transaction which his principal or client subsequently ratified: *Lampkin v. First Nat. Bank*, 96 Ga. 487; *Hovey v. Blanchard*, 13 N. H. 145.

In *Taylor v. Evans* (Tex. Civ. App.), 20 S. W. Rep. 172, it was held that if a person, contemplating making a general assignment for the benefit of his creditors, delays executing it in order that certain of them may, by levying attachments, secure preferences, and communicates this purpose to his attorney, who is soon afterward employed by such creditors to levy the writs, the latter are chargeable with notice of the information possessed by the attorney. It was claimed in this case that though the information when obtained by the attorney was received by him in his professional capacity, yet that being a communication between an attorney and client looking to the accomplishment of an illegal object, it was not entitled to protection as privileged and confidential, and that if the purpose of the insolvent was communicated to his attorney previously "to his employment by the creditors, but sufficiently recent to justify the belief that such information was fresh in his memory while he was acting for such creditors in suing out and causing the writs of attachment to be levied, it would not have been a breach of professional confidence for such attorney to have disclosed such information to his clients, and they are chargeable with knowledge of the information possessed by their attorney."

There are some American and many English cases which undoubtedly hold a client chargeable with the knowledge of his attorney though acquired previously to his employment and in an entirely different transaction and without proof as to whether such knowledge was present in his mind when acting for the client sought to be charged therewith: *Abell v. Howe*, 43 Vt. 403; *Hart v. Farmers' etc. Bank*, 38 Vt. 252; *Dresser v. Norwood*, 17 Com. B., N. S., 466. Cases to which it has been sought to apply this rule have frequently been those in which it appeared that a person intending to purchase real property, or to make a loan to be secured thereby, applied to an attorney or solicitor to make an examination and to advise him with respect to the title thereto, and that such attorney or solicitor had already knowledge of facts respecting the title acquired in another transaction, and failing to communicate such knowledge to his client, a purchase or loan was made, and it was afterward sought to charge the purchaser or lender with notice of an unrecorded conveyance or of some secret equity to which the title was subject. The early English cases and all the American decisions falling within our observation, except those just cited from the state of Vermont, refuse to charge a purchaser or encumbrancer with knowledge not

communicated to him, but which may have been previously possessed by the attorney whom he employs to examine the title and advise with him in respect thereto: *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172; *Campbell v. Benjamin*, 69 Ill. 244; *Trentor v. Pothem*, 46 Minn. 298; 24 Am. St. Rep. 225; *Kountze v. Helmuth*, 140 N. Y. 432; *Arrington v. Arrington*, 114 N. C. 151; *Lowther v. Carlton*, 2 Atk. 242; *Preston v. Tubbin*, 1 Vern. 287. In England, on the other hand, the rule established by the most recent decisions is, that a client purchasing real property or taking an encumbrance thereon is conclusively presumed to have been informed of all facts respecting the title which were known to his solicitor or attorney: *Bradley v. Riches*, L. R. 9 Ch. Div. 189. Thus it was said in a recent opinion that: "It has been held, over and over again, that notice to a solicitor of a transaction and about a matter as to which it is part of his duty to inform himself is actual notice to his client. Mankind would not be safe if it were not held that under such circumstances a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior encumbrance, because he was not told of it by his solicitor": *Rolland v. Hart*, L. R. 6 Ch. App. 678. This line of reasoning would seem to make it exceedingly dangerous for a person intending to purchase property to consult a solicitor respecting the title, and, at all events, should warn him to consult one who, from his obscurity, want of business, or otherwise would not probably have any previous knowledge of the title, and would act solely upon the abstracts or other papers submitted to his consideration.

JEFFRIS v. FITCHBURG RAILROAD COMPANY.

[93 WISCONSIN, 250.]

STOPPAGE IN TRANSITU.—STRICT PROOF OF INSOLVENCY is not required to justify the exercise of the right of stoppage in transitu. It is sufficient that there has been a failure to pay the debt on account of which the right is claimed, and that the debtor cannot be found at his reputed place of business.

STOPPAGE IN TRANSITU—GOODS, WHEN NOT BEYOND RIGHT OF.—If the property sold and not paid for is shipped by railway to the purchaser, and reaches its place of destination, where it remains in possession of the carrier with the freight unpaid, it will be presumed to continue subject to the exercise of the right of stoppage in transitu, in the absence of evidence that the carrier had become the agent of the purchaser and was keeping the goods for him as such, and not as carrier.

STOPPAGE IN TRANSITU—RIGHT OF, WHEN TERMINATES.—DELIVERY, ACTUAL OR CONSTRUCTIVE, BY A CARRIER to a consignee or his agent is essential to terminate the right of stoppage in transitu; and the fair implication of the law is, where the goods remain in the carrier's warehouse with charges unpaid, that the transitus has not been ended. No inference of its termination arises from evidence that it was the custom of the assignee of goods of the character of those in question to leave them in charge of the

carrier, at the consignee's risk and expense, to be taken away at any time, on payment of freight.

STOPPAGE IN TRANSITU.—THE DELIVERY OF PART OF THE GOODS does not amount to a delivery of the whole, so as to terminate the right of stoppage in transitu, unless the circumstances show that it was the intention that such part delivery should operate as a constructive delivery of the remainder of the goods.

STOPPAGE IN TRANSITU.—THE GIVING OF AN ORDER BY A CONSIGNEE of goods to a carrier in whose possession they remain, directing him to deliver them to a third person, on payment of freight, does not terminate the transit, nor put an end to the right of stoppage in transitu.

Action for the conversion of lumber sold by the plaintiff to the J. B. Dixon Lumber Company of Boston, in December, 1890. This lumber was shipped by the defendant railroad company to Boston, where it arrived in due course of time, and was placed in the defendant's warehouse. The payment for the lumber became due February 15, 1891, but no payment therefor was ever made. The lumber remained in the possession of the defendant, when, on December 21, 1891, the freight agent of the defendant said that it had not been delivered because the freight remained unpaid. This agent was then informed that the lumber company had never made any payment therefor, and that the plaintiff desired to stop the lumber then in transit and to take it, and the plaintiff then offered to pay the charges against the lumber for freight and storage. The defendant, by its agent, refused to deliver to plaintiff the lumber, and stated that he would have to bring an action of replevin therefor. On the part of the defendant, it appeared that about one-fourth of the lumber had been taken away, and sold to the New Bedford Casket Company in November, 1890, and that in March, 1891, the J. B. Dixon Lumber Company had given an order upon the defendant directing it to deliver the lumber, on the payment of freight and charges, to F. C. Bill. There was also evidence to the effect that it was the custom and understanding between the Dixon Lumber Company and the defendant railway company that any lumber which might arrive should be stored by the railway company at the risk of the lumber company, which, on its part, had the right to remove such lumber whenever convenient, subject to the charges of the railway company. The trial court found that the lumber remaining in the possession of the defendant had never been delivered to the Dixon Lumber Company, that such company became and was insolvent December 21, 1891, at which time the plaintiff claimed the right to stop the lumber by reason of the failure of the lumber company to pay for the same, and demanded such lumber

from the defendant, but the defendant refused to deliver it, and converted it to its own use. Judgment was given in favor of the plaintiff for the difference between the value of the lumber so found to be converted and the charges of the defendant against it. The defendant thereupon appealed.

Jackson & Jackson, for the appellant.

Fethers, Jeffris & Fifield, for the respondent.

255 **PINNEY, J.** 1. It is insisted that the finding that the J. B. Dixon Lumber Company was insolvent was without any evidence to support it, and that therefore the claim of the **256** plaintiff to exercise the right of stoppage in transitu of the lumber, December 21, 1891, was without any warrant or foundation. The sale of the lumber by the plaintiff to that company occurred in the early autumn of 1890, and the purchase price became due February 15, 1891. This was a just and undisputed debt. Effort to collect it had proved unavailing, and the purchaser had wholly failed to respond to its obligation for a period of over ten months. Investigation then made showed that there was no such concern located at or about the alleged place of its business, and it was not named in the city directory. The person in charge where it had done business stated that there was no such concern, but that it was J. B. Dixon. The witness Cooper, examined by the defendant, testified that J. B. Dixon was the president of the J. B. Dixon Lumber Company, and that he (witness) was connected with the company "during its corporation, so to speak—not exactly in its literal sense—during its continuance in business, up to about the 1st of February, 1891." The just inference is, that this company was a corporation, and that it had suspended business February 1, 1891, a few days before the plaintiff's debt matured. Strict proof of insolvency is not required in order to justify the exercise of the right of stoppage in transitu. "By the word 'insolvency' is meant a general inability to pay one's debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence": Benjamin on Sales, sec. 837; Smith's Mercantile Law, 550, and note. It had failed to pay the just and undisputed debts it had owed to the plaintiff and to the defendant for over ten months. Inquiry made at the former place of business of the debtor elicited the information that there was no such concern—that it was only J. B. Dixon; and the fact that the witness Cooper, connected with it during its corporate existence and having some knowledge of its business, called to

show that the right of stoppage had been terminated by delivery ²⁵⁷ to the company or its agent, was not interrogated as to its solvency, is quite suggestive, in view of the facts in evidence, when fairly satisfactory proof of its solvency would have been fatal to the plaintiff's action. The evidence constitutes sufficient prima facie proof of insolvency to sustain the finding. There was no attempt made to dispute this evidence or to rebut it. We must hold that the evidence was sufficient to warrant the finding.

2. Had there been a delivery of the lumber, in view of the evidence, to the consignee, or to an agent of the consignee, so that the defendant had no longer any possession or control of it as carrier? The lumber had reached its ultimate destination, and the controversy is really reduced to the question whether the defendant held it as carrier or as the agent and warehouseman of the consignee. It may be properly said that the possession of the lumber by the defendant was ambiguous, and that it is necessary to gather the intention of the parties from their acts and the effect the law imputes to what they have done. It is said that nothing prevents an agreement by the carrier to hold the goods, after arrival at destination, as agent of the buyer, though he may at the same time say, "I shall not let you take them till my freight is paid." The question is one of intention, and in *Whitehead v. Anderson*, 9 Mees. & W. 518, the captain was held not to have intended such an agreement by telling the assignee that he would deliver him the cargo when he was satisfied about the freight; Parke, B., saying: "There is no proof of such a contract. A promise by the captain to the agent of the assignee is stated, but it is no more than a promise, without a new consideration, to fulfill the original contract and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before": Benjamin on Sales, sec. 853. The existence of the carrier's lien for unpaid freight, it is held, raises a strong presumption that the carrier continues to hold the goods as ²⁵⁸ carrier and not as warehouseman; and in order to rebut this presumption there must be proof of some arrangement or agreement between the buyer and the carrier whereby the latter, while retaining his lien, becomes the agent of the buyer to keep his goods for him: *Ex parte Barrow*, L. R. 6 Ch. Div. 783.

In *Ex parte Cooper*, L. R. 11 Ch. Div. 68, it was held that: "Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the tran-

transitus is not at an end so long as the carrier continues to hold the goods as carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent." Unless something equivalent to an attornment on the part of the carrier to the consignee is shown, so that he has altered his position and holds the goods in another capacity, the transitus is not at an end. No doubt, where the carrier enters into a new contract with the consignee, distinct from the original contract of carriage, to hold the goods for him as his agent in a new character for the purpose of custody on his account, the transitus would be at an end and the goods constructively in the possession of the consignee: *McLean v. Breithaupt*, 12 Ont. App. 383, 388, 390. In *Whitehead v. Anderson*, 9 Mees. & W. 518, the court say: "A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody, on his account, and subject to some new or further order to be given to him"; and James, L. J., shortly puts it in *Ex parte Cooper*, 11 Ch. Div. 68, that "there must be no such change as makes the carrier or warehouseman the holder of the goods as the agent of the vendee."

²⁵⁹ In *Hoover v. Tibbits*, 13 Wis. 79, this court held that where the warehouseman to whom the goods are directed to be sent receives them as the agent of the carrier, and, while he is holding them as such agent for the purpose of collecting freight and charges, the vendor asserts his right of stoppage of the goods, they will not be considered as in the possession of the vendee, so as to cut off that right; and in *Harding Paper Co. v. Allen*, 65 Wis. 584, the rule laid down in *Benjamin on Sales*, second American edition, 788, is declared to be the rule in this state—that "if the possessor of the goods has the intention to hold them for the buyer, and not as agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end; but I apprehend that both these intents must concur, and neither can the carrier of his own will convert himself into a warehouseman, so as to terminate the transitus, without the agreeing mind of the buyer, nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatever to retain possession

as against the buyer." In *Sherman v. Rugee*, 55 Wis. 346, 347, the question is broadly put whether there was ever a moment in which the purchasers had dominion and control over the property. Delivery, actual or constructive, by the carrier to the consignee or his agent, is a part of its duty as such, and, until performed, it cannot be said that the carrier has ceased to hold the goods as carrier. The real question is, whether, under the evidence, it is a just inference that the carrier has intended to waive his lien for freight, and to surrender dominion and control over the property, or to hold it subordinate to and for the consignee. Unless the evidence justifies such a conclusion, the fair implication of the law is, that if the goods are in the carrier's warehouse awaiting payment of freight and other charges, then the transitus has not been ended, but that the carrier holds them in his capacity of carrier, to keep good his common-law lien for freight and charges, and ²⁰⁰ that they are subject to the vendor's right of stoppage: *Calahan v. Babcock*, 21 Ohio St. 281; 8 Am. Rep. 63; *Symns v. Schotten*, 35 Kan. 310.

The evidence fails to establish an agreement or contract which would constructively render the possession of the defendant of the lumber in its warehouse the possession of the consignee. Simons, the freight agent, had no personal knowledge of the transaction. It occurred before his connection with the defendant company. He does not claim to know of any such arrangement between the defendant and the consignee. He testified only to the existence of a custom of the defendant, as he gathered it "from its records and papers in his charge" when he gave his testimony; and he said that such custom had existed with all railroads terminating in Boston for years; but that was merely a custom on the part of the consignees of lumber to leave it in the sheds of the carrier, at their expense and risk, "to be taken away by them at any time, upon payment of freight and charges," and was no more than an understanding or custom on the part of the carrier to deliver on the usual terms and according to the contract with him as carrier. It did not give the consignee any new rights, and did not give him dominion or control over the property. Cooper's testimony is equally inadequate to the purpose intended, and was, in substance, the same. He defined the right of the J. B. Dixon Lumber Company, after the lumber had been stored in the shed of the carrier, in the same way, as "a right to remove it whenever it was convenient to do so, subject to the payment of the charges of the railroad company"—the same right upon which any consignee may obtain his goods of a carrier.

Speaking of the fact that after the lumber was stored in the shed part of it was delivered to him for the J. B. Dixon Lumber Company, he said, "Some person connected with the freight department authorized me to take it."

²⁶¹ The language of Lord Blackburn in *Kemp v. Falk*, L. R. 7 App. Cas. 584, is quite pertinent: "The freight was not paid, but I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman, instead of being a carrier or shipowner. He alters his responsibilities altogether, and yet, by arrangement or agreement, retains a lien over the goods until the freight is paid. I think such a contract might be made. But when one is asked to say that such a contract was made, the non-payment of the freight is a very important element leading one to say that no such contract was made at all. In this case, I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made, and in no other way." And the defendant so acted in the present case, as well as the consignee, as we have seen. The witnesses do not testify to any agreement or contract, or even understanding in the contractual sense, such as is relied upon to work a constructive delivery; and within the principles referred to, upon the evidence in the record, none can be deduced or implied.

3. The contention that a delivery of a part of the consignment operated as a constructive delivery of the remainder cannot be sustained. Whether delivery of a part amounted to a delivery of the remainder is a question of intention, and a delivery of a part will not be a delivery of the whole, unless the circumstances show that it was intended so to operate. It cannot be supposed that the carrier intended to abandon his lien for the unpaid freight and charges: *Benjamin on Sales*, sec. 857; *Ex parte Cooper*, L. R. 11 Ch. Div. 68; *Buckley v. Furniss*, 17 Wend. 504; *Crawshay v. Eades*, 1 Barn. & C. 181. Much more clearly would this be so where, as in this case, it was understood that delivery could be had only on payment of unpaid freight and charges.

4. The order given March 9, 1891, by the J. B. Dixon ²⁶² Lumber Company to F. C. Bill upon the defendant to deliver the lumber in question to him "on payment of freight and charges," and left with the defendant, could only operate to give Bill whatever rights the J. B. Dixon Lumber Company had.

There is nothing to show that the defendant ever assumed to hold the lumber as his agent, or that it ever recognized any right on his part to have the delivery of it, or that it ever agreed to deliver it to him upon any terms whatever. The evidence shows that the defendant afterward regarded the J. B. Dixon Lumber Company as entitled to the delivery of the lumber upon the usual terms, as before. There is nothing in the case to show that this order is entitled to any significance in the present controversy.

The defendant has been fully protected in its rights by the judgment of the circuit court, and no error has intervened to its prejudice.

By the Court. The judgment of the circuit court is affirmed.

SALES—STOPPAGE IN TRANSITU—INSOLVENCY OF VENDEE.—The right of stoppage in transitu depends upon the insolvency of the vendee, either at the time of the sale of the property or subsequently and before possession, either actual or constructive, by the vendee: *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496; 54 Am. St. Rep. 114, and note. Actual insolvency is not essential. It is sufficient if, before the stoppage, the vendee was either in fact insolvent, or had by his conduct in business, afforded the ordinary apparent evidences of insolvency such as a general inability to pay one's just debts in the usual course of business: *Diem v. Koblitz*, 49 Ohio St. 41; 34 Am. St. Rep. 531, and note.

SALES—STOPPAGE IN TRANSITU—HOW LONG RIGHT OF CONTINUES—POSSESSION OF CARRIER.—The right of stoppage in transitu continues, not only while the goods are in transit, but until they have reached their destination and been delivered into the actual or constructive possession of the consignee: *Harris v. Tenney*, 85 Tex. 254; 34 Am. St. Rep. 796, and note citing previous cases and notes to this point. See, also, *Farrell v. Richmond etc. R. R. Co.*, 112 N. C. 390; 11 Am. St. Rep. 760, and note. Delivery to a carrier under an order of the consignee is not such a constructive delivery to him as will interfere with the consignor's right of stoppage in transitu: *Harris v. Tenney*, 85 Tex. 254; 34 Am. St. Rep. 796. The essential question seems to be whether the control of the carrier over the goods has ceased, and the transit thus ended: *Note to Ocean S. S. Co. v. Ehrlich*, 30 Am. St. Rep. 166.

SALES—STOPPAGE IN TRANSITU—DELIVERY TO CONSIGNEE—WHAT CONSTITUTES.—If the purchaser of goods on credit has become insolvent, and the goods have not been delivered to him, but are in the possession of a carrier, an attaching creditor, or a person acting for such creditor, will not be allowed to become the agent or representative of the purchaser for the purpose of procuring or accepting delivery of such goods and thereby cutting off the right of the vendor to stop them in transit: *Harris v. Tenney*, 85 Tex. 254; 34 Am. St. Rep. 796. In the case just cited, it was held that goods which have been shipped to the purchaser, and which are on drays in process of being carried from a railway depot to the store of the vendee, are still subject to the right of stoppage in transitu. The placing of the goods on drays, though done at the instance of the purchaser, is not such a delivery as defeats the right of stoppage in transitu: See, also, *Ocean S. S. Co. v. Ehrlich*, 88 Ga. 502; 80 Am. St. Rep. 164, and note.

FOR GENERAL DISCUSSIONS OF THE RIGHT OF STOP-
PAGE IN TRANSITU, see notes to *Allen v. Maine Cent. R. R. Co.*,
Am. St. Rep. 312-314; *Rucker v. Donovan*, 19 Am. Rep. 87-92; *Sangs-
ferr v. Stix*, 60 Am. Rep. 51-57; also, monographic note to *Hause v.
Hudson*, 29 Am. Dec. 384-394.

SHAW v. KIRBY.

[98 WISCONSIN, 879.]

HOMESTEAD.—IF LAND IS PURCHASED WITH THE
BONA FIDE INTENTION OF MAKING IT A HOMESTEAD, and
is prepared and fitted for occupancy as such within a reasonable
time, the homestead exemption attaches thereto by relation as of the
date of its purchase.

Suit in equity to enjoin the defendants from selling certain
real property under a judgment in their favor and against the
plaintiff. The property was conveyed to Lewis Brown in 1880,
the defendants obtained a judgment against it in February, 1883,
and in December, 1892, caused execution to be issued thereon.
Brown purchased the land with the intention of making it his
homestead. He cleared part of it, dug a well thereon in 1880,
and erected a small house in the following year. This house was
occupied by his father in law until June, 1882, when it was rent-
ed to one Squires who lived thereon until April, 1883, and paid
rent therefor by building additions thereto. Brown moved into
the house with his family in April, 1883, and continued to reside
there until his death in January, 1887. His family continued
to occupy the property as their residence until January, 1889.
The plaintiffs' title was derived from and under Brown and his
heirs. The trial court was of the opinion that the property was
the homestead of Brown, that the defendants' judgment was not
a lien thereon, and that they should be enjoined from making a
sale thereof under execution. The defendants therefore ap-
pealed.

Edward E. Browne and E. L. Browne, for the appellants.

John B. Hagarty and E. H. Schweppe, for the respondents.

380 WINSLOW, J. This case is ruled by the case of *Scofield
Hopkins*, 61 Wis. 370, 375. It was said, in that case, that "the
bona fide intention of acquiring the premises for a homestead,
without defrauding any one, evidenced by overt acts in fitting
them to become such, followed by actual occupancy within a
reasonable time, must be held to give to the premises answering
the description prescribed in the statute the character of a home-
stead; and the homestead exemption thus secured . . . relates

back to the time of purchase with such intent to make the premises a homestead."

Applying these principles of law to the present case, it is very plain that the judgment is right.

By the Court. Judgment affirmed.

HOMESTEAD—POSSESSION AND OCCUPATION ESSENTIAL—INTENTION.—There must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal, or to complete needed repairs or a dwelling-house in process of construction: Extended now to Pryor v. Stone, 70 Am. Dec. 347. Homestead rights attach to a lot which has been purchased for a homestead, and which the purchaser intends to use as such, though he has not yet occupied it, and it is not fit for such occupancy until he can have a residence built thereon, if he is proceeding in good faith to secure the erection of such residence for the purpose of using it as his home: Cameron v. Gebhard, 85 Tex. 610; 34 Am. St. Rep. 832, and note. See, also, note to Arendt v. Mace, 9 Am. St. Rep. 209.

HOULTON v. NICHOL

[98 WISCONSIN, 393.]

LOBBYING CONTRACTS, WHAT ARE.—All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action, or action by any department of government, are contrary to sound morals, lead to inefficiency in the public service, and are void.

LOBBYING CONTRACT, WHAT IS NOT.—A contract to furnish a party with minutes of desirable public lands upon which to locate, to instruct him in respect to what he should do as a settler thereon to secure priority under the laws of the United States, and to do all that was necessary and could be done to bring the land into the market and to enable him to acquire title thereto does not contemplate the doing of anything unlawful, and is, therefore, a sufficient consideration to support an agreement to pay for the services to be so performed.

CONSIDERATION, PRESUMPTION AS TO CHARACTER OF.—The presumptions are in favor of innocence, and, where the character of the services rendered, or to be rendered, does not appear, they will be presumed to be legal.

Action by plaintiff to recover eight hundred dollars as compensation to plaintiff for furnishing defendant with minutes and descriptions of land and with information necessary to enable the defendant to comply with the land laws of the United States to obtain title to such lands. Judgment for the plaintiff, and the defendant appealed.

Brossard & Colignon, for the appellant.

Loud & O'Brien, for the respondent.

MARSHALL, J. The principal question here presented is, Was the contract entered into between plaintiff and defendant void as against public policy? And that turns on whether it embraces, by its terms or by necessary implication, an agreement to do an illegal act or to resort to secret and improper tampering with official action, either legislative or otherwise, to effect the purposes of the agreement, or that such was its tendency. If, by its terms or by necessary implication, the agreement stipulated for corrupt action or personal solicitation in the nature of lobbying, or tended directly to such results, then it is void; and if such facts appear satisfactorily the court should not hesitate to put the seal of condemnation upon it. The rules governing this subject are as old, at least, as the common law, have been long and firmly established in our jurisprudence, and must be rigidly enforced by courts of justice, else purity and integrity ³⁹⁷ in the administration of government will be seriously imperiled. All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action, or action by any department of the government, are contrary to sound morals, lead to inefficiency in the public service, and come under the condemnation of the rule here under consideration. The following are a few of the cases that might be cited in support of the foregoing proposition: *Tool Co. v. Norris*, 2 Wall. 45; *Elkhart County Lodge v. Crary*, 98 Ind. 238; 49 Am. Rep. 746; *Lyon v. Mitchell*, 36 N. Y. 235; 93 Am. Dec. 502; *Winpenny v. French*, 18 Ohio St. 469; *Mills v. Mills*, 40 N. Y. 543; 100 Am. Dec. 535; *Milbank v. Jones*, 127 N. Y. 370; 24 Am. St. Rep. 454; *Trist v. Child*, 21 Wall. 441; *Powers v. Skinner*, 34 Vt. 274; 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200; 68 Am. Dec. 55; *Fuller v. Dame*, 18 Pick. 472; *Chippewa Valley etc. Ry. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 224. In the last case, there is a very exhaustive discussion of the general subject in an opinion by Mr. Justice Cassoday, including numerous citations of authorities, which might be extended to include all reputable courts, in aid of the views above expressed. There is no failure exhibited anywhere to rigidly maintain the high standard of sound morals in public affairs which a correct application of the rule here invoked requires. In *Marshall v. Baltimore etc. R. R. Co.*, 16 How. 314, the learned judge who wrote the opinion said, in effect, public policy and sound morals imperatively require that courts shall condemn every act, and pronounce void every contract, the elements or probable tendency of which would be to sully the purity or mislead the judgment of those to whom official position

has been intrusted; and this court, in *Chippewa Valley etc. Ry. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 224, quoting with approval from *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519, said, in effect, that "it matters not that nothing improper is done or expected to be done. It is enough if such is the tendency of the contract, that it is contrary to sound morality and public policy, leading ³⁰⁸ necessarily, in the hands of designing and corrupt persons, to improper tampering with public officers, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive some, that is sufficient to stamp its character with the seal of disapproval before a judicial tribunal."

As applied to contracts like the one before us, the dangers and mischiefs that may arise from allowing parties to make merchandise of mere personal solicitation and influence are what the law seeks to guard against, by closing the doors of the courts securely against all efforts to enforce, or to secure the fruits of, agreements that involve such elements as a subject of sale, either expressly or by necessary inference.

Does the agreement under consideration come within the condemnation of the salutary rule referred to? That is the question. Unless it does, clearly, the contract should be upheld. As very truly said by Sir George Jessel, M. R., in *Printing etc. Co. v. Sampson*, L. R. 19 Eq. 462: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." This means no more, we take it, than that it should be made to appear clearly—that is, beyond reasonable controversy—that the contract is void, as contrary to law or sound morals, else it should be sustained.

In the light of the foregoing, the contract in question ³⁰⁹ must be subjected to judicial interpretation in order to determine whether it contains the fatal element or not; for it cannot be seriously contended that by its terms, either as set forth in the complaint or established by the evidence, it necessarily required

doing of anything of an improper character or necessarily led to any such thing. Plaintiff agreed to furnish defendant with minutes of desirable lands on the public domain upon which to locate, and to instruct him in respect to what he should do as a settler on such lands in order to secure priority under the laws of the United States, and to do all that was necessary could be done to bring the land in question into market and enable defendant to acquire title thereto. Wherein does this language contemplate the doing of anything illegal? The intention of the parties must be gathered from the language they used, from the contract actually made, in the light of attending circumstances, the same as in any other case. If, properly construed, it does not, by its terms or by necessary implication, contain anything illegal or tend to any violation of sound morals, the fatal element should not—through an overzealous desire to certify against the deplorable effects of lobbying contracts, strictly so called, which all recognize and should unhesitatingly condemn—be injected into it by mere suspicion and conjecture that the parties intended to do some illegal act or a legal act by illegal means, or that the agreement might have probably led to improper influences upon, or tampering with, official conduct, and thereby defeat the contract.

It is sometimes lost sight of that the presumptions in human affairs are in favor of innocence rather than of guilt, and that such rule applies in testing such a contract as the one we have here by the principles of sound morals: *McBratney v. Chandler*, 12 Kan. 692; 31 Am. Rep. 213. In *Salinas v. Stillman*, 66 Fed. Rep. 677, the agreement between the parties provided that a portion of the moneys eventually ⁴⁰⁰ to be derived from the United States, under an act to purchase the Fort Brown reservation, should be paid to a certain agent, who was to procure the purchase. The court, citing *Trist v. Child*, 21 Wall. 441, in support of the proposition that contracts to aid in procuring legislation are not necessarily unlawful, said, in effect, that as the bill does not show the character of the services to be rendered, the presumption is that they are lawful rather than unlawful. *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55, decided by this court many years ago, and which has often been cited with approval in other jurisdictions, is to the same effect. There was an agreement to prosecute and superintend, in the capacity of agent and attorney, a private claim before the legislature. The court held that, under a proper interpretation of the contract, it contained, by its terms, an agreement to pay money in consideration

of influence by way of personal solicitation of members of the legislature in favor of the desired legislation. The following language was used by the learned judge who delivered the opinion: "We have had some difficulty in determining that the contract sued upon in this case was a contract which stipulated for the use of the influence of the plaintiff with the members of the legislature in favor of a law, but upon reflection we think that to be the case. . . . We know of no way by which plaintiff could comply with the contract on his part without resorting to personal solicitation with the members of the legislative body. We therefore think that the contract was, by its terms, an agreement to pay money for a consideration inconsistent with public policy."

To the same effect is *Chippewa Valley etc. Ry. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 224, where this court, quoting with approval from *Tool Co. v. Norris*, 2 Wall. 45, and *Oscanyan v. Arms Co.*, 103 U. S. 261, to the effect that agreements to influence the action of the legislative or other branches of the government by personal solicitation or influence ⁴⁰¹ are void as against public policy without reference to the question of whether improper means are contemplated; held that the law looks to the general tendency of such agreements, and closes the doors to temptation by refusing their recognition in any of the courts of the country; but, in applying the principle to the case in hand, the court held that the language of the contract was such that the plaintiff, in carrying it out, must necessarily have resorted to methods classed as lobbying; that though the contract did not, in terms, require anything of an improper character, it did so impliedly, as performance necessarily led to methods that come within the condemnation of the law; thereby, recognizing that the test is, Does the contract, by its terms or by necessary implication, require the performance of acts of a corrupt character or which have a corrupting tendency? Obviously, when the learned judge in *Tool Co. v. Norris*, 2 Wall. 45, so often quoted and approved, said that the law looks to the tendency of such agreements, and closes the doors of the courts to them, and that their invalidity turns, not on whether improper influences are intended, but upon their corrupting tendency, he referred to agreements to do acts in themselves contrary to public policy, or agreements the performance of which, by necessary inference, required or contemplated the resort to methods having a corrupting tendency; that is all.

In *Trist v. Child*, 21 Wall. 441, the agreement was for the

influence of a lobbying agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means of personal influence and solicitation. The court held the contract void, and there clearly pointed out the distinction between agreements for services that may, and such as may not, properly be entered into to obtain legislative or executive action, and, in effect, said that the preparation of petitions, taking of testimony, collecting of facts, preparing of arguments, and submitting ⁴⁰² them, orally or in writing, to committees or other proper authority, and services of like character, which are intended to reach only the reason of those to be influenced, are legitimate. They are not to be classed with contracts for personal solicitation or the means customarily resorted to by the lobbyist. It is upon the latter that the law puts the seal of condemnation; not upon the former. To the same effect are *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608; *Powers v. Skinner*, 34 Vt. 275; 80 Am. Dec. 677; *Chippewa Valley etc. Ry. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 224. In *Powers v. Skinner*, 34 Vt. 275, 80 Am. Dec. 677, the court held that a contract to labor faithfully before the legislature to effect a desired end was not by its terms illegal; but the trial court found, in addition, that it contained an agreement that the plaintiff should solicit members in an individual way, as opportunity therefor was presented, and, because of such element, that the contract was void.

A contract somewhat similar to the one under consideration, in *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, was held void as against public policy; but the court appears to have rested the decision, not so much on the contract, as on what was done under it and done before it was entered into. The evidence showed that plaintiff attended sessions of Congress, appeared before its committees, and employed counsel to urge the passage of a bill forfeiting lands to the government, and to open them to settlement in such a way as to secure priority of settlers thereto. So far as we can gather from the reported case, all acts done in regard to obtaining legislation were prior to the making of the agreement.

There was really nothing in the language or purposes of the contract, viewed in the light of attending circumstances and what was actually done, showing that improper influence was contemplated, or that there was any tendency to that end. There was no personal soliciting of members of Congress or the officers of the interior department. ⁴⁰³ The carrying out of the contract

did not require or lead to any such thing, for it was, so far as relates to any official action, a mere agreement to promote the enforcement and application of existing laws and established regulations of the interior department to existing conditions, to the end that persons having a right to select and acquire lands on the public domain might exercise such right. This required only the collecting of facts, and presenting them to the proper officers, and making arguments thereon in respect to the legal status of the lands under the circumstances, and the rights of parties, under such existing laws and regulations, to acquire such lands. The fact that plaintiff was not a member of the legal profession makes no difference with the legitimate character of his services, in the face of the undisputed facts that such services required special knowledge and training, and that plaintiff, by years of study and experience, had qualified himself to render valuable services to his employers. Under these circumstances, to infer that the services contracted for were other than such as are sanctioned by *Trist v. Child*, 21 Wall. 441—the collecting of facts, making of arguments, and promoting action by appeals to reason—is rather to reverse the rule which presumes innocence rather than guilt in the affairs of life. So far as *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, is inconsistent with the decision in this case, we are not disposed to follow it, but to hold that, unless the contract was for the performance of some act illegal per se, or to do something of itself of a corrupting tendency, or by its terms or by necessary implication it contemplated a resort to improper means, such as personal solicitation or influence, something other than an appeal to the reason of the department officers whose action was sought, or to obtain their action as a favor instead of as a right, it should be upheld.

So far as appears from the evidence in this case, plaintiff had acquired all his information in respect to the legal status ⁴⁰⁴ of the lands in question, their location and value, before the contract was made with the defendant. No legislation was had, solicited, or required. The only thing plaintiff did after making such contract, and the only thing contemplated, was to make such presentation before the secretary of the interior as to satisfy such officer of the legal status of the lands, and that they should be thrown open to settlement under existing laws, which would secure to the first settler thereon priority thereto, and there is no element, in the agreement, the performance of which, by necessary or reasonable inference, tended to any other result. It appears that plaintiff did not go before such department and

make such presentation and urge such action as a favor to his principals, but as a right to which they, and all other persons similarly situated, were entitled. Looking at the contract and its tendency, as above stated, the elements requisite to warrant the court in condemning it as contrary to public policy are absent; hence it must be sustained as a binding agreement between the parties.

The other questions raised have been considered, but we do not deem them of sufficient importance to more than mention them, so that it may be seen that they have not been overlooked. There is no reversible error that we perceive in the record.

By the Court. Judgment affirmed.

CONTRACTS TO PROCURE LEGISLATION—VALIDITY OF.—An agreement by which one party agrees with another to put him into possession of land belonging to the United States, not then in the market, nor subject to entry, and to keep him in possession until it can be purchased from the government, and, for a consideration to be paid by such party, agrees to procure such legislation from Congress as will enable such party in possession to secure the land in preference to any other party, is a lobbying contract and void against public policy: *Houlton v. Dunn*, 60 Minn. 26; 51 Am. St. Rep. 493, and note. See note to *Spalding v. Ewing*, 34 Am. St. Rep. 613, and note to *Parsons v. Trask*, 66 Am. Dec. 506.

CONTRACTS—ILLEGALITY OF—PRESUMPTION AGAINST.—Parties are presumed to know the law of the place where performance is to be made, and to contract with a view to that law, unless it is otherwise expressed in the contract, and this presumption is legal and irrebuttable: *Lewis v. Headley*, 36 Ill. 433; 87 Am. Dec. 227. See note to *Palmer v. Farrell*, 15 Am. St. Rep. 713-715; also *Wyatt v. Larimer etc. Ins. Co.*, 18 Colo. 298; 36 Am. St. Rep. 280, and note.

DAVIS v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

[93 WISCONSIN, 470.]

CARRIERS—CONTRACTS EXEMPTING FROM LIABILITY.—A stipulation in a drover's return ticket that the carrier shall not be answerable under any circumstances, whether of negligence of its agents or otherwise, for any injury to him is void as against public policy.

CONFLICT OF LAWS.—A CONTRACT WITH A COMMON CARRIER, to be performed partly in the state wherein it was made and partly in another state, is governed by the laws of the former, when it does not appear that the parties intended to be bound by the law of any other state.

INTERSTATE COMMERCE—CONTRACTS LIMITING LIABILITY OF CARRIERS.—Until Congress shall enact statutes controlling the subject, the right of carriers operating lines in two or more states to exact and enforce stipulations limiting their liability for negligence is controlled by the common law, and the common law upon the subject is not superseded by the nonexercise of the authority of Congress.

JURY TRIAL.—A SPECIAL VERDICT is that by which the jury finds the facts only, leaving the judgment to the court.

JURY TRIAL.—A SPECIAL VERDICT IS FATALLY DEFECTIVE in an action to recover for personal injuries alleged to have resulted to the plaintiff from the negligence of the defendant, if it leaves the proximate cause of the accident unanswered.

NEGLIGENCE.—THE MERE FAILURE TO WARD AGAINST A RESULT which could not reasonably have been expected is not negligence. Negligence is not the proximate cause of an accident, unless, under all the circumstances, it could have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough that the accident is a natural consequence of the negligence. It must have been a probable consequence.

NEGLIGENCE—RAILWAYS.—A special verdict against a railway corporation to recover for personal injuries suffered by the plaintiff from the derailment of a train, finding that the ties were not in good condition, and that the defendant was guilty of the negligence which occasioned the injury, is insufficient, because it does not show that such negligence was the proximate cause of the plaintiff's injury.

JURY TRIAL.—INSTRUCTIONS AS TO NEGLIGENCE.—An instruction to a jury that, if the defendant was guilty of the negligence which injured the plaintiff, the verdict should be in his favor, is fatally inadequate, because it ignores the rule that it is not enough to prove that the injury was the natural consequence of the negligence of the defendant, but that it must also be a probable consequence, and, under all the circumstances, such an injury as might have been reasonably foreseen by a man of ordinary intelligence and prudence.

JURY TRIAL—INSTRUCTIONS RESPECTING FACTS, WHEN REQUIRED.—If the attorney for one of the litigants makes a statement of a matter of fact contrary to the undisputed testimony, the court should, if requested, instruct the jury that such fact is established by the evidence, and that they are not at liberty to find to the contrary.

Action to recover for personal injuries. The plaintiff while traveling as a passenger on a train of the defendant company was injured as a consequence of the derailment of cars. It was claimed in the complaint that the track, railway bridge, ties, frogs, and appliances for the distance of one hundred feet over and to the westward of Coon river at a point near the village of Coon Rapids were out of repair, defective, and unsafe. The defendant denied that the injuries suffered by plaintiff were caused by any negligence on its part, but it further pleaded that the plaintiff was riding on a ticket, among the terms and conditions of which were that he assumed all risks of accidents, and agreed that the defendant should not be liable under any circumstances whatever, whether by negligence of the agents of the defendant or otherwise, for any injury to him while traveling on the defendant's road. There was some evidence tending to show that certain laborers had been discharged by the defendant, and had threatened to ditch the train, that a person passing through the bridge and

over the trestle a short time before the accident saw four men on the track, and that they started down the side of the grade and went behind a clump of bushes. There was a special verdict which found: "1. The engine was not, nor any part of it, off the track west of the trestle; 2. The roadbed from the west end of the trestle to switch stand No. 3, on the north side of the main track, was of a proper and sufficient width; 3. The ties of the track from the west end of the trestle to switch stand No. 3 were not in good condition at the time of the wreck; 4. The rails, switches, and frogs from the west end of the trestle to the guard-rail of switch No. 3 were in good condition at the time of the accident; 5. The train was running, at the time it approached the place of the accident, at about the usual rate of speed; 6. The engineer was not guilty of any negligence which caused the car wherein the plaintiff was riding at the time of the accident to leave the track and to fall over the embankment; 7. The defendant company was guilty of negligence which occasioned the injury to the plaintiff; 8. If the plaintiff was entitled to judgment, his damages were assessed at four thousand dollars." Upon this verdict there was a judgment in favor of the plaintiff, and the defendant moved for a new trial.

George W. Bird and Burton Hanson, for the appellant.

P. H. Fay, Rickel & Crocker, and Richmond & Smith, for the respondent.

479 PINNEY, J. . 1. We think that the evidence on the part of the plaintiffs was sufficient to require that the case should be submitted to the jury on some, at least, of the allegations of negligence; and that the defendant's motion for a nonsuit, and its request that the jury be instructed to find a verdict for the defendant, were properly denied. As we have arrived at the conclusion that there must be a new trial, we will abstain from any discussion of the evidence, and content ourselves with stating that the case was clearly one for the jury, under proper instructions as to the law, to determine whether the claim of the plaintiff or that of the defendant as to the cause of the accident was the true one.

There is a question of law presented by these motions, whether by the contract between the plaintiff and the company, and the terms of the "drover's return ticket" issued under it, upon which he was riding at the time of the accident, the plaintiff is precluded from maintaining his action, upon the ground that he had assumed all risks of accident and expressly agreed that the company

"shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to me." This stipulation was part of an entire contract made in Wisconsin, to be performed in part in Wisconsin and in part in Iowa. It is very well established in this state that a contract for such an exemption from liability by a common carrier is void, as against public policy. The defendant could not, by any agreement, however plain and explicit, wholly relieve itself from liability for injuries caused by its negligence or the negligence of its agents or employes: *Abrams v. Milwaukee etc. Ry. Co.*, 87 Wis. 485; 41 Am. St. Rep. 55, and cases cited. The validity of ~~any~~ such a stipulation was fully considered in that case, and very many authorities were referred to holding against the validity of such an exemption; and the doctrine of the case of *Railroad Co. v. Lockwood*, 17 Wall, 357, in which the question of the validity of an exemption in substance the same as the present case was elaborately considered, was approved and followed, and the conclusion was reached that a railroad company could not thus abdicate the essential duties of its employment, of carefulness and fidelity as a common carrier. This is in accordance with previous decisions of this court there referred to, and the law was held to be the same in the state of Iowa: *Hart v. Chicago etc. Ry. Co.*, 69 Iowa, 490; so that, both by the law and public policy of the place where made and the states within which the contract was to be performed, the provision in question was void, and it can afford no protection to the defendant in this action. We think it plain that the interpretation and validity of this provision are to be governed by the law of Wisconsin, where it was made, as it does not appear that the parties intended to be bound by the law of any other state or country in respect to the contract: *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 450, and cases there cited. This result is in accord with the common law and principle of public policy in all the states.

The proposition that resort cannot be had to the common law to determine the validity of a contract for interstate carriage or transportation, in the absence of any legislation to the contrary by congress under its power to regulate commerce, is, we think, without support in reason or adjudicated cases. Until congress shall act in the premises, it is competent for the parties to make any agreement on the subject not void as against the principles of the common law and public policy, to which resort may be had, as the law of the contract, in determining the validity of any of its provisions. Transportation companies, by reason of

their control ⁴⁸¹ over the carrying trade, cannot be allowed to exact any stipulation they may choose, and arrogate to themselves the right to regulate commerce, in defiance of the common law and settled principles of public policy. The invalidity of such stipulations in contracts relative to interstate transportation has been declared in very many cases in which the principles laid down in *Railroad Co. v. Lockwood*, 17 Wall. 357, have been applied. In *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 439, it was said that "by the common law of England and America, before the Declaration of Independence, recognized by the weight of English authorities for half a century afterward, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence." The constitutional grant to Congress of the power to regulate commerce did not supersede or displace the common law, but conferred upon Congress the power to make such regulations as in its wisdom it saw fit; and, until Congress acts in the premises, the principles of the common law governing such contracts will necessarily apply, and cannot be regarded as obnoxious to the objection that they are regulations of commerce, within the meaning of the constitutional provision. In the case last cited, it is said that the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, "rests upon the doctrine that an express stipulation by any common carrier for hire, in the contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases," there cited: *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 338; *Railroad Co. v. Pratt*, 22 Wall. 123, 134; *Railway Co. v. Stevens*, 95 U. S. 655; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 181; *Phoenix Ins. Co. v. Erie etc. Transp. Co.*, 117 U. S. 322. These are full and instructive ⁴⁸² cases showing that the provision in question relied on by the defendant to exempt it from liability to the plaintiff is void.

2. The special verdict in this case is fatally defective, in that the question as to what was the proximate cause of the injury to the plaintiff is not substantially answered by it. The third finding, that the ties of the track from the west end of the trestle to switch stand No. 3 were not in good condition at the time, does not attribute the accident to that cause; nor does the seventh finding, that the defendant company was guilty of negligence

which occasioned the injury to the plaintiff, meet the requirements of the rule. The verdict leaves the question of the proximate cause of the wreck unanswered. "A special verdict is that by which the jury find the facts only, leaving the judgment to the court": Rev. Stats., sec. 2857. Whether the negligence of the defendant was the proximate cause of the plaintiff's injury was a vital question, and one sharply litigated; and the defendant had a right to have that question submitted to the jury and passed on by the special verdict. Unless it is substantially answered by the verdict, no judgment can be given on it, and a new trial will be necessary: *Kerkhof v. Atlas Paper Co.*, 68 Wis. 674; *Kreuziger v. Chicago etc. Ry. Co.*, 73 Wis. 158; *McGowan v. Chicago etc. Ry. Co.*, 91 Wis. 147. The question here was, whether the negligence of the defendant was the proximate cause of the plaintiff's injury, the defendant's case going to show that it was not, but that the proximate cause was an entirely independent and adequate one, for which the defendant was not in any way responsible. It was not enough to entitle the plaintiff to recover to show that his injury was the natural consequence of the negligent act or omission of the defendant; but it must have appeared that, under all the circumstances, it might reasonably have been expected that such an injury would result. A mere failure to ward against a result which could not ⁴⁸³ have been reasonably expected is not negligence: *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 156; 50 Am. Rep. 352; *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469. As was said in *McGowan v. Chicago etc. Ry. Co.*, 91 Wis. 147: "The plaintiff was not entitled to recover merely because the injury he had received was in consequence of the defendant's track and roadbed having not been maintained and kept in repair. In order to warrant a recovery, it must have appeared that its failure in this respect was the result of negligence on its part, and that a person of ordinary intelligence and prudence might have expected, as the result of such negligence, that such an injury would occur. . . . The gist of the action is negligence on the part of the defendant, and the relation of cause and effect could be established only by showing that the negligent act or omission of the defendant caused the injury and was its proximate cause." As was said in *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 378; 46 Am. St. Rep. 849: "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natu-

ral consequence of the negligence. It must also have been the probable consequence": *Barton v. Pepin etc. Soc.*, 83 Wis. 19; *Huber v. La Crosse etc. Ry. Co.*, 92 Wis. 636; 53 Am. St. Rep. 940; *Craven v. Smith*, 89 Wis. 119; *Guinard v. Knapp-Stout etc. Co.*, 90 Wis. 129: The defendant owed to the public the duty of a very high degree of vigilance and care in the structure, inspection, repair, and management of its track; and it gave evidence tending to show that it had performed this duty and had no reasonable ground to expect such an accident. The seventh finding of the special verdict goes no farther than to find that the accident was the natural consequence of the defendant's negligence, and does not find that the plaintiff's accident was the probable consequence of such negligence, or that such negligence was ⁴⁸⁴ its proximate cause; nor does this finding refer in any manner to the third finding, in respect to the ties not being in good condition, as connected with or the cause of the accident. Such a defect in the verdict can be supplied by reference to the evidence only in case the evidence relied on for that purpose is uncontradicted: *Hutchinson v. Chicago etc. Ry. Co.*, 41 Wis. 553; *Sheehy v. Duffy*, 89 Wis. 12. But such was not the present case. In *Abrams v. Milwaukee etc. Ry. Co.*, 87 Wis. 485, 41 Am. St. Rep. 55, there was no dispute as to the proximate cause of the death of the horses, and no question was made as to the sufficiency of the verdict. The case turned wholly upon the validity of the stipulation exempting the company from liability for injuries caused by its own negligence, and limiting the amount of its liability therefor.

8. Whether the negligence of the defendant was the proximate cause of the plaintiff's injury was a vital question in dispute, and it was important that the court, in its charge to the jury, should have instructed them as to the law in this respect, explaining in what aspects of the case the defendant's negligence could be considered as the proximate cause of the plaintiff's injury. The charge of the court, like the special verdict, does not deal with this question at all. In submitting the question, "Was the defendant company guilty of negligence which occasioned the injury of the plaintiff?" the court said only: "That is a question for you to answer, and if you find the company was guilty of negligence in this case, which injured the plaintiff, your answer will be, 'Yes.' If you find it was not guilty of negligence, then your answer will be, 'No.'" This, in substance, was all the charge contained on the subject; and, as applied to the evidence, the instruction was an inadequate and misleading one, for it en-

tirely ignored the rule that it was not enough to prove that the injury of the plaintiff was the natural consequence of the negligence of the defendant, but that it must ⁴⁸⁵ also have been the probable consequence, and that, under all the circumstances, such an injury might have been reasonably foreseen by a man of ordinary intelligence and prudence. This was an error plainly prejudicial to the defendant, and requires a reversal of the judgment.

4. In the argument of plaintiff's counsel to the jury, he contended that no threats were made by one of the discharged laborers, named Mike Camp, and that no person was seen near the place of the accident about half an hour before the wreck, as claimed by the defendant; whereupon the defendant's counsel asked the court to instruct the jury "that it is a fact established by the testimony that Mike Camp made the threats testified to, and that four persons were seen near the place of the accident about half an hour prior to this wreck, and you are not at liberty to find to the contrary." This instruction was refused. The facts stated in the instruction were testified to by witnesses of apparent intelligence and credibility, who were in no way impeached or contradicted. The plaintiff's counsel, under the circumstances, had no right to make such an unfair and reckless assertion, and the only method of counteracting the injurious effect of this manifest impropriety was by asking for the instruction as soon as the occasion for it occurred. We think that the instruction should have been given. Under the circumstances stated, the jury would have no right capriciously to discredit the testimony; and the court should have instructed the jury as requested, thus correcting the injurious consequences of the improper assertion. It is not to be tolerated that counsel, by reckless or unfounded statements, shall rule the course of the trial and injuriously affect its result.

Several other questions were argued, but, as they may not arise on a retrial, we decline to intimate any opinion in respect to them.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ON REHEARING.

⁴⁸⁶ PINNEY, J. The counsel for the plaintiff are in error in supposing that the court has held, or intended to hold, that the defendant company, as a carrier of passengers, was not bound to exercise extraordinary care for their safety, but ordinary care only. The opinion refers to the very high degree of vigilance

and care the defendant company owed to the public in the structure, inspection, repair, and management of its track, and that the defendant's negligence could not be considered the proximate cause of the plaintiff's injury, so as to warrant a recovery, unless under all the circumstances, the accident in question might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is pointed out that the language of the opinion on the subject of proximate cause, as to whether the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence, although a correct expression of the law in actions for injuries to property, or where the servant sues his master for damages caused by the negligence of the latter, and the measure of the defendant's duty is ordinary care, is inaccurate, as applied to the present case, where a passenger sues a railway company for injuries received while being carried on its road, and where the defendant is bound to the exercise of extraordinary care for his safety. It must be conceded that the criticism as to the use of the expression "ordinary intelligence and prudence," which was inadvertently used, is well founded. It should have been stated, instead, that the defendant's negligence could not, in the present case, be considered the proximate cause of the plaintiff's injury, so as to warrant a recovery, unless, under all the circumstances, the accident in question might have been reasonably foreseen by a competent and experienced man accustomed to the structure, inspection, repair, and ⁴⁸⁷ management of the roadbed and track of a railway, while in the exercise of extraordinary care and prudence. The opinion is to be considered as modified accordingly. There was no proper instruction, or finding by the jury, upon the question of the proximate cause of the plaintiff's injury; and the erroneous expression does not furnish, nor do we perceive, any sufficient ground for a rehearing.

By the Court. The motion for a rehearing is denied.

CARRIERS—CONTRACTS EXEMPTING FROM LIABILITY.—A carrier may restrict its liability by special contract, although it cannot thus exonerate itself from the consequences of its own negligence: *Reid v. Evansville etc. R. R. Co.*, 10 Ind. App. 385; 53 Am. St. Rep. 391, and note. It is contrary to public policy to allow a common carrier to stipulate for immunity from the consequences of his own negligence or fraud, or that of his employes: *Willock v. Pennsylvania R. R. Co.*, 166 Pa. St. 184; 45 Am. St. Rep. 674, and note. See, also, note to *Duntley v. Boston etc. R. R.*, 49 Am. St. Rep. 612.

CARRIERS—CONFLICT OF LAWS.—A contract made in one state, between a railroad company and a shipper for the transportation of freight from a point in that state to a point in another state,

and limiting the liability of the carrier, must be interpreted according to the law of the state where it was made: *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 568; 49 Am. St. Rep. 898; *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231; 54 Am. St. Rep. 550, and note.

TRIAL—SPECIAL VERDICT—WHEN DEFECTIVE.—Where a special verdict fails to cover all the issues, plaintiff cannot take judgment thereon: *Note to Gulf etc. Ry. Co. v. James*, 15 Am. St. Rep. 752. See, also, note to *Wightman v. Chicago etc. Ry. Co.*, 9 Am. St. Rep. 782. A special verdict should find material facts, and not the evidence of those facts: *La Frombois v. Jackson*, 8 Cow. 589; 18 Am. Dec. 463, and note. Facts not included within a special verdict will not be presumed to exist: *Lawrence v. Beaubien*, 2 Bail. 623; 23 Am. Dec. 155.

TRIAL—NEGLIGENCE—INSTRUCTIONS AS TO.—Instruction that if the jury found from the evidence that the defendant, through its agents, servants, and employes, fired and exploded a blast, as charged by plaintiff's complaint, and that it resulted in the death of the plaintiff's intestate, then that plaintiff is entitled to recover, is not erroneous, and does not remove from the jury the consideration of all questions except as to whether defendant fired the blast, if the complaint set forth a careless and negligent explosion of the blast: *Munro v. Pacific etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248. See, also, *Brownfield v. Hughes*, 128 Pa. St. 194; 15 Am. St. Rep. 667; *Spokane Truck Co. v. Hoefer*, 2 Wash. 45; 26 Am. St. Rep. 842.

TRIAL—MISCONDUCT OF COUNSEL IN ARGUMENT—WHEN AND HOW CURED.—Where an attorney who has made improper remarks in his argument to the jury, when called to order, admits his error, and immediately desists, or when the court, upon objection made, rules out the objectionable remarks, and instructs the jury to disregard them, the great weight of authority holds that the mischief is thereby remedied, and that a new trial ought not, in such cases, to be granted: *Extended note to McDonald v. People*, 9 Am. St. Rep. 569, which discusses the point fully.

NEGLIGENCE—PROXIMATE CAUSE.—To warrant a finding that negligence or an act not amounting to a wanton wrong is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances: *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306; 56 Am. St. Rep. 728, and note. It is not enough to prove that the accident was the natural consequence of the negligence; it must also have been the probable consequence. The mere failure to ward against a result which could not have been reasonably anticipated is not actionable negligence: *Huber v. La Crosse City Ry. Co.*, 92 Wis. 636; 53 Am. St. Rep. 940, and note.

DEGENHARDT v. HELLER.

[93 WISCONSIN, 662.]

ASSAULT, WHAT IS NOT.—The firing of a revolver in close proximity to a person without pointing it at him or intending to harm him, but with an intention of frightening him, is not an assault.

Timlin & Glicksman, for the appellant.

Thwaites & Runge and Reitbrock & Halsey, for the respondent.

662 CASSODAY, C. J. The complaint alleges, in effect, that September 3, 1893, at Milwaukee, the defendant, with force and arms, unlawfully and maliciously assaulted the plaintiff with **363** a revolver, and did then and there, by such unlawful and malicious assault, inflict great and permanent injuries on the plaintiff, in body and mind, whereby he suffered great physical pain, and became hopelessly sick and physically enfeebled, and demands judgment therefor in the sum named. The answer is a general denial.

At the close of the trial the jury returned a special verdict to the effect: 1. That the defendant, on or about September 3, 1893, discharged a revolver in proximity to the plaintiff; 2. At a distance of about sixty feet from him; 3. That the defendant did not aim or present the pistol at the plaintiff at the time the same was discharged; 4. That the defendant did not aim or present the pistol at the plaintiff immediately after the same was discharged; 5. That the defendant, by the discharge of the pistol, did not intend to do any bodily harm to the plaintiff; 6. That the defendant, by threats and the discharge of the pistol, did intend to frighten the plaintiff; 7. That the plaintiff did sustain mental or physical injury, which was approximately caused by the acts of the defendant; 8. That, if the plaintiff is entitled to recover, his damages are assessed at one thousand dollars. From the judgment entered thereon in favor of the plaintiff, the defendant brings this appeal.

The question presented is, not whether the plaintiff could maintain an action against the defendant upon the facts found in the special verdict, but whether the verdict sustains the cause of action alleged in the complaint, which was the only cause of action which the defendant was required to defend. The only cause of action so alleged is for an unlawful and malicious assault upon the plaintiff with a revolver. The verdict simply finds that the revolver was not aimed or presented at the plaintiff when discharged, nor immediately thereafter, and that the defendant

discharged the same with the intention of frightening the plaintiff, but without intending to do him any bodily harm. In *Hay v. People*, 1 Hill, 352, Mr. Justice Cowen, speaking for the court, said: "An assault is defined to be an attempt with force or violence to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person." "An assault is an intentional attempt, by violence, to do an injury to another": Wharton's American Criminal Law, 4th ed., sec. 1241. If there is no such intention—no present purpose to do such injury—then there is no assault: Wharton's American Criminal Law, 4th ed., sec. 1241. Another author says: "An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect. Mere threats alone do not constitute the offense. There must be proof of violence actually offered": 2 Greenleaf on Evidence, sec. 82. "The intention to do harm is of the essence of an assault, and this intent is to be collected by the jury from the circumstances of the case": 2 Greenleaf on Evidence, sec. 83. "In the case of a mere assault, the *quo animo* is material, as without an unlawful intention there is no assault": 2 Greenleaf on Evidence, sec. 94. To the same effect is *Vosberg v. Putney*, 80 Wis. 527; 27 Am. St. Rep. 47. Such being the law, it is very manifest that the verdict acquits the defendant of committing the assault alleged. There was no motion for a new trial. Each party moved for judgment in his favor upon the verdict. The court erroneously denied the defendant's motion and granted the plaintiff's motion.

By the Court. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to enter judgment upon the verdict in favor of the defendant and against the plaintiff.

ASSAULT—WHAT IS NOT.—There is no assault without an actual attempt to do physical violence, coupled with a present ability to carry it into execution. Therefore, a person who stands on the opposite side of even a very narrow street from another, and points an unloaded pistol, or a pistol not shown by any evidence to have been loaded, at the other, and threatens to use it upon him, is not guilty of an assault, as the element of present ability is lacking: *Klein v. State*, 9 Ind. App. 865; 58 Am. St. Rep. 354, and note. *Contra, State v. Herron*, 12 Mont. 290; 33 Am. St. Rep. 576, and note.

OELBERMANN v. IDE.

[93 WISCONSIN, 669.]

JUDGMENT.—IF AN ORDER FOR THE SERVICE OF SUMMONS IS NOT BASED UPON a verified complaint, it is void, and cannot support a judgment founded thereon.

OFFICIAL SEALS.—If the verification of a complaint is made before an officer outside of the state, his official character must be authenticated by his official seal, if the law provides for that method of establishing such character. Otherwise, the complaint cannot be treated as verified.

SEAL, OFFICIAL, OMISSION OF.—If the law provides that an officer shall have an official seal, that his acts shall be certified to under his hand and seal of office, his certificate of verification of a complaint which is not impressed with such seal is void.

SEALS.—AN OFFICIAL SEAL MUST CONTAIN enough to show the official character of the officer, and must be capable of making a distinct and uniform impression upon the paper on which the certificate is written, or on some tenacious substance, as wax, or on wafers, or some adhesive substance attached thereto, capable of receiving an impression. Words or figures made by the pen or otherwise than impressed, so as to show in the paper itself, or some substance attached thereto, cannot be considered as forming any part of the seal.

SEAL, OFFICIAL, WHAT IS NOT.—If a commissioner of deeds impresses on his certificate a seal containing his name and designating him as a commissioner for the state of New York, and writes in a blank place the word "Wisconsin," such impression, cannot be treated as his official seal for the last-named state.

GARNISHMENT BASED UPON A JUDGMENT void for want of jurisdiction is ineffective.

F. J. Walthers, for the appellant.

Friend & Bright and Orren T. Williams, for the respondents.

⁶⁷¹ MARSHALL, J. If the judgment in the principal action is void for want of jurisdiction of the court to enter it, then the judgment appealed from must be reversed. It is claimed on the part of appellant that such is the case, because the verification to the complaint was insufficient to support the order for service by publication, in that it purports to have been made in New York before a commissioner of deeds for ⁶⁷² this state, and that his official character was not authenticated by an official seal; that though a seal was impressed on the paper, containing the words, "S. Steinhammer, Commissioner for in the State of New York," and the blank space in such impression was filled up with pen and ink by writing in the word "Wisconsin," it is not a seal of office, within the meaning of the statute upon the subject (Rev. Stats., sec. 182), sufficient to show the official character of the commissioner.

An order for the service of a summons by publication can

only be granted on a complaint duly verified and filed, and an affidavit, together showing the facts required to exist: Rev. Stats., sec. 2640. Without such verified complaint on file at the time of making such order, it is a nullity: *Cummings v. Tabor*, 61 Wis. 185; *Manning v. Heady*, 64 Wis. 630; *Witt v. Meyer*, 69 Wis. 595. If the verification of a complaint is made before an officer outside this state, unless his official character is authenticated by his official seal, if the law provides for that method of establishing such character, such complaint cannot be treated as verified according to law: *Fellows v. Menasha*, 11 Wis. 558; *Knowles v. Fritz*, 58 Wis. 216.

Section 182 of the Revised Statutes provides that, before the commissioner is authorized to exercise any power, he shall, in addition to depositing in the office of the secretary of state a prescribed oath of office, deposit an impression of his seal of office. Section 183 of the Revised Statutes provides that his acts done pursuant to the laws of this state, certified under his hand and seal of office, shall be as valid as if done by a proper officer of this state. The same section provides that the commissioner may administer oaths required to be used in this state. From this it is obvious that only by force of the statute can the verification be made before a commissioner in another state. The law that provides that it may be so made provides the manner in which the official act must be authenticated, and this court has no authority to dispense with the statutory requirement. ⁶⁷³ Counsel for respondents treats the point lightly, but we are unable to say that an express statutory provision may be treated as a mere formal matter. It positively requires an official seal to be used by the commissioner, in order to authenticate his official acts, without providing what such seal shall contain. Therefore, unless the seal used is sufficient, within the authorities on the subject, we must hold, in conformity to previous adjudications of this court, that the complaint was not verified as the statute requires.

It needs no argument or citation of authority to support the proposition that an official seal, when required by statute, no particular form or words being prescribed, must contain enough to show the official character of the officer, and must be capable of making a distinct and uniform impression upon the paper on which the certificate is written, or on some tenacious substance as wax, or on wafers, or some adhesive substance, attached thereto, capable of receiving an impression: Rev. Stats., sec. 4971, subd. 16; *Pierce v. Indseth*, 106 U. S. 546. A seal made by a pen, or a

written scrawl, does not fill the requirements of an official seal: *Mason v. Brock*, 12 Ill. 273; 52 Am. Dec. 490; 21 Am. & Eng. Ency. of Law, 909; *Hinckley v. O'Farrel*, 4 Blackf. 185. A design printed in ink is not a seal of office: *Richard v. Boller*, 51 How. Pr. 371. "A seal can only be made upon the paper itself, when the design is impressed upon the paper and does not require any other substance to exhibit it": *Richard v. Boller*, 6 Daly, 460. These authorities, to which many more might be added, clearly show that nothing short of an impression on the paper will constitute an official seal. Any word or figures made by pen or otherwise than impressed so as to show in the paper itself or some substance attached to the paper, cannot be considered as forming any part of the seal: Rev. Stats., sec. 4971, subd. 16.

Applying what has been said to the instant case, the word "Wisconsin," written in after the impression was made on ⁶⁷⁴ the certificate, obviously adds nothing to the seal; for, if one part could be thus made, it all might be, and the requirement that the seal shall be impressed on the paper would be entirely unsatisfied. It follows that the question must be answered, Are the words, "S. Steinhammer, Commissioner for in the State of New York," impressed on paper, sufficient to indicate the official character of the officer? Clearly not. That appears too plain for argument. It is wanting in the word written in, "Wisconsin," and without it the impression is meaningless. Without it no information is conveyed by such impression, in respect to the state for which the officer is commissioner, or whether he is a commissioner of deeds at all. Such was the conclusion reached by the supreme court of the state of Iowa in a similar case: *Gage v. Dubuque etc. R. R. Co.*, 11 Iowa, 310, 77 Am. Dec. 145, cited by counsel for appellant. In deciding the question under consideration, Baldwin, J., said, in effect: "If a portion of the words necessary to be used in the body of the seal can be written, the whole may be. The law requires that they shall be impressed. A seal of office thus designed [without name of the state] may be used for any state, whereas it is contemplated by our statutes that the commissioner shall have a seal designed for this state alone."

It is difficult to avoid the force of this reasoning. In truth, as it appears to us, it cannot be avoided without, in effect, by judicial construction, doing away with a statutory requirement. That we are not disposed to do; hence must hold that, for want of a proper verification of the complaint, the order for service by publication of the summons in the original action was void,

and, on that account, that the court failed to obtain jurisdiction to render the judgment in such action, hence no jurisdiction to render the judgment appealed from.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

JUDGMENTS — JURISDICTION—NECESSITY OF.—Judgments reciting service of process, but not stating the mode of service, when there is a return upon such process, must be considered as referring to such return, and if the service there shown is insufficient, the judgment is void: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note. Judgments rendered without jurisdiction are void: Note to *Great West Min. Co. v. Mining Co.*, 13 Am. St. Rep. 220. See note to *Falls v. Wright*, 29 Am. St. Rep. 78; and extended note to *Choate v. Spencer*, 40 Am. St. Rep. 430-434.

ATTACHMENT BASED UPON VOID JUDGMENT.—All proceedings based upon void judgments are absolute nullities, irrespective of notice or bona fides: Note to *Two Rivers Mfg. Co. v. Beyer*, 17 Am. St. Rep. 143. The garnishee may not set up mere irregularities in the main proceedings to resist the judgment against himself, unless the principal judgment is void, in which case he should resist payment to the garnisher: Extended note to *Sessions v. Stevens*, 46 Am. Dec. 344. Absence of legal service or authorized appearance is jurisdictional, and without jurisdiction no judgment can be entered under which any rights can be lost or acquired: *Great West Min. Co. v. Mining Co.*, 12 Colo. 46; 13 Am. St. Rep. 205.

SEAL—OFFICIAL—OMISSION OF.—A writ issued from a court having a seal is void, unless attested thereby: *Choate v. Spencer*, 13 Mont. 127; 40 Am. St. Rep. 425. In that case, it was held that a judgment based upon a summons not attested by the seal of the court is void, and a deed pursuant to a sale under execution, issued upon such judgment, will be canceled in equity as a cloud upon complainant's title: See the extended note thereto in which the scattered authorities upon the question are collected and criticised. A writ of summons being unsealed is a mere nullity, and as such imposes no legal obligation upon the defendant to appear and defend against the action; in such a case, a judgment entered against the defendant by default is erroneous: *Stayton v. Newcomer*, 1 Eng. 451; 44 Am. Dec. 451; *Frosch v. Schlumpf*, 2 Tex. 422; 47 Am. Dec. 655; *Garland v. Britton*, 12 Ill. 232; 52 Am. Dec. 487, and note. This rule has not been adhered to always, however: *Jump v. Batton*, 35 Mo. 193; 86 Am. Dec. 146, where it is held that the omission of the seal of a court from a writ issued therefrom makes it irregular, but not void, and it may be amended by affixing the seal pending a motion to quash: See, also, *Cartwright v. Chabert*, 3 Tex. 261; 40 Am. Dec. 742.

SEAL—WHAT IS SUFFICIENT.—A printed impression of a seal is not a seal, and a contract of insurance having thereon such impression is not, therefore, a sealed instrument: *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; 71 Am. Dec. 104. Wax, wafers, or something capable of receiving an impression is, by the law of New Jersey, necessary to constitute a seal, except in instruments for the payment of money, on which a scroll, ink, or other device, affixed by way of seal, is made by the statute to have the same effect as if sealed by wax: *Perrine v. Cheeseman*, 11 N. J. L. 174; 19 Am. Dec. 388. See, also, the note to *Davis v. Burton*, 36 Am. Dec. 514.

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ACTIONS.

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Where a statute gives a right of action without providing the mode of recovery, an action of debt ordinarily lies, but the form of the action may be adapted to the nature of the case and modeled according to the distinctions of the common law, and may, therefore, if the nature of the wrong or injury so requires, be assumpsit, trespass, or case. (Maple v. John, 839.)

2. STATUTES ALLOWING ACTION FOR INJURIES ON DEFECTIVE HIGHWAYS—CONSTRUCTION.—A statute giving a right of action against counties and townships in favor of a person who, "without contributing negligence on his part," sustains damages by reason of defective bridges or highways, does not declare a rule either of pleading or of evidence, but simply a rule of right. It does not change the rule of pleading, or shift the burden of proof as to cases falling within its terms, but simply brings a class of cases within the operation of the common law of negligence which hitherto had been without it. Hence, a plaintiff suing for damages for injuries caused by such defects need not allege or prove that he was not negligent, and the defendant, if he relies upon contributory negligence, must allege and prove it. (Reading Township v. Telfer, 855.)

See Cotenancy, 5, 6; Estates, 2; Insurance, 18-22; Judgments.

ADULTERY.

See Marriage and Divorce, 6.

ADVANCEMENTS.

See Parent and Child, 4.

ADVERSE POSSESSION.

See Deeds, 4.

AFFIDAVITS.

See Contempts, 2, 8; Contracts, 16.

AGENCY.

1. AGENCY.—NOTICE OR KNOWLEDGE coming to an employé in the line of his service is notice to the principal. (Higman v. Camody, 83.)

2. AGENCY — CONFLICT OF LAWS—DELIVERY OF INSTRUMENT IN ANOTHER STATE.—It is the law of this state which must determine the authority of an agent, as well as the validity of an obligation which the agent, as such, seeks to impose upon his principal by the delivery, in another state, of an instru-

ment signed by his principal in this state. If the agent has no power to deliver it here, he has no power to deliver it there. (*Freeman's Appeal*, 112.)

3. **PRINCIPAL AND AGENT—RESCISSION BECAUSE OF UNAUTHORIZED AGREEMENT OF AGENT.**—If an agent employed to sell real property makes an unauthorized agreement or representation to induce, and which does induce, a purchase, the purchaser believing that the agent had authority to make it, and the principal having no knowledge that it had been made, the purchaser on a breach of such agreement has the right to rescind the purchase and recover the money paid. The principal cannot retain what is beneficial in the transaction and reject what is onerous. (*Rackemann v. Riverbank Imp. Co.*, 427.)

4. **A PRINCIPAL REJECTING THE MEANS BY WHICH HIS AGENT PROCURED A CONTRACT** entitles the other party to rescind, whether the unauthorized act of the agent was fraudulent or was merely a matter of warranty or promise. (*Rackemann v. Riverbank Imp. Co.*, 427.)

5. **AGENCY—EVIDENCE OF.**—Although agency cannot be proved by declarations of an alleged agent, yet he is a competent witness to prove the agency, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject. (*Lawall v. Groman*, 662.)

6. **PRINCIPAL AND AGENT—CRIMINAL ACT OF THE LATTER, WHEN AFFECTS THE FORMER.**—If an agent procures a contract by bribing a member of a board of education to attend a meeting, his principal, though ignorant of, and not consenting to, this wrongful act, is affected by it to the extent that he cannot enforce the contract so secured. (*Honaker v. Board of Education*, 847.)

7. **PRINCIPAL AND AGENT.**—If an agent acquires personal property with the funds of his principal, it may be followed into the hands of a third person, though innocent, having no notice of the right of the principal, who purchased for value, because a third person cannot get any better title than the agent had. (*Stevenson v. Kyle*, 854.)

8. **PRINCIPAL AND AGENT.—IF AN AGENT SELLS PROPERTY OF HIS PRINCIPAL TAKING IN PAYMENT AN ORDER IN HIS OWN NAME** given by the purchaser upon another person, which the latter had agreed to accept, because the agent owed him, and in the belief that he could satisfy the order by giving credit to the agent for the amount thereof, such order is equitably the property of the principal, and he may recover the amount thereof from the acceptor, though the latter has already credited it upon the obligation due to him from the agent in ignorance of the existence of the rights of the principal. (*Stevenson v. Kyle*, 854.)

See Ballment, 3; Instructions, 2; Insurance, 2, 3, 5-8; Joint Liability, 2, 3; Municipal Corporations, 4; Negotiable Instruments, 16; Suretyship, 2.

ALTERATION OF INSTRUMENTS.

ALTERATION IN WRITINGS, WHEN DOES NOT AVOID THEM, THOUGH MATERIAL.—An alteration in a written contract after its execution, though in a respect material to it, made in good faith, to correct it and to more nearly conform it to the agreement of the parties, and where such alteration could not possibly prejudice the other party, does not avoid the contract. (*Lee v. Butler*, 466.)

See Negotiable Instruments, 7.

ANTENUPTIAL CONTRACTS.**See Marriage and Divorce, 9.****APPEAL.**

1. APPEAL—WHAT IS NOT A SPECIFIC ASSIGNMENT OF ERROR.—A rule of court requiring specific assignments of error is violated by an assignment of error to the effect that the charge of the trial court, taken as a whole, was not a full and fair presentation of appellant's claims, or of the questions of law involved, as this is a mere general assignment of alleged error. (*Kimberly's Appeal*, 101.)

2. RECEIVERS—APPELLATE PRACTICE.—If, after a receiver is appointed, a judgment creditor appears by attorney and is permitted to and does intervene and move to set aside the order appointing the receiver and to dismiss the proceedings, and his motion is denied and motion for a new trial filed and overruled, he has a right to appeal. (*State v. Union National Bank*, 209.)

3. APPELLATE PRACTICE—WAIVER OF ERROR.—If no objection to the sufficiency of the facts alleged is pointed out, an assignment of error that the trial court erred in overruling a demurrer to the complaint is waived on appeal. (*Callaway v. Mellett*, 238.)

4. APPELLATE PRACTICE—DUPLICITY IN PLEADING.—If the facts pleaded may be construed as proceeding upon different theories in the statement of a cause of action, the construction placed upon them by the trial court is the theory upon which they must be considered on appeal. (*Callaway v. Mellett*, 238.)

5. APPELLATE PRACTICE—PRESUMPTION AGAINST ERROR.—If an instruction complained of has been lost or does not appear in the record, it will be presumed to have been free from error. (*Jordan v. Benwood*, 859.)

6. APPELLATE PROCEDURE—ERRORS, WHEN MAY BE DISREGARDED.—Though the instructions given to the jury were erroneous, the judgment will not be reversed if the conclusion reached by the verdict was sustained by the decided or plain preponderance of the testimony. (*Cunningham v. Bucky*, 878.)

See Contempt, 4; Highways, 7; Instructions, 3; Judgment, 12; Jurisdiction, 1; Negligence, 12; Pleading, 1; Wills, 4.

ARBITRATION AND AWARD.

1. DEFINITIONS—THERE IS A DISTINCTION BETWEEN APPRAISERS AND ARBITRATORS.—Persons selected to value property sold are simply appraisers; and not arbitrators, as arbitration is properly the submission of a matter, in controversy or dispute between the parties, to the decision of one or more persons. (*Guild v. Atchison, Topeka etc. R. R. Co.* 312.)

2. ARBITRATION AND AWARD — APPRAISERS — REVOCATION OF AUTHORITY.—A mere naked arbitration is generally held revocable at the pleasure of either party at any time before an award is made; but if there is an agreement for a valid consideration for the purchase and sale of lands, or chattels, to be appraised by third parties, and if such appraisement is rather an incident of the contract than a single subject of agreement between the parties, one party cannot retain an advantage gained by the contract and revoke the authority of the appraisers. (*Guild v. Atchison, Topeka etc. R. R. Co.*, 312.)

3. ARBITRATION AND AWARD—WHEN AUTHORITY OF APPRAISERS CANNOT BE REVOKED.—After a contract for the purchase and sale of lands, at a price to be fixed by appraisers, to be

selected by the parties, has been executed upon the consideration of a settlement of past differences, and where such appraisers are afterward named in accordance with the provisions of the contract, and a majority of them make a valuation of the property, the authority of the appraisers cannot be revoked at the pleasure of one of the parties, for the contract is then complete in all its parts and enforceable specifically. Such persons, appointed to fix a value, are merely appraisers, though they are denominated in the contract as "arbitrators." (Guild v. Atchison, Topeka etc. R. R. Co., 312.)

4. ARBITRATION AND AWARD—SETTING ASIDE APPRAISEMENT.—IF FRAUD, MISTAKE, OR MISCONDUCT OF APPRAISERS is relied upon as a ground for setting aside an appraisal of lands made by them, it must be pleaded, where they are selected in accordance with the agreement of the parties. (Guild v. Atchison, Topeka etc. R. R. Co., 312.)

5. ARBITRATION—REVOCABLE AGREEMENT.—If an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be eventually chosen by the parties, it is revocable by either party. (Yost v. McKee, 604.)

See Insurance, 12.

ARREST.

1. ARREST WITHOUT WARRANT.—While an arrest on an exigency, when reasonable grounds of suspicion exist, may be made without a warrant, yet it is the duty of the person or officer making the arrest to immediately take the accused before a magistrate for formal accusation and hearing. (Burk v. Howley, 607.)

2. CRIMINAL LAW.—WARRANTS OF ARREST ARE REQUIRED to recite the offenses charged, but not with the same particularity as an indictment. A warrant is not fatally defective because it merely avers in general terms that the accused has been guilty of each and all of the acts forbidden by a statute designated therein. (Lacey v. Palmer, 795.)

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ASSAULT, WHAT IS NOT.—The firing of a revolver in close proximity to a person without pointing it at him or intending to harm him, but with an intention of frightening him, is not an assault. (Degenhardt v. Heller, 945.)

ASSIGNMENT.

See Judicial Sales, 1; Mortgage, 6-9; Negotiable Instruments, 17; Statutes, 1.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See Executions, 4, 5.

ASSOCIATIONS.

1. BOOKMAKING AND POOLSELLING.—The holding of a meeting for the racing of horses in the ordinary manner does not render the association holding it guilty either of bookmaking or of poolselling. (People v. Fallon, 492.)

2. GAMBLING, WHAT IS NOT.—The offering and paying premiums or prizes by an association to the owner of horses contesting at racing held by such association is not gambling, where the fees paid to such association are put into its general fund, and become, for the time being, a part of its assets, subject only to the obligation

of the association to pay out of its funds the sums which it has offered as premiums or prizes. Horseracing, under such circumstances, differs from that in which a stake is contributed by the participants alone. (*People v. Fallon*, 492.)

See Labor and Trades Unions; Lotteries; Statutes, 8.

ATTACHMENT.

1. ATTACHMENT OF PARTNERSHIP PROPERTY UNDER A WRIT AGAINST ONE PARTNER ONLY—MITIGATION OF DAMAGES.—If an officer, under a writ against one partner only, attaches partnership property, he cannot, in an action of tort against him therefor, prove in mitigation of damages that he delivered the property to an assignee in insolvency of the member against whom the writ issued. (*Russell v. Cole*, 432.)

2. GARNISHMENT—ERRORS IN THE INDORSEMENT OF THE WRIT.—If garnishment is duly served on the president of a bank, after which part of the funds belonging to the defendant is permitted to be drawn out on checks, the bank cannot relieve itself from liability by proving that the president relied upon the manner in which the writ was indorsed on the back. Such indorsement constitutes no part of the writ, and the neglect of the president to examine the writ itself must be treated as the neglect of the bank. (*Cook v. Coleman*, 465.)

3. GARNISHMENT BASED UPON A JUDGMENT void for want of jurisdiction is ineffective. (*Oelbermann v. Ide*, 947.)

See Execution, 2, 4; Partnership, 8.

ATTESTATION.

See Wills, 6, 24.

ATTORNEY AND CLIENT.

1. ATTORNEY'S DUTY, UPON WITHDRAWAL, TO NOTIFY HIS CLIENT.—An attorney at law, engaged to defend a cause, acts in bad faith, where he abandons it without justifiable cause and without giving his client ample notice and a full opportunity to procure other counsel to defend the case in court. Hence, no valid judgment by default can be legally entered, after appearance and answer, when such appearance and answer are withdrawn by the attorney, in bad faith, without first giving notice to the defendant; and a notice that, if his fees are not paid, he will withdraw from the case is not a notice that he will withdraw the answer. (*Nichells v. Nichells*, 540.)

2. ATTORNEY'S WITHDRAWAL OF ANSWER—ACT OF BAD FAITH.—An attorney at law, who has appeared and filed an answer for the defendant in a case, has no authority to withdraw such answer and appearance, merely because his client has failed to pay his fee. Such an act is one of bad faith, and, therefore, beyond the scope of an attorney's authority; and the rule applies to actions for divorce as well as to other actions. (*Nichells v. Nichells*, 540.)

3. CONTEMPT — DISBARMENT — COMPOUND AND UNAUTHORIZED PROCEEDINGS.—It is an irregular and unauthorized proceeding where an attorney at law is charged with criminal contempt of court, to order that he show cause why he should not be punished therefor and be debarred from practice, to try him for the contempt, and, after finding him guilty thereof, to include in the sentence therefor, an order of disbarment from practice. (*State v. Root*, 568.)

4. CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—UNAUTHORIZED PUNISHMENT.—When an attorney at law, charged with a criminal contempt of court, is tried upon such charge, and no other, and found guilty, the court has no authority to suspend or disbar him from practice as a punishment for the contempt. To do this, the accused must first have been accorded a trial under the safeguards of the special statute governing disbarment proceedings. (*State v. Root*, 568.)

5. ATTORNEY AND CLIENT — LIABILITY FOR NEGLIGENCE.—If an attorney for a mortgagee is guilty of negligence in examining the title to ascertain that the mortgage is a first lien on the property, as he has agreed to do, the mortgagee, without waiting for the mortgage to be foreclosed, is entitled to at once recover from such attorney the difference between the value of the security contracted for and that actually received. The cause of action is the breach of duty, not the damages, which are only an incident. (*Lawall v. Groman*, 662.)

6. ATTORNEY AND CLIENT — LIABILITY FOR NEGLIGENCE.—If the attorney for a mortgagor who pays the fees, undertakes, on behalf of the mortgagee, to see that the mortgage is a first lien on the property, he is bound to perform that duty with ordinary and reasonable skill and care in his profession, and is liable for negligence in that respect. (*Lawall v. Groman*, 662.)

7. ATTORNEY AND CLIENT—EVIDENCE OF RELATIONSHIP.—The fact that the attorney for a mortgagor also acts for the mortgagee in keeping the mortgage and placing it on record and in agreeing to search the title and record in reference to liens is sufficient to establish the relationship of attorney and client between them. (*Lawall v. Groman*, 662.)

8. ATTORNEY AND CLIENT.—ADVERSE INTERESTS, to be amicably adjusted, may be represented by the same counsel, though the cases in which this may be done are exceptional and never entirely free from danger of conflicting duties. Thus, the same attorney may represent both borrower and lender, upon mortgage or similar security, upon a mutual understanding between the parties, although the former only is expected to pay the fees. (*Lawall v. Groman*, 662.)

9. ATTORNEY AND CLIENT—RELATIONSHIP AND EVIDENCE TO ESTABLISH.—The payment of a fee is the most usual and weighty item of evidence to establish the relationship of client and attorney, but it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material, nor is it even indispensable that the compensation should be assumed by the client, but, ordinarily, it is so from the nature of the employment, which, in the vast majority of cases, involves the guarding or enforcement of the client's interest against an adverse one and is, therefore, exclusive. (*Lawall v. Groman*, 662.)

10. ATTORNEY AND CLIENT—EVIDENCE OF NEGLIGENCE—DECLARATIONS.—In an action by a mortgagee against an attorney to recover for the latter's negligence, declarations made by the mortgagor are not admissible in evidence, in the absence of proof of fraud and collusion between him and such attorney. (*Lawall v. Groman*, 662.)

11. NOTICE.—A CLIENT IS NOT CHARGED with notice of a fraud or wrong to which his attorney was a party while employed

by another, because it is almost certain that the attorney will conceal such fraud or other wrong. (*Melms v. Pabst Brewing Co.*, 899.)

12. NOTICE TO AN ATTORNEY IS NOTICE TO HIS CLIENT in regard to any matter in which he is engaged, and, where the purchaser employs the same attorney as his vendor, he will be affected with notice of whatever such attorney acquired notice of in his capacity of attorney for either the vendor or purchaser in the transaction in which he was so employed. (*Melms v. Pabst Brewing Co.*, 899.)

13. NOTICE TO AN ATTORNEY—WHEN NOT NOTICE TO HIS CLIENT.—If an attorney, while conducting a transaction, acquires knowledge which it would be a breach of professional confidence for him to disclose, and he is subsequently employed by another person, the latter is not chargeable with the knowledge thus acquired and possessed by the attorney. (*Melms v. Pabst Brewing Co.*, 899.)

14. VENDOR AND PURCHASER EMPLOYING THE SAME ATTORNEY—WHEN NOT CHARGED WITH HIS KNOWLEDGE.—If a person, intending to purchase real property, employs the attorney of his vendor to act as his attorney, and such attorney has, in his previous employment by the vendor, obtained knowledge of facts on account of which the title of the latter may be impeached, it is not to be expected that he will disclose such knowledge to the purchaser, and the latter is not chargeable therewith. (*Melms v. Pabst Brewing Co.*, 899.)

See Contempt, 4, 6, 8, 9, 11, 12; Equity, 2; Judgment, 13, 14; Negligence, 6; Receivers, 6.

AUCTIONS.

1. AUCTIONS—PUFFERS.—The employment of puffers by owners selling at auction with a view to raise the price on bona fide bidders is a fraud upon them, and such sale may be avoided at the option of the purchaser. (*Flannery v. Jones*, 648.)

2. AUCTIONS—SECRET BIDS.—If an owner of property advertises it for sale at public auction, upon condition that the highest bidder shall be the purchaser, and that the property shall be sold without reserve, any secret bid made by such owner invalidates the sale at the option of the purchaser. (*Flannery v. Jones*, 648.)

3. AUCTIONS.—AN AUCTIONEER MAY FAIRLY AND SECRETLY BID for a third person who employs him, but not for the owner; nor can such owner employ a third person to secretly bid for him as against a bona fide bidder. (*Flannery v. Jones*, 648.)

4. AUCTIONS—FRAUD.—If a public sale at auction is tainted with fraud, a bona fide purchaser may avoid it, although the property is actually worth what he has bid for it. (*Flannery v. Jones*, 648.)

5. AUCTIONS—FICTITIOUS BIDDING—EVIDENCE.—In an action to set aside a public auction sale, on the ground of fraud by secret and fictitious bidding, evidence that such bidding at such sales is customary, is inadmissible. (*Flannery v. Jones*, 648.)

6. AUCTIONS—SECRET BIDS.—If an auctioneer conducting a public auction sale announces on behalf of the owner of the property sold, that it is to be sold to the highest bidder without reserve, and then secretly bids for one of the owners, the sale may be avoided by a bona fide bidder to whom the property is knocked down. (*Flannery v. Jones*, 648.)

BAILMENTS.**1. BAILMENTS FOR HIRE—DEGREE OF CARE REQUIRED.**

A bailee for hire must exercise that degree of care in respect to the property bailed which a man of average prudence and diligence would bestow upon his own like property under like conditions, and which is denominated ordinary care, and he is also liable for ordinary negligence. (*Higman v. Camody*, 33.)

2. BAILMENTS — KNOWLEDGE OF DEFECTS — NEGLIGENCE.—A bailee for hire who acquires knowledge of a dangerous defect in the thing bailed arising after the bailment has no right to further rely upon the bailor's statement that the thing bailed was all right and in good condition at the time of the bailment. The bailee, upon acquiring such knowledge, must discontinue the use of the thing bailed, and repair it himself, or inform the bailor of the defect and thus put the responsibility on him. Not doing this, and continuing the use of the thing bailed in its dangerous condition, he is guilty of negligence, although the condition of the thing bailed in other respects may have been bad at the time the bailment was made. (*Higman v. Camody*, 33.)

3. BAILMENT—SECRET INSTRUCTIONS TO AGENT—EVIDENCE.—In an action against a bailee for hire to recover damages to the thing hired, evidence of secret instructions given by the bailee to his agent who made the contract of bailment, is not admissible, unless the bailor had notice of such instructions. (*Higman v. Camody*, 33.)

4. BAILMENTS—EVIDENCE.—In an action against a bailee for hire to recover damages for injury to a barge hired, the fact that evidence that such barge was defective in construction in not being strengthened by "rift bolts" is admitted, does not admit evidence that greater care should be exercised in loading such a barge, as this is a matter of inference for the jury from the absence of such bolts and the testimony as to their utility. (*Higman v. Camody*, 33.)

5. BAILMENTS FOR HIRE—BURDEN AND SHIFTING OF PROOF.—In an action by a bailor against a bailee for hire to recover for the destruction of, or injury to, the property through the negligence of the latter, the burden of proof is first upon the bailor to show the bailment, the condition in which the bailee took the property, and that he returned it in a damaged condition, or did not return it at all; and, if the property was in good condition for the uses of the bailment when delivered, and was returned in a damaged condition or not at all, the burden of proof shifts to the bailee to show a cause producing the injury which, *prima facie*, did not arise or result from, or operate on account of a want of ordinary care on his part. This being shown, the burden of proof shifts back to the bailor to affirmatively show some negligence on the part of the bailee producing the injury complained of. (*Higman v. Camody*, 33.)

BANKS AND BANKING.

INSOLVENCY—EQUITY OF BANK DEPOSITORS WHO HAVE PROVED THEIR CLAIMS—CREDITORS.—If a banking firm allows the money of depositors to be greatly overdrawn at a time when the firm knows itself to be insolvent, and the depositors afterward do not rescind the contract of debtor and creditor created by the deposit on the ground of fraud, but affirm it by proving their claims in insolvency proceedings by the bank, they, as creditors, have no greater equity than other creditors of the insolvent firm. (*Pott v. Smucker*, 415.)

See Attachment, 2; Checks, 2; Guaranty, 1; Partnership, 16.

BICYCLES.

See Railroad Companies, 5-7.

BILLS OF EXCHANGE.

See Negotiable Instruments.

BOARDS OF EDUCATION.

See Municipal Corporations, 8; School Districts, 1, 2.

BONA FIDE PURCHASERS.

See Auctions, 4; Executors and Administrators, 4; Fraudulent Conveyances, 6; Mortgages, 8; Negotiable Instruments, 19; Notice, 8; Vendor and Purchaser, 5.

BRIBERY.

See Agency, 6; Contracts, 17, 18; Definitions, 4.

BROKERS.

See Contracts, 4; Insurance, 5, 8.

BUILDING AND LOAN ASSOCIATIONS.

See Usury, 2.

BURDEN OF PROOF.

See Evidence, 6; Fraudulent Conveyances, 4; Wills, 8.

BY-LAWS.

See Corporations, 14, 15.

CARRIERS.

1. CARRIERS—CONTRACTS EXEMPTING FROM LIABILITY.—A stipulation in a drover's return ticket that the carrier shall not be answerable under any circumstances, whether of negligence of its agents or otherwise, for any injury to him is void as against public policy. (Davis v. Chicago etc. Ry. Co., 935.)

2. CONFLICT OF LAWS.—A CONTRACT WITH A COMMON CARRIER, to be performed partly in the state wherein it was made and partly in another state, is governed by the laws of the former, when it does not appear that the parties intended to be bound by the law of any other state. (Davis v. Chicago etc. Ry. Co., 935.)

See Interstate Commerce, 7; Stoppage in Transitu, 2, 8.

CHATTEL MORTGAGES.

1. A MORTGAGE OF CHATTELS MUST BE RECORDED or the property must be delivered to, and retained by, the mortgagee. (Moors v. Reading, 460.)

2. MORTGAGE OR PLEDGE OF CHATTELS, CHANGE OF POSSESSION NECESSARY TO.—If a dealer in goods makes bills of sale of them to secure indebtedness existing, and to exist, to the receiver of such bills, and the latter takes formal possession, and constitutes the bookkeeper of the pledgor his agent to retain such possession, and when additional goods are purchased, receives bills of sale therefor from time to time, but such goods are not separated from the others, and the pledgor continues in business, selling from the goods as before and retaining the proceeds thereof, there is no

such apparent change of possession as will support his pledge; and if the pledgor is declared insolvent in proceedings for that purpose, his assignee in insolvency is entitled to the possession of the goods so attempted to be pledged. (*Moors v. Reading*, 460.)

See Receivers, 4.

CHECKS.

1. CHECKS—EVIDENCE OF DISHONOR.—A CERTIFICATE OF THE PROTEST of a check is competent evidence of due presentment, demand, and refusal to pay. (*State v. McCormick*, 841.)

2. CHECKS—COMPETENT EVIDENCE THAT CHECK IS BAD.—The cashier of a bank, who is its manager, and who has supervision of the books kept, is competent to testify that a certain person has no account with it, or money there subject to his check, although he gets his information, principally, from the books of the bank; and a book purporting to contain a list of the depositors, and which is identified by the cashier, is admissible for the same purpose, although no other evidence is offered of its being correct. (*State v. McCormick*, 841.)

CHOSES IN ACTION.

See Equity, 3.

COMMON LAW.

See Actions, 1; Contracts, 2, 4; Cotenancy, 1; Covenants, 1, 2; Evidence, 2-4; Husband and Wife, 9, 16; Interstate Commerce, 7.

CONFLICT OF LAWS.

See Agency, 2; Carriers, 2; Contracts, 1-3, 5; Husband and Wife, 2-19; Pleading, 1; Usury, 1, 2; Wills, 19, 20.

CONSIDERATION.

See Contracts, 7, 19; Judgments, 2, 5; Vendor and Purchaser, 2.

CONSPIRACY.

See Master and Servant, 2.

CONSTITUTIONS.

See Elections, 1, 2; Equity, 1; Municipal Corporations, 11; Statutes, 2, 14.

CONTEMPT.

1. CONTEMPT WHILE COURT IS SITTING—BRANCH OF COURT.—A contempt is established where offensive behavior is exhibited while the court is sitting in the discharge of judicial functions, if it is committed in the presence of some branch of the court when so engaged. (*State v. Root*, 568.)

2. CONTEMPT.—AN AFFIDAVIT does not charge contempt of court where it contains no averment that the language charged was used in the immediate view and presence of the court, and fails to state the particular date or time when the offensive words were spoken. (*State v. Root*, 568.)

3. CONTEMPT.—AN AFFIDAVIT charging a criminal contempt of court will be tested by the rules of criminal pleading, which are applicable to indictments or informations, as this is the formal ac-

prosecution upon which the accused is to be tried for a criminal offense. (State v. Root, 568.)

4. CONTEMPT—IRREGULAR PROCEDURE—RIGHTS ON APPEAL.—If an attorney at law, charged by affidavit with contempt of court, is denied the right of pleading to the jurisdiction of the trial court by preliminary motion, he will, on appeal, be given the benefit of all preliminary motions which he could properly have made in the court below. (State v. Root, 568.)

5. CONTEMPT—CHARGE—PROOF.—If it is charged that offensive behavior was exhibited while the court was sitting, and in its immediate view and presence, the charge can be made out by proof without showing that the offensive act took place within the sight or hearing of the judge. (State v. Root, 568.)

6. CONTEMPT—WHAT IS NOT—LANGUAGE NOT IN PRESENCE OF COURT.—Abusive and defamatory language, used by an attorney at law concerning a judge and his official action in cases pending, which the attorney is prosecuting, and which language attacks the private character of the judge as a citizen, does not constitute contempt of court, where it is not used in the courthouse or in the immediate view and presence of the court. (State v. Root, 568.)

7. CONTEMPT—WORDS SPOKEN IN COURTROOM.—The fact that obnoxious words were spoken of a judge in his courtroom is not important, upon a charge of contempt, unless coupled with the fact that, at the time they were spoken, the court was sitting and discharging judicial functions and that the words were spoken in the immediate view and presence of the court, and were calculated to interrupt its proceedings or to impair its authority. (State v. Root, 568.)

8. CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—DEFENSIVE MOTIONS.—If an attorney at law is charged with criminal contempt of court, and is ordered to show cause why he should not be punished therefor, and be debarred from practice, he has a right to make a preliminary motion that the proceeding be quashed, and, if that is overruled, to follow it by a motion requiring the prosecution to elect and declare, at the outset, upon which branch of the case it will first proceed. (State v. Root, 568.)

9. CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—PREJUDICIAL ERROR.—When an attorney at law is charged with criminal contempt of court, and is ordered to show cause why he should not be punished therefor, and be debarred from practice, it is highly prejudicial error to deny him the right to demur to the accusation so far as it is sought to be used as a basis for the revocation of his license to practice law, and to compel him to answer interrogatories under oath touching the facts bearing upon the charges against him. (State v. Root, 568.)

10. CONTEMPT — DISBARMENT — COMPOUND PROCEEDING.—The statute governing criminal prosecutions for contempt is wholly independent of the statute authorizing disbarment proceedings, and each is designed to accomplish a different result. Hence, an attorney at law cannot be punished for criminal contempt and be disbarred from practice in one and the same proceeding. In other words, a proceeding for contempt and one for disbarment, founded on the contempt, cannot be joined. (State v. Root, 568.)

11. CONTEMPT — DISBARMENT — COMPOUND PROCEEDING—EXCEPTION, BY MOTION, TO JURISDICTION—PREJUDICIAL ERROR.—When an attorney at law is charged with criminal contempt of court, and is ordered to show cause why he should not be punished therefor, and be debarred from practice, it is prejudicial error to deny him the right of excepting, by a preliminary

motion, to the jurisdiction of the trial court, and to require him, by express mandate, to plead at once to the facts set out in the affidavit charging him by admitting or denying them. (State v. Root, 568.)

12. CONTEMPT—PRACTICE—RIGHTS OF ACCUSED—CURING ERROR.—An attorney at law, charged by affidavit with criminal contempt of court, has the right to except to the jurisdiction of the trial court before he can be compelled to answer matters of fact, and he may do so by preliminary motion, without specifying any grounds, although the statute regulating contempt proceedings does not, in terms, make provision for reaching defects in the accusation, by motion or otherwise. Such motion may be leveled at either matters of substance or mere irregularities of procedure; and a fundamental error committed in denying the accused the right to interpose preliminary objections before being called upon to answer as to the facts, is not cured by later proceedings. (State v. Root, 568.)

See Attorney and Client, 3, 4.

CONTRACTS.

1. CONTRACTS AS TO THEIR VALIDITY are governed by the laws of the state wherein they are to be performed. (Peet v. Hatcher, 45.)

2. CONFLICT OF LAWS.—If a contract made in a state or country wherein the common law is not presumed to exist is sought to be enforced in the courts of another state, and the *lex loci* is not produced, the law of the latter state must be applied. (Peet v. Hatcher, 45.)

3. CONTRACTS—BY WHAT LAW GOVERNED.—A contract made and to be performed in the same state is governed by the law of that state as to its nature, obligation, and interpretation. (Peet v. Hatcher, 45.)

4. CONTRACTS — VALIDITY — DEALING IN FUTURES.—At common law, contracts founded on dealings in "futures" are void; but if such a contract is made by a broker who has no interest therein except to realize his commissions, which are payable in any event, the principal is bound to reimburse the broker for advances made by him, if he subsequently executes his note or bill therefor, or makes a promise to pay them, or, with full knowledge of the facts, without objection, permits the transaction to proceed, unless a statute makes such contracts absolutely void. (Peet v. Hatcher, 45.)

5. CONTRACTS—VALIDITY—DEALING IN FUTURES—CONFLICT OF LAWS.—A contract of dealing in "futures" made and to be performed in another state, where it is valid, may be enforced in a state where it is forbidden by statute and contrary to its public policy. (Peet v. Hatcher, 45.)

6. VENDOR AND VENDEE—AGREEMENT NOT TO SELL EXCEPT AT A SPECIFIED PRICE IS VALID.—An agreement in selling part of a tract of land that the vendor will not sell any of the residue, except for a specified price per front foot, is not void as against public policy in that it may remove a large tract from the market for a very long time. The agreement should be construed in view of the circumstances, and no limitation being fixed, it must last for a reasonable length of time. (Rackemann v. Riverbank Imp. Co., 427.)

7. CONSIDERATION.—AN AGREEMENT NOT TO BRING a well-founded suit for divorce is both a legal and a sufficient consideration. (Polson v. Stewart, 452.)

8. STATUTE OF FRAUDS—MEMORANDUM.—Several papers signed at the same time by the party sought to be charged may be

considered and used together to complete the memorandum required by the statute of frauds. (Lee v. Butler, 466.)

9. STATUTE OF FRAUDS.—LETTERS WRITTEN YEARS after a contract is entered into may be received to establish its terms. (Lee v. Butler, 466.)

10. STATUTE OF FRAUDS.—PAROL EVIDENCE MAY BE INTRODUCED TO SHOW THE SITUATION OF THE PARTIES and the circumstances attending the transaction for the purpose of applying the contract to a subject matter and establishing the connection of the different writings connecting the memoranda with one another. (Lee v. Butler, 466.)

11. A CONTRACT FOR PERMANENT EMPLOYMENT SHOULD BE CONSTRUED AS MEANING that where the employer had work which the employé could do and desired to do, and was able to do satisfactorily, his employment should be continued. Such a contract is, therefore, capable of enforcement, and is not defective for want of mutuality. (Carnig v. Carr, 488.)

12. RESTRAINT OF TRADE.—A CONTRACT TO ABANDON ONE'S BUSINESS AND ENTER THE PERMANENT EMPLOYMENT OF ANOTHER in the same line of business is not in restraint of trade, nor against public policy. (Carnig v. Carr, 488.)

13. STATUTE OF FRAUDS—CONTRACT FOR PERMANENT EMPLOYMENT.—If a person carrying on the business of an ename-ler agrees to abandon such business and enter the services of another who, on his part, agrees to furnish the former permanent employment at stipulated wages, such contract is not within the statute of frauds, because it can be completely performed within a year. (Carnig v. Carr, 488.)

14. CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—EVIDENCE.—The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. (Clinch Valley Coal etc. Co. v. Willing, 626.)

15. CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—FRAUD.—It is a fraud to secure the execution of a contract by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the written contract, and, after the contract has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would not have been signed. (Clinch Valley Coal etc. Co. v. Willing, 626.)

16. CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—BREACH OF AS DEFENSE.—In an action on notes given to secure deferred payments on lots secured by trust deeds thereon, an affidavit of defense is sufficient which alleges the breach of a parol agreement executed at the time that the notes were made, providing that the lots were to be at once reconveyed to a trustee, who should hold them as security for the sums due, and who should exhaust the security thus furnished before the payment of the notes should be required of the maker. (Clinch Valley Coal etc. Co. v. Willing, 626.)

17. BRIBERY.—A CONTRACT GROWING OUT OF AN ILLEGAL ACT will not be enforced. Hence, a contract procured by the bribery of an officer will not be enforced against the contractor nor against the municipal corporation represented by him. (Honaker v. Board of Education, 847.)

18. BRIBERY—PAYING A MEMBER OF A BOARD OF EDUCATION FOR ATTENDING A MEETING.—If a person, desirous of making a contract with a board of education, procures one of its members to attend a meeting by paying him two dollars and a half for the loss which he claims he will sustain by closing his place of business while so attending, a contract obtained by the vote of such member is tainted with bribery, and therefore is void. (*Honaker v. Board of Education*, 847.)

19. CONSIDERATION, PRESUMPTION AS TO CHARACTER OF.—The presumptions are in favor of innocence, and, where the character of the services rendered, or to be rendered, does not appear, they will be presumed to be legal. (*Houlton v. Nichol*, 928.)

20. LOBBYING CONTRACT, WHAT IS NOT.—A contract to furnish a party with minutes of desirable public lands upon which to locate, to instruct him in respect to what he should do as a settler thereon to secure priority under the laws of the United States, and to do all that was necessary and could be done to bring the land into the market and to enable him to acquire title thereto does not contemplate the doing of anything unlawful, and is, therefore, a sufficient consideration to support an agreement to pay for the services to be so performed. (*Houlton v. Nichol*, 928.)

21. LOBBYING CONTRACTS, WHAT ARE.—All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action, or action by any department of government, are contrary to sound morals, lead to inefficiency in the public service, and are void. (*Houlton v. Nichol*, 928.)

See Carriers, 1, 2; Alteration of Instruments; Damages, 3, 4; Evidence, 1; Fraud, 4; Husband and Wife, 2, 6, 7, 9; Interstate Commerce, 7; Partnership, 5, 6; Patents, 1, 2; Specific Performance; Suretyship, 1; Vendor and Purchaser, 2.

CONVEYANCES.

See Parent and Child, 4, 5.

CORPORATIONS.

1. CORPORATIONS—CAPITAL STOCK AS A TRUST FUND.—The capital stock of a corporation is now regarded in equity as a trust fund for the payment of debts. Creditors have a lien upon it which is prior in point of right to any claim which the stockholders as such can have; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund, or in any way to place it beyond the reach of creditors. (*Buck v. Ross*, 60.)

2. CORPORATIONS—WHAT IS A WITHDRAWING OF ASSETS.—If a stockholder in a corporation which is known by him to be insolvent, sells his stock to the company, at its par value, and receives for it a note and mortgage, executed and delivered directly to him by the buyer, who is a debtor of the company upon notes secured by mortgage, and whose mortgage indebtedness to it is discharged in equal amount, the transaction is a withdrawing of the assets of the corporation, and such stockholder is liable for the amount of the secured notes so withdrawn, in a suit by the trustee of the insolvent corporation. (*Buck v. Ross*, 60.)

3. CORPORATIONS — CONDITIONAL SUBSCRIPTIONS.—An organized corporation may take subscriptions to its capital stock conditioned that they shall be valid and binding only in the event that a certain aggregate amount is subscribed. (*Shick v. Citizens etc. Co.*, 230.)

4. CORPORATIONS—SUBSCRIPTIONS TO STOCK.—In an action to recover subscriptions to the capital stock of a corporation conditioned to be valid and binding only in case a certain aggregate amount of stock is subscribed, a complaint alleging a performance of this condition is sufficient without alleging that such subscriptions were made in good faith by solvent parties not under any disabilities. This latter fact is matter of defense, and must be specially pleaded. (Shick v. Citizens' etc. Co., 230.)

5. CORPORATIONS — STOCK SUBSCRIPTIONS — ALLEGATION OF CORPORATE EXISTENCE.—In an action to recover a subscription to the capital stock of an existing corporation, the facts necessary to show a legal corporate organization need not be alleged. (Shick v. Citizens' etc. Co., 230.)

6. CORPORATIONS—SUBSCRIPTIONS TO CAPITAL STOCK.—In subscribing to the capital stock of an existing corporation, it is not necessary for the subscriber to sign and acknowledge the articles of incorporation. (Shick v. Citizens' etc. Co., 230.)

7. CORPORATIONS—STOCK SUBSCRIPTIONS — PLEADING CORPORATE EXISTENCE.—In an action to recover a subscription to the capital stock of a corporation, made before its incorporation, the complaint must allege and the proof show that all the steps necessary to create a legal corporation have been taken. (Shick v. Citizens' etc. Co., 230.)

8. CORPORATIONS -- ORGANIZATION.—ALTHOUGH ARTICLES OF INCORPORATION mention some purposes not within the purview of the statute under which the corporation was organized, this does not vitiate the organization. (Shick v. Citizens' etc. Co., 230.)

9. CORPORATIONS — STOCK SUBSCRIPTIONS — INSUFFICIENT DEFENSE.—In an action to recover subscriptions to the capital stock of a corporation, an answer alleging that the amount of stock required was never subscribed by solvent persons in good faith is not a sufficient defense as against a complaint alleging that such stock was subscribed, especially if such answer does not allege that any subscription was made by an insolvent person or in bad faith. (Shick v. Citizens' etc. Co., 230.)

10. CORPORATIONS—FALSE REPRESENTATIONS BY PROMOTERS.—The fact that promoters of a corporation made false representations prior to its organization as to the purposes thereof is no defense to an action to recover on a subscription of its capital stock. (Shick v. Citizens' etc. Co., 230.)

11. CORPORATIONS—SUBSCRIPTION TO STOCK—EXCESS OF CAPITAL.—Although promoters of a corporation secure subscribers to its capital stock in excess of the amount prescribed in its charter, such fact is not a defense to an action to recover on such preliminary subscription, in the absence of averment and proof that such excess entered into the capital stock after incorporation, or that the subscription sued on is part of such excess. (Shick v. Citizens' etc. Co., 230.)

12. CORPORATIONS—TRANSFER OF STOCK—EQUITABLE TITLE.—If one holding a certificate of stock executes a transfer on the back thereof and delivers the certificate to another, the latter has an equitable title to the stock without a transfer on the books of the company. (Victor G. Bloede Co. v. Bloede, 373.)

13. CORPORATIONS—LIMITATIONS UPON POWER TO REGULATE TRANSFER OF STOCK.—The power to regulate the transfer of stock does not authorize a corporation to control its transferability by prescribing to whom the owner may sell, and to whom not, and upon what terms. (Victor G. Bloede Co. v. Bloede, 373.)

14. CORPORATIONS—BY-LAWS—INVALID RESTRAINT ON ALIENATION OF STOCK.—A by-law of a corporation providing that, if any stockholder desires to dispose of his stock, he shall, before a transfer, notify the president of his intention to sell and the price he can obtain, which notice shall be communicated to the other stockholders, who shall have the option to purchase the shares at the price named, in pro rata amounts, and that the corporation shall have the right to take any such stock not taken by the shareholders, is an unreasonable and palpable restraint upon the alienation of property and, therefore, invalid. (*Victor G. Bloede Co. v. Bloede*, 373.)

15. CORPORATIONS—WHAT IS NOT A SALE OF STOCK.—If a large number of shares in a corporation are originally issued, for value, to one who afterward causes some of them to be transferred to other parties, including a certificate for nine shares made out in the name of a particular person, for the purpose of giving him an opportunity to purchase them if he wishes, and such person refuses to accept, or to pay for, the shares made out in his name, but assigns the certificate to the original holder, who demands a transfer of the shares back to himself, which transfer the corporation refuses to make, upon the ground that a by-law of the company regulating transfers of stock has not been complied with, the shares in question continue to be the property of the original holder, and a retransfer of them to him is not a sale within the meaning of such a by-law, even if it were valid; and, if it is invalid, the company could not, of course, interpose it as an obstacle to the transfer of the shares. (*Victor G. Bloede Co. v. Bloede*, 373.)

16. CORPORATIONS—TESTING VALIDITY OF ARTICLES OF INCORPORATION.—The validity of articles of incorporation cannot be inquired into incidentally and collaterally. (*Pott v. Smucker*, 415.)

17. CORPORATIONS—IDENTITY OF CORPORATION WITH ONE OWNING ALL ITS STOCK AND ASSETS.—In an appropriate case, and in furtherance of the ends of justice, a debtor corporation and the individual owning all its stock and assets, will be treated as identical. (*Pott v. Smucker*, 415.)

18. A CORPORATION IS VALIDLY FORMED if the requirements of the incorporation law have been substantially complied with. (*Pott v. Smucker*, 415.)

19. CORPORATIONS—EXISTENCE OF NEED NOT BE PROVED IN SUITS AGAINST INDORSERS.—An indorser of a note purporting to be made by a corporation admits the corporate existence of the apparent maker, and therefore, in an action upon the note, cannot require the corporate capacity to be proved. (*Giddenden v. Chamberlain*, 479.)

20. CORPORATIONS—SERVICE OF PROCESS UPON.—An officer or agent of a foreign corporation cannot commence an action against such corporation by serving himself with the process or summons necessary to commence such action. (*George v. American Ginning Co.*, 671.)

21. CORPORATIONS—OFFICER AS LITIGANT AGAINST HIS CORPORATION.—If an officer of a corporation undertakes, as attorney in fact for a third person, to begin an action against it, he necessarily abandons, for the time and occasion at least, his position as an officer or agent of the corporation. (*George v. American Ginning Co.*, 671.)

22. CORPORATIONS—PROCESS—SERVICE OF ON OFFICER OF CORPORATION.—If an officer of a corporation, acting as attorney in fact for a third person to sue such corporation, commences

h action by suing out an attachment against such corporation his principal, he becomes, pro hac vice, such principal, and service of process upon him as an officer of the corporation is in fact vice upon the plaintiff in the action. (George v. American Ginning Co., 671.)

See Partnership, 15, 16.

COTENANCY.

COTENANTS—IMPROVEMENTS, RIGHT TO COMPENSATION FOR.—At the common law, a tenant in common who made permanent improvements, as distinguished from ordinary repairs, could not recover from his cotenants any part of his expenditures made for that purpose, unless they were made at the request or with the consent, express or implied, of the latter. (Cosgriff v. Foss, 500.)

COTENANTS—IMPROVEMENTS. COMPENSATION FOR PARTITION, WHEN WILL NOT BE DIRECTED.—A tenant in common who is also the lessee of his cotenant will not, when the property cannot be partitioned otherwise than by its sale, be allowed compensation from the proceeds of such sale for improvements made upon the property during the course of his tenancy, which enhance its value and were made with the knowledge, but without the consent, of his cotenants, when the effect of such improvements is not to protect or preserve the property, but to aid the tenant in carrying on his business then prosecuted by him upon the premises, and increasing the income therefrom, which was not shared with his cotenants. (Cosgriff v. Foss, 500.)

SUBROGATION—COTENANCY.—If one tenant removes a mortgage or other encumbrance from the common property, he is entitled to subrogation to such lien to secure contribution from his cotenants. (Haverford Loan etc. Assn. v. Fire Assn., 657.)

SUBROGATION—MORTGAGES.—If a husband, supposing that, under the will of his wife, he is the sole owner of land, mortgages it to a third person, who, also supposing the mortgagor to be the sole owner, applies part of the loan, at his request, to the payment of a prior mortgage, and it subsequently transpires that such mortgagor owns only an undivided fifth of the land as tenant in common, he is nevertheless entitled to contribution from his cotenants for having relieved the common estate of an encumbrance, and, upon his death, the second mortgagee succeeds to his rights by subrogation, if no other interests have intervened, and in a suit in equity by such mortgagee against the first mortgagee and the cotenants for relief he is entitled to have the satisfaction of the first mortgage canceled, and such mortgage declared a lien on the common property for his use, and to have his second mortgage declared a junior lien upon the undivided estate of his mortgagor. (Haverford Loan etc. Assn. v. Fire Assn. 657.)

COTENANTS—SURVIVORSHIP OF CAUSE OF ACTION.—Whenever a cause of action is joint, it survives to the remaining cotenants on the death of either of them, or, if all die, it vests in the personal representative of the last survivor. (Rowe v. Shenandoah Lumber Co., 870.)

COTENANTS—ABATEMENT OF ACTION ON THE DEATH OF ONE.—If, after the bringing of an action of trespass on the case by several cotenants to recover for injuries to their real property by running water thereon, one of them dies, the survivors are entitled to recover the whole damages, and the action therefore does not abate as to the moiety of the decedent. An order of court subsequently entered directing that the suit proceed as to his moiety in

the name of his administrator is therefore erroneous, and entitles the defendant to a reversal. (*Rowe v. Shenandoah Pulp Co.*, 870.)

See Fraud, 2; Partnership, 17-19.

COVENANTS.

1. COVENANT OF ANCESTOR—LIABILITY OF HEIRS—COMMON LAW.—To hold heirs liable, at common law, upon a covenant of their ancestor, it is necessary to show that they are named therein and have assets by descent sufficient to meet the demand. (*Rohrbaugh v. Hamblin*, 334.)

2. COVENANT OF WARRANTY BY ANCESTOR—LIABILITY OF HEIRS—JURISDICTION OF COURTS.—If an ancestor binds himself by a covenant of warranty in a deed for certain real estate and dies testate, leaving all his property to the defendants as his legatees, but there is a breach of the covenant by eviction of the plaintiff six years after the final settlement, and distribution of the estate, and discharge of the personal representative by the probate court, the district court has jurisdiction of a suit in equity brought directly by the plaintiff against the defendants, and may compel them to refund that which, in good conscience, they ought not to retain. (*Rohrbaugh v. Hamblin*, 334.)

3. THE COVENANT OF A STRANGER TO THE TITLE, it appearing from the deed that he did not claim the property which he purports to convey, is personal to the covenantee, and incapable of transmission by his mere conveyance of the land. (*Mygatt v. Coe*, 521.)

4. COVENANTS OF WARRANTY, WHEN DO NOT PASS WITH THE LAND.—If a husband joins with his wife in a conveyance of her separate estate, and covenants that she has good right to convey the premises, and the deed also contains the usual covenants of warranty and for quiet enjoyment, such covenants, as against the wife, pass with the land, because she has possession of it, and delivers such possession to her grantee, but as the husband had no possession in his own right, and therefore delivered none to the grantee, his covenant is personal, and does not run with the land, and a subsequent grantee cannot recover against the husband thereon, unless he can prove its assignment to him. (*Mygatt v. Coe*, 521.)

See Husband and Wife, 10-12.

CREDITOR'S SUIT.

CREDITOR'S BILL—WIDOW'S UNASSIGNED RIGHT OF DOWER.—Creditors cannot, by means of a creditor's bill, subject a widow's unassigned right of dower in the lands of her deceased husband to the payment of her debts. (*Harper v. Clayton*, 407.)

CRIMINAL LAW.

See Arrest, 2; Jurisdiction, 1.

CUSTOM.

See Evidence, 17; Negligence, 14.

DAMAGES.

1. DAMAGES—INJURY FROM NEGLIGENCE—PROOF OF EXPENSES.—If special damages are claimed in an action for damages for injuries occasioned by defendant's negligence, proof of charges against the plaintiff for surgical and medical attendance may be made, if the plaintiff has become legally bound to pay the

ount thereof, although it has not been actually paid at the time of al. (Wilson v. Southern Pac. Co., 766.)

2. **NEGLIGENCE CAUSING DEATH—DAMAGES—MEASURE**
F.—In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband on a railroad crossing, the law will allow nothing more than the pecuniary loss, as shown by the proof and measured by a pecuniary standard. The extent of this loss should not be measured by the wealth or poverty of the recipient or giver, but by his earnings, care, health, benefit and pecuniary contributions given, or in reasonable expectation of being given, to the widow and children, as shown by the proof and judged from all the circumstances of the case to be just, but measured by a pecuniary standard. (English v. Southern Pac. Co., 772.)

3. **DAMAGES.—FOR THE BREACH OF A CONTRACT TO PAY MONEY**, no matter what amount of inconvenience is sustained by the plaintiff, the measure of damages is only the interest on the money. (Bethel v. Salem Imp. Co., 808.)

4. **DAMAGES.—WHERE THE FAILURE OF ONE PARTY TO PERFORM HIS CONTRACT IS DUE TO THE FAILURE OF THE OTHER TO MAKE PAYMENTS** as therein provided, the former cannot recover as damages the profits which could have been realized had he performed his contract. His recovery is limited to the amount due him for work actually done, with interest. (Bethel v. Salem Imp. Co., 808.)

5. **DAMAGES—MEASURE OF FOR INJURY TO REAL PROPERTY.**—In an action to recover for injuries to real property resulting from the construction and maintenance of a dam backing water thereon, the measure of damages is the difference between the value of the property at the time the damages were inflicted and its value before such damage was done. (Rowe v. Shenandoah Pulp Co., 870.)

See Attachment, 1; Estates, 2, 3; Limitations of Actions, 1; Municipal Corporations, 18, 14; Negligence, 11, 12; New Trial, 4; Partnership, 6; Nuisance, 2; Telegraph Companies, 1, 2.

DEATH.

See Evidence, 12, 13.

DEBTOR AND CREDITOR.

See Equity, 3; Executions, 4; Executors and Administrators, 8; Homesteads, 2; Mortgages, 13; Partnership, 12-16, 18, 19; Payment, 1; Receivers, 1; Sales, 4.

DEDICATION.

See Highways, 2.

DEEDS.

1. **DEED — AGREEMENT, WHEN NOT MERGED IN.**—An agreement made before the sale of land that the grantor will not sell any part of the remaining tract, except at a specified price per front foot, does not contradict anything in the subsequent deed of the property, and therefore does not merge in such deed. It is a collateral agreement on a distinct subject, and, though oral, may be proved. (Rackemann v. Riverbank Imp. Co., 427.)

2. **DEEDS, UNRECORDED—VALIDITY OF, AS TO THOSE WITH NOTICE.**—An unrecorded deed is valid between the parties thereto and those who have notice thereof, either actual or constructive. (Doran v. Dazey, 550.)

3. DEEDS—PRESUMPTION OF DELIVERY.—The signing, attestation, and acknowledgment of a deed by the grantor and the recording of it raises a presumption of delivery, which cannot be overcome by declarations of the grantor that the deed was not delivered. (*Kern v. Howell*, 641.)

4. DEEDS—SUBSEQUENT POSSESSION BY VENDOR—TRUST—STATUTE OF LIMITATIONS.—The possession of land by a vendor, after execution and delivery of a deed therefor, is in trust for the vendee, and the statute of limitations does not begin to run until the vendor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee. (*Kern v. Howell*, 641.)

5. DEED FOR AN EXPRESSED PURPOSE, WHEN VESTS THE FEE.—A conveyance by a husband to a trustee for the benefit of the grantor's wife, which declares that the property is conveyed as the absolute property of the wife, "that she may have a permanent home for her life, and his children by her a pittance after her death," vests her with the fee, and does not create any remainder in favor of their children. These words indicate the motive of the grantor in making the deed, but do not limit its effect. (*Fackler v. Berry*, 819.)

6. CONVEYANCE—CONSTRUCTION OF RESERVATION OF RIGHT TO TAKE COAL.—If, in a conveyance of a tract of land, the grantor reserves the right of coal for his family at the bank then in use, this reservation cannot justify the successor in interest of such grantor in mining on his land at a point distant from the bank in use when the conveyance was made and so as to approach within five feet of his boundary line, when the statute prohibits such mining without the consent of the adjacent landowner. (*Maple v. John*, 839.)

See Husband and Wife, 12; Notice, 1, 4; Partnership, 17, 19.

DEFINITIONS.

1. DEFINITIONS.—"IN SESSION," as applied to a court, expresses not only the idea that the judge is sitting on the bench and engaged in the discharge of judicial functions, but that the court has convened for a term, and has not yet adjourned for the term. (*State v. Root*, 568.)

2. DEFINITIONS.—THE WORD "FOR" in a statute requiring a publication of notice of sale, upon the foreclosure of a mortgage, by advertisement, to be made "for six successive weeks at least once in each week" means "throughout" or "during the continuance of." It is obvious that a notice of sale has not been published "during the continuance of" a week when the day of sale follows the day of publication at an interval of less than a week. (*Finlayson v. Peterson*, 581.)

3. POOLSELLING, WHAT IS.—A "pool," as the term is used in connection with horseracing and contestants in games, is a combination of a number of persons, each staking a sum of money on the success of a horse in a race, or a contestant in a game, the money to be divided among the successful betters according to the amount put in by each. (*Lacey v. Palmer*, 795.)

4. CRIMINAL LAW.—BRIBERY IS the voluntary giving or receiving of anything of value in corrupt payment of an official act done or to be done. A promise to pay an officer for loss of time is bribery. (*Honaker v. Board of Education*, 847.)

"Appraisers and arbitrators." (*Gulld v. Atchison etc. R. R. Co.*, 312.)

"Connivance." (*Dennis v. Dennis*, 95.)

"Defective highway." (*Reading Township v. Telfer*, 335.)

"Educational appliances." (*Honaker v. Board of Education*, 847.)

Habitual intemperance." (Dennis v. Dennis, 95.)
Lobbying contracts." (Houlton v. Nichol, 928.)
Special verdict." (Davis v. Chicago etc. Ry. Co., 985.)

DEVISES.

DEVISES, WHEN NOT TO A CLASS AND THEREFORE SUBJECT TO LAPSE.—A devise to the testator's aunt, naming her, and to his cousins, naming seven persons, each to take an equal share, is not a devise to a class, though all the cousins are the children of such aunt. Therefore, upon the death of any of such cousins, his or her devise lapses and goes into the residue. (Moffett v. Elmendorf, 529.)

See Wills, 17, 18, 22; Trusts, 3.

DISBARMENT.

See Attorney and Client, 3, 4; Contempt, 8-11.

DOMICILE.

See Evidence, 13.

DOWER.

DOWER—NATURE OF RIGHT BEFORE ASSIGNMENT.—Previous to the assignment of dower to a widow, her interest is a mere chose in action, nothing but a right by appropriate proceedings to compel the assignment to be made. (Harper v. Clayton, 407.)

- See Creditor's Suit; Execution, 1; Fraud, 1.

DRAINS.

See Municipal Corporations, 9.

DURESS.

See Homestead, 3.

EASEMENT.

See Highways, 3-5.

ELECTIONS.

1. ELECTIONS—PROPERTY QUALIFICATIONS FOR VOTERS IN CITIES, WHEN VALID.—If the constitution authorizes the legislature to create corporations for municipal purposes, leaving the management of their concerns to it, and does not prohibit it from imposing any reasonable restriction upon the right to vote, a law providing that the voters at a certain municipal election shall possess a property qualification is valid. (Hanna v. Young, 396.)

2. "ELECTIONS." IN CONSTITUTION, INCLUDES WHAT.—The word "elections," in the suffrage clause of a constitution providing that every male citizen of the United States of the age of twenty-one years and upward who has been a resident of the state for one year, etc., shall be entitled to vote at "all elections," includes only those elections which the constitution itself requires to be held, or those which it has directed the legislature to provide for. (Hanna v. Young, 396.)

3. ELECTIONS—PROPERTY QUALIFICATION FOR VOTERS OUTSIDE OF CITY NAMED IN CONSTITUTION—POWER OF LEGISLATURE.—Although a particular city is mentioned in that part of a constitution prescribing the qualifications of voters, the

legislature has constitutional power to prescribe a property qualification for voters at municipal elections in the state outside of such city, where it is clothed with power to create and manage municipal corporations, and is not prohibited by the constitution from imposing any reasonable restriction upon the right to vote. (*Hanna v. Young*, 396.)

4. ELECTIONS—VALID RESTRICTION AS TO PROPERTY QUALIFICATION FOR VOTERS IN CITIES.—A statute providing that only male residents above twenty-one years of age and assessed on the tax-books with one hundred dollars' worth of real or personal property shall be entitled to vote at an election for commissioners of a certain town is a valid restriction upon the right to vote at such election. (*Hanna v. Young*, 396.)

See Mandamus.

EMPLOYES.

See Injunction, 8; Master and Servant, 1, 2.

EQUITY.

1. JURY TRIAL—EQUITY CASES.—The provisions of the state constitution respecting the right to trial by jury do not extend to cases in equity unless they are specially named. (*Maynard v. Richards*, 145.)

2. EQUITY PRACTICE—JURY TRIAL.—In a suit by a surviving partner to settle the affairs of the partnership in which it is claimed that an attorney has performed services for which he ought to be compensated out of the firm assets, in which suit he is made a party defendant, the court may, without the aid of a jury, fix the compensation due such attorney and direct its payment out of the funds of the firm in the hands of the survivor. (*Maynard v. Richards*, 145.)

3. EQUITY.—CHOSES IN ACTION—PAYMENT OF CREDITORS—JURISDICTION.—Aside from statute, and in the absence of fraud, or some element of trust, it seems that equity has no jurisdiction to subject choses in action to the payment of creditors, merely because the creditors have no remedy at law. (*Harper v. Clayton*, 407.)

4. LACHES WILL NOT BE IMPUTED to a person while under disability. (*Melms v. Pabst Brewing Co.*, 899.)

5. LACHES AND NEGLIGENCE ARE DISCOURAGED IN EQUITY, and a delay of less than the period of limitation fixed by statute may be regarded as laches, and prevent the interposition of equity. (*Melms v. Pabst Brewing Co.*, 899.)

6. LACHES—PLEADING.—If the delay of the complainant in seeking relief is such as to apparently charge him with laches, he must aver and prove when he discovered the fraud or mistake of which he complains and what the discovery is, so that the court may judge whether, by the exercise of ordinary diligence, the discovery might have been made before. (*Melms v. Pabst Brewing Co.*, 899.)

See Corporations, 1, 12; Covenants, 2; Judicial Sales, 4; Letters, 2; Marriage and Divorce, 9; Partnership, 10; Trusts, 1; Vendor and Purchaser, 3; Wills, 5.

ESTATES.

1. LIFE ESTATE—OIL AND GAS LEASE.—A tenant for life of land upon which there has never been any oil or gas operations previous to the time that the life estate accrued, has no right to operate thereon for oil or gas himself, and cannot give such right to

another by lease. If such right is attempted to be given by lease, the life tenant cannot enforce the covenants thereof. (Marshall v. Mellon, 601.)

2. REVERSIONER AND LIFE TENANT — RESPECTIVE RIGHT TO RECOVER FOR INJURIES TO PROPERTY.—If there is a tenant for years or life in the actual possession of real property, he can sue and recover damages for any trespass affecting his immediate interest, and the reversioner or remainderman, if the act does a permanent injury to the inheritance, may sue as to that. The claims, however, of the tenant and the reversioner or remainderman are separate and distinct, and the damages sustained by both cannot be recovered in an action brought by one of them only. (Jordan v. Benwood, 859.)

3. REVERSIONER OR REMAINDERMAN—WHEN DEEMED DAMAGED BY INJURIES TO PROPERTY.—If the injury is of a permanent nature, deteriorating the market value to property, so that if the remainderman or reversioner were to sell, it would fetch less money in the market, there is damage to the reversion or remainder for which he is entitled to recover. If the same act affects both his estate and that of the tenant in possession, the damages are apportionable between them, the tenant recovering only for damage to his present enjoyment during his term if it affects the entire term, and the remainderman or reversioner only for the damages to his remainder or reversion. (Jordan v. Benwood, 859.)

See Deeds, 5; Dower; Highways, 5; Pleading, 5.

ESTOPPEL.

1. ESTOPPEL—ADMITTING LOCATION OF HIGHWAY.—A person will not be heard to dispute the location of a highway, which location he has distinctly admitted by his declarations and acts. (Whitesides v. Green, 740.)

2. AN ESTOPPEL TO DENY THE GENUINENESS OF A SIGNATURE DOES NOT ARISE from the failure to at once repudiate it, nor from saying that the note on which it appeared will be paid, if there was no intention to mislead, and the statement was not acted upon by anyone to his prejudice. (Traders' Nat. Bank. v. Rogers, 458.)

See Fraud, 3; Husband and Wife, 5; Marriage and Divorce, 8.

EVIDENCE.

1. EVIDENCE—JUDICIAL NOTICE.—Courts take judicial notice that a contract entered into between a city and a water company for a supply of water for public purposes becomes in a sense perpetual. (Blenville Water etc. Co. v. Mobile, 28.)

2. EVIDENCE—PRESUMPTIONS.—THE COMMON LAW is not presumed to exist in the state of Louisiana. (Peet v. Hatcher, 45.)

3. EVIDENCE—PRESUMPTIONS—COMMON LAW.—In states having a common origin or populated by citizens coming from states having a common origin, the common law is presumed to exist. (Peet v. Hatcher, 45.)

4. EVIDENCE—PRESUMPTION—COMMON LAW.—If there is no proof of the law of another state nor judicial knowledge of the origin of such state, such as raises the presumption that the common law prevails there, it is presumed that the law of the forum in which the issue is being tried is the law of that state on the question under consideration. (Peet v. Hatcher, 45.)

5. THE STATUTES OF ANOTHER STATE, WHEN IN ISSUE, AND PROPERLY ADMITTED IN EVIDENCE.—If, in a complaint to foreclose a mortgage, the plaintiff is alleged to be a corporation,

organized, existing, and doing business pursuant to the statutes of another state, the statute under which it was organized is admissible in evidence. (*Frele v. No. 4 Fidelity B. & S. Union*, 123.)

6. EVIDENCE—BURDEN IN CRIMINAL CASES—PREJUDICE—IMPROPER INFLUENCES.—Unless the record, in a criminal case, shows that improper influences did not prejudice the rights of the defendant, the burden of proving that the defendant did not suffer prejudice by reason thereof rests upon the prosecution. (*State v. McCormick*, 341.)

7. CRIMINAL LAW—EVIDENCE.—If one arrested under a charge of larceny says to the arresting officer that he is not guilty, but that he will have to suffer for some one else, such statement is admissible in evidence against him. (*Commonwealth v. Flynn*, 472.)

8. FALSE IMPRISONMENT—EVIDENCE.—In an action to recover for false imprisonment, a conversation between the plaintiff and the arresting officer, not had in the presence of the defendant, concerning the matter over which the arrest took place, is not admissible in evidence. (*Burk v. Howley*, 607.)

9. EVIDENCE—PRODUCTION OF LETTERS OR PAPERS.—If there is an issue, either direct or collateral, on the forgery of papers, courts of law or of equity may compel their production for inspection in advance of trial. (*Dock v. Dock*, 617.)

10. EVIDENCE.—PRODUCTION OF PRIVATE WRITINGS in which another has an interest may be had either by bill of discovery in proper cases in equity, or by writ of subpoena duces tecum at law, directed to the person who has them in his possession. Courts of law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other. Such order may also be obtained by a defendant on a special case, such as if there is reason to suspect that the writing is forged, and he wishes that it may be seen by himself and his witnesses. (*Dock v. Dock*, 617.)

11. EVIDENCE—PRODUCTION OF WRITINGS.—If a party is entitled to the production and inspection of a written document as being applicable to his case, his right to such discovery is not affected by the fact that the same document is evidence for the other party's case also. (*Dock v. Dock*, 617.)

12. EVIDENCE—DEATH—PRESUMPTION.—A presumption of death is raised by the absence of a person from his domicile unheard of for seven years. Absence in this connection means that a person is not at the place of his domicile, and that his actual residence is unknown. Removal alone is not enough. (*Francis v. Francis*, 668.)

13. EVIDENCE—PRESUMPTION OF DEATH.—If a person removes from his domicile to establish a home for himself in another state or country, at a place well known, this is a change of residence only, and absence from the former domicile does not raise a presumption of death. If alive at his last domicile when last heard from the presumption is that life continues. (*Francis v. Francis*, 668.)

14. EVIDENCE—ADMISSION OF NEGLIGENCE OR CARE—ACTS OR DECLARATIONS OF SWITCHMAN—RES GESTAE.—After the occurrence of a railroad accident, a switchman is not authorized to make any admission of negligence on the part of the company, or of care by a party injured; and any narration of the facts by him, subsequent to the occurrence, and not made upon the witness stand, is inadmissible in evidence; but the acts and declarations of the switchman constituting a part of the *res gestae* are admissible, though given to the jury by a third party. (*Wilson v. Southern Pac. Co.*, 766.)

15. EVIDENCE — RES GESTAE — CONVERSATION ABOUT RAILROAD ACCIDENT.—A train of cars was moving backward and forward over a street crossing, and a person riding in a wagon with the driver attempted to cross, but the wagon was struck by the cars, and the passenger, in jumping out, was injured. Immediately thereafter, the train having moved along, the injured party walked across the track and said to the switchman, "Who is to blame for this?" The latter replied, "It was the engineer. I told him to stop, and I told you to go on." The party injured then asked, "Did you tell us to go across?" The switchman answered, "That is what I did." This conversation, being immediately and intimately connected with the transaction, was held to be admissible as part of the *res gestae*, which included the fact that the train stood across the street, the movement of the cars, and the different attempts of the driver to cross. (*Wilson v. Southern Pac. Co.*, 766.)

16. EVIDENCE—WHAT ACTS AND DECLARATIONS ARE PART OF RES GESTAE.—If a train of cars is moving backward and forward over a street crossing, and a person riding in a wagon with the driver is injured while they are attempting to cross, and while a switchman is at his post, all acts and declarations of the parties which are the immediate expressions of the fears, the intentions, and the conflicting purposes brought into play by the occurrences of the occasion, the situations of the respective parties, and their dangers and emergencies, real or apparent, constitute a part of the transaction, and are, therefore, a part of the *res gestae*. (*Wilson v. Southern Pac. Co.*, 766.)

17. EVIDENCE OF THE CUSTOMARY WAY OF DOING THINGS is not admissible if it is a matter of common knowledge. (*Simonds v. Baraboo*, 895.)

See Agency, 5; Attorney and Client, 7, 9, 10; Auctions, 5; Bailments, 3, 4; Checks, 1, 2; Contracts, 9, 10, 14; Damages, 1; Fraudulent Conveyances, 2, 3; Husband and Wife, 7, 10; Judgment, 1, 5, 6, 9, 10; Limitations of Actions, 2; Municipal Corporations, 10; Negligence, 11, 14; New Trial, 1; Negotiable Instruments, 11; Notice, 9; Pleading, 4; Railroad Companies, 20; Sheriffs, 1; Wills, 10, 21.

EXECUTIONS.

1. EXECUTION—WIDOW'S RIGHT OF DOWER BEFORE ASSIGNMENT.—A widow's right of dower in the lands of her deceased husband cannot be taken in execution by her creditors before the same has been assigned and set off to her. (*Harper v. Clayton*, 407.)

2. EXECUTION.—THE PROPERTY OF A PARTNERSHIP CANNOT BE ATTACHED UNDER A CLAIM AGAINST ONE OF THE PARTNERS, and an officer levying such an attachment acquires no title. (*Russell v. Cole*, 432.)

3. EXECUTIONS—LIABILITY OF OFFICER FOR DELAY.—An execution creditor, who places his execution in the hands of the sheriff with directions to make the money upon it, and who does not countermand or modify his instructions but repeats them from time to time, does not lose his lien by the delay of the sheriff in making the sale. (*Gillespie v. Keating*, 622.)

4. EXECUTIONS—DELAY IN MAKING SALE—PRIORITY BETWEEN CREDITORS.—If a judgment creditor places his execution in the hands of the sheriff, with directions to make the money upon it, and the officer delays making the sale, though repeatedly requested to do so, and, in the mean time, an attachment execution in favor of a third person is issued against the debtor, and,

after the latter has made an assignment for the benefit of creditors, the attachment execution is pursued to judgment, and an execution thereunder is placed in the hands of the sheriff, who subsequently sells the property, the lien of the first execution creditor on the proceeds of the sale is superior to that of the second execution creditor or the general creditors, in the absence of a claim and proof of fraud by either of the latter. (Gillespie v. Keating, 622.)

5. EXECUTIONS—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—There can be no valid levy made on a writ of execution after the execution debtor has made an assignment for the benefit of creditors. (Gillespie v. Keating, 622.)

See Sheriffs, 1, 2.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—SUIT AGAINST FOREIGN EXECUTOR.—In Pennsylvania, a foreign executor within the jurisdiction of the courts of that state is liable to suit by a resident creditor of his decedent, and such suit may be sustained unless it trenches unduly on the jurisdiction of another court already attached or would expose parties subject to such jurisdiction to inequitable burdens. (Laughlin v. Solomon, 633.)

2. EXECUTORS AND ADMINISTRATORS—SALES OF ARE VOIDABLE BUT NOT VOID.—Under a statute forbidding executors, administrators, and guardians from purchasing, directly or indirectly, the real property of the estates of their wards or decedents, and declaring such sales to be void, they are not absolutely void, but are voidable only at the instance of persons prejudiced thereby. (Melms v. Pabst Brewing Co., 899.)

3. EXECUTOR'S SALES—CREDITORS AND HEIRS, WHEN MAY IMPEACH.—If the property of the estate of a decedent was purchased for the benefit of an executor or administrator, the sale may be avoided by creditors or heirs at law of the decedent who were prejudiced thereby. (Melms v. Pabst Brewing Co., 899.)

4. EXECUTORS' SALES—INNOCENT PURCHASERS.—Though an executor's sale was made for his benefit, and was therefore subject to be attacked and set aside by heirs or creditors prejudiced thereby, innocent purchasers who have acquired title under such sale without notice of the vice therein are protected. (Melms v. Pabst Brewing Co., 899.)

5. LACHES IN SEEKING TO AVOID AN EXECUTOR'S SALE. If the property of a decedent was purchased at an executor's sale for the benefit of the executor, and was afterward sold to a stranger, the heirs are chargeable with laches and precluded from setting aside the sale, though the statute of limitations has not run against them, if, by the exercise of ordinary diligence, they might have discovered that the sale was made for the benefit of such executor, and they failed to exercise such diligence or to take any proceeding to avoid the sale for nearly twenty years and until the youngest of the heirs was more than four years past her majority. (Melms v. Pabst Brewing Co., 899.)

See Cotenancy, 6; Wills, 4, 23.

FALSE IMPRISONMENT.

See Evidence, 8; Malicious Prosecution, 2.

FALSE PRETENSES.

1. FALSE PRETENSES—ESSENTIAL ELEMENTS OF OFFENSE.—An essential element of the offense of obtaining property

by false pretenses is, that the person who parts with it is, in fact, defrauded to his injury. In addition to the false pretenses, there must be an intent to defraud. The pretenses must be used for the purpose of perpetrating the fraud, and a fraud must be actually accomplished by means of the false pretenses. (State v. McCormick, 341.)

2. FALSE PRETENSES—GIVING OF WORTHLESS CHECK—IMMATERIALITY OF DEFENDANT'S INSOLVENCY.—It is not essential to a conviction for obtaining property by fraud and false pretenses, where the defendant is charged with having obtained a horse by stating that he had money in a certain bank and that a check thereon which he gave was good and would be paid on presentation, when he did not, in fact, have any money in the bank, or any account with it, to allege or prove that the defendant was insolvent, especially where the check was taken as the equivalent of money, without any intention of extending credit to the defendant. The seller was defrauded to his injury regardless of how solvent the defendant may have been. (State v. McCormick, 341.)

3. FALSE PRETENSES—RELIANCE UPON FALSE REPRESENTATIONS.—If the defendant upon a charge of obtaining property by fraud and false pretenses, is assisted by another in fraudulently obtaining the property, and such other person makes false representations to the owner in the presence and hearing of the defendant, without objection, or explanation, by him, and which are, in effect, an affirmation of the representations made by the defendant, the false representations made by such other person, with the approbation and concurrence of the defendant, will, if relied upon by the owner, bind the defendant to the same extent as if he himself had made them. (State v. McCormick, 341.)

See New Trial, 8.

FIRE DEPARTMENT.

See Municipal Corporations, 2-3; Statutes, 4.

FORGERY.

1. FORGERY, RATIFICATION OF.—Omission by an apparent indorser on being shown a note to inform the holder that the indorsement was a forgery does not amount to an affirmation of the signature, if such indorser is not proved to have received any benefit from the forgery or to have authorized the forger to act as his agent for any purpose. (Traders' Nat. Bk. v. Rogers, 458.)

2. FORGERY—EVIDENCE OF RATIFICATION.—The fact that a person whose name has been forged does not at once repudiate the signature is admissible as bearing upon the question whether he assumed the signature as his own, but it is not conclusive. Nor is the statement of such person that the note will be paid conclusive evidence of his ratification of the forgery. (Traders' Nat. Bk. v. Rogers, 458.)

FRAUD.

1. FRAUD—REFUSAL TO HAVE DOWER ASSIGNED.—As a person may stand upon his legal rights without violating any rule of equity, the neglect or refusal to have dower assigned does not amount to fraud. (Harper v. Clayton, 407.)

2. FRAUD—PARTICEPS CRIMINIS WILL NOT BE RELIEVED FROM.—If several cotenants join in an agreement by which the property of the cotenancy is sold at a tax sale to one of their number for the purpose of defrauding other cotenants, none of such per-

sons will be granted relief in equity as against a person who, in pursuance of the scheme, acquired the tax title. (*Lawton v. Estes*, 459.)

3. FRAUD—CONCEALMENT OF MATERIAL FACTS—ACCOUNTING.—If a member of a partnership operating a gas well negotiates a sale thereof to a third party for one-half of the gross proceeds, and concealing this offer, and by means of false representations made by himself and his agent, that one-fourth of such proceeds is the best price obtainable, secures from his copartners a contract of sale at the latter price in blank, and then inserts his own and his agent's name and immediately resells to such third party in accordance with his offer, both the copartner and his agent are liable to account to the other members of the partnership for the profits of the latter sale, and such agent having, during all of the negotiations, represented that he was interested as one of the members of the firm, he is estopped to deny that he is one of the partners in an action for an accounting. (*Bennett v. McMillin*, 591.)

4. FRAUD—CONCEALMENT OF MATERIAL FACTS.—If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract may be avoided. Knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent. (*Bennett v. McMillin*, 591.)

See Arbitration and Award, 4; Auctions, 1; Contracts, 4, 5, 15; Homesteads, 2; Larceny, 1; Wills, 14, 15.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—RESERVATION OF BENEFIT.—If an insolvent debtor conveys his property to his creditor in payment of a bona fide debt, and for an adequate price, the sale is not rendered fraudulent simply by the fact that the husband of such debtor is subsequently employed as a clerk by the purchaser, without any prior agreement for such employment. (*Simmons v. Shelton*, 39.)

2. FRAUDULENT CONVEYANCES—NOTICE OF INSOLVENCY OF DEBTOR—EVIDENCE.—In an action to set aside a conveyance by a debtor to his creditor as fraudulent toward other creditors, evidence that shortly after the conveyance the purchaser had reason to suspect that the seller owed money to others, is not sufficient to charge the purchaser with knowledge or notice of an intent on the part of the seller to delay and defraud his other creditors. (*Simmons v. Shelton*, 39.)

3. FRAUDULENT CONVEYANCES—NOTICE OF INSOLVENCY OF DEBTOR—EVIDENCE.—In an action to set aside a conveyance by a debtor to his creditor as fraudulent toward other creditors, evidence that suits were instituted against such debtor and the purchaser garnished, and that the latter made several payments of the purchase money, without showing when they were made, is not sufficient to show that such payments were made after notice of the insolvency of the debtor or after such suits were instituted. (*Simmons v. Shelton*, 39.)

4. FRAUDULENT CONVEYANCES—SALE FOR VALUABLE CONSIDERATION—NOTICE OF FRAUDULENT INTENT—BURDEN OF PROOF.—A sale or conveyance made upon a valuable consideration by a debtor who is insolvent, or in failing circumstances, can be set aside at the instance of his creditors only upon proof by them that the purchaser participated in or knew of the purpose on the part of the debtor to place his property beyond the reach of his creditors, or had such information as charges him with notice of that

purpose. If the purchaser, before full payment, is chargeable with knowledge of the fraudulent intent of the seller he is not permitted to make further payments, but must hold them for the paramount claims of the debtor's creditors. (Simmons v. Shelton, 39.)

5. FRAUDULENT TRANSFER TO A PARTNERSHIP OF WHICH TRANSFERRER IS A MEMBER.—Though the object of a person in forming a partnership with another and transferring property to him is fraudulent as against his creditors, and in contravention of the statute relating to insolvency, the transfer cannot be avoided, if the other partner did not know of, nor participate in, the fraud, and purchased in good faith and for a valuable consideration. (Russell v. Cole, 432.)

6. PURCHASER BONA FIDE.—A purchaser for a valuable consideration is entitled to be protected in his title, and, in the absence of actual notice of fraud, it is necessary that the facts and circumstances relied upon to charge him with knowledge of a fraud should be of a character equivalent to notice. (Anderson v. Blood, 515.)

7. PURCHASER, WHAT NOT SUFFICIENT TO CHARGE HIM WITH NOTICE OF A FRAUD.—Where the premises have been sold at public auction by an executor and trustee of an estate, and, at the time, under an advantageous lease to a tenant, and a third person is subsequently negotiating for their purchase, the fact that the trustee and lessee are friends and associates in business, that the amount bid at such auction sale has never been collected, and the ten per cent required to be paid at the sale has been paid by a check given by such tenant, but never presented for payment, that he is willing to surrender his lease, and that the premises are, in the opinion of the purchaser, worth several thousand dollars more than has been bid for them, is not sufficient to charge him with notice that the sale was made for the benefit of the executor or trustee, and in fraud of the rights of persons interested in the estate. (Anderson v. Blood, 515.)

See Receivers, 1.

GAMBLING.

See Associations, 2; Statutes, 9, 10.

GUARANTY.

1. GUARANTY OF DRAFT.—A guarantor of a draft is not liable thereon if the drawer rightfully refuses to accept the draft. (Merchants' Nat. Bank v. Citizens' State Bank, 284.)

2. GUARANTY NOT DESTROYED BY TAKING AND FORECLOSING OTHER SECURITIES.—If a party making a loan to a corporation receives as collateral security part of its bonds and the guaranty of a third person making himself responsible for the payment of the debt, the foreclosure of the mortgage given to secure such bonds does not release the guarantor. The creditor's interest in the real estate subject to such foreclosure stands as before as mere security for his debt, and does not affect his right to proceed against his guarantor. (Lee v. Butler, 468.)

See Husband and Wife, 2, 3; Negotiable Instruments, 18-20.

HABEAS CORPUS.

THE OFFICE OF THE WRIT OF HABEAS CORPUS is not to determine the guilt or innocence of a prisoner, but only to ascertain whether he is restrained of his liberty by due process of law. (Lacey v. Palmer, 795.)

See Parent and Child, 2.

HEIRS.

HEIRS—LIABILITY OF, UPON OBLIGATION OF ANCESTOR.—In the state of Kansas, if the obligation of an ancestor matures after all the assets have been converted into money and distributed to the heirs, they may be compelled to refund to a claimant so much of what they have received as shall be sufficient to satisfy the obligation. (*Rohrbaugh v. Hamblin*, 334.)

See Covenants, 1, 2; Executors and Administrators, 2.

HIGHWAYS.

1. HIGHWAYS—DEFINITIONS—PUBLIC HIGHWAY—DEFECTIVE HIGHWAY.—A laid out and opened road is a public highway, although it has not been put in condition for travel, and a defect in it makes it a "defective highway," within the meaning of a statute giving a right of action for injuries sustained on a "defective highway." To constitute such a road a "defective highway," it is not necessary that it should first have been improved and then allowed to become defective through lack of repair. (*Reading Township v. Telfer*, 355.)

2. HIGHWAYS—IMPLIED DEDICATION.—The law implies a dedication of land, on which a highway is located, to the use of the public for the purposes of travel, where it appears that the highway has been traveled by the public continually and uninterruptedly for a period of more than fifteen years. (*Whitesides v. Green*, 740.)

3. HIGHWAYS ACQUIRED BY USER—WIDTH OF.—After the right to a highway has been acquired by user, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case. Whatever may be the width, in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path. (*Whitesides v. Green*, 740.)

4. HIGHWAYS ACQUIRED BY USER—EVIDENCE OF WIDTH.—It may be inferred that the width of a highway acquired by user extends to the ordinary width of highways in the locality, or, if the highway is inclosed with fences, to include the entire space so inclosed, as such ordinary width, and the fact of such inclosure in connection with other evidence, especially circumstances of recognition by the owner of the fee and the public, of definite and fixed limits, pertinent evidence from which width may be inferred. (*Whitesides v. Green*, 740.)

5. HIGHWAYS ACQUIRED BY USER—RIGHTS OF PUBLIC AND OWNER OF FEE.—The acquisition of a highway by user vests in the public the mere right of passage over the land, and does not divest the owner of the fee. He may, therefore, continue to make any use thereof which is not incompatible with the public easement. (*Whitesides v. Green*, 740.)

6. HIGHWAYS ACQUIRED BY USER—WIDTH—QUESTION OF FACT.—A controversy about the width of a highway acquired by user presents a question of fact for the jury to determine from all the facts and circumstances proved, and when such a case is tried by the court, without a jury, then it is a question of fact to be determined by the court. (*Whitesides v. Green*, 740.)

7. HIGHWAYS ACQUIRED BY USER—APPEAL—FINDINGS OF FACT, BY COURT, AS TO WIDTH.—In a controversy about the width of a highway acquired by user, where the case has been tried by the court, without a jury, the findings of fact will not be dis-

ed unless they are so manifestly erroneous as to demonstrate oversight or mistake. (*Whitesides v. Green*, 740.)

See Estoppel, 1; Negligence, 5, 16; New Trial, 4; Nuisance, 1.

HOMESTEAD.

HOMESTEADS—EXCHANGE OF.—A homestead right may exist in vacant land for which a former homestead has been exchanged, or which has been purchased with the proceeds of such homestead, and is held in good faith for use as a home. The homestead character of such land is not affected by the fact that it cannot be improved, and a dwelling-house erected thereon, from the proceeds of the former homestead. (*Mann v. Corrington*, 256.)

HOMESTEAD—EXCHANGE OF, FOR OTHER LAND IS NOT A FRAUD ON JUDGMENT CREDITORS.—A debtor cannot commit a fraud upon his creditor by disposing of his homestead, and his homestead may be exchanged for another free from any claim of creditors upon either. Hence, if a judgment debtor, desiring to change his place of residence, exchanges his homestead for other land subject to an encumbrance, not with the intention of occupying the land traded for, but for the purpose of executing a mortgage on it to pay off the encumbrance, and to obtain enough money, together with what he may realize from the sale of the equity of redemption, to buy another home, at another place, and is advised, upon applying for a loan to one fully informed of the facts, that if he will take a deed in the name of his son, so that the judgments will not appear to be liens upon the property, a loan will be made, and this done, the son executing to the lender a first mortgage on the land, and the lender discharging the encumbrance, and paying the balance of the money over to the father, the transaction, though the father afterward conveys the equity of redemption, is not a fraud upon the father's judgment creditors, and, in an action against him to subject the land traded for to the payment of the judgments against him, such creditors have no right to complain as against the lender and his assignees. (*Winter v. Ritchie*, 331.)

3. HOMESTEAD—DURESS OF WIFE.—If a wife is compelled, by her husband, through force and fear, to sign a mortgage upon the homestead, such mortgage is a nullity, although it accompanies, and is given to secure the payment of, a negotiable promissory note, which with the mortgage, is transferred to an innocent holder before maturity; and, in an action to foreclose the mortgage, the defense of duress is available to her. (*Berry v. Berry*, 851.)

4. HOMESTEAD.—IF LAND IS PURCHASED WITH THE DONA FIDE INTENTION OF MAKING IT A HOMESTEAD, and is prepared and fitted for occupancy as such within a reasonable time, the homestead exemption attaches thereto by relation as of the date of its purchase. (*Shaw v. Kirby*, 927.)

See Husband and Wife, 4.

HOMICIDE.

1. HOMICIDE — INSTRUCTIONS — INVOKING PROCESS OF LAW IS NOT AN ELEMENT OF SELF-DEFENSE.—It is error, on prosecution for murder, where self-defense is relied on, to instruct the jury to the effect that the right of self-defense does not arise where there is opportunity to restrain the assailant by process of law, and that if the defendant had ample opportunity to have the deceased bound over, by a magistrate, to keep the peace, but did not do so, then he is not entitled to the plea of self-defense. (*State v. Hatch*, 37.)

2. CRIMINAL LAW—SELF-DEFENSE—"RETREAT TO THE WALL."—The doctrine that a person unlawfully attacked must "retreat to the wall" before he can be justified in taking the life of his assailant in self-defense is not the law of Kansas; but if the defendant is in the wrong and commences the affray, even with no intent to kill or inflict great bodily harm, and the other party, being thus provoked, makes a deadly assault, then it is the duty of the defendant to retreat as far as the fierceness of the assault will permit him to do, without danger of great personal injury to himself, before slaying his antagonist. (State v. Hatch, 337.)

HORSE-RACING, BOOKMAKING, AND POOL-SELLING.

See Associations, 1, 2; Definitions, 2, 3; Interstate Commerce, 2; Lotteries; Statutes, 3, 9-11.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—STATUS CREATED BY COVERTURE.—Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in, or with, regard to the rest of the community, no one belonging to such class can vary, by any contract, the rights and liabilities incident to this status. Coverture creates such a status, and a married woman's rights and liabilities cannot, therefore, be varied or changed by any contract she may make. (Freeman's Appeal, 112.)

2. HUSBAND AND WIFE—CONTRACTS OF MARRIED WOMEN—CONFLICT OF LAWS.—Contracts which coverture prevents a woman from making herself she cannot make through the interposition of an agent. Hence, if a woman, married and domiciled in this state, has no legal capacity here to make a contract as surety or guarantor for her husband, she cannot become a guarantor or surety for her husband's debt in another state, by acting through the interposition of an agent, whom she appoints, in this state, to execute such a contract, or to deliver it after it has been signed by her. (Freeman's Appeal, 112.)

3. STATUTES AS TO CONTRACTS OF MARRIED WOMEN—RETROSPECTIVE OPERATION.—A statute changing the rule that a married woman cannot make any contract as surety or guarantor for her husband does not enlarge the rights of women married before the passage of the act, and the disability still applies to them, unless it is removed in the manner indicated by such statute. (Freeman's Appeal, 112.)

4. PLEADINGS.—A CONVEYANCE FROM A WIFE to her husband cannot be assailed on the ground that the conveyance was for the homestead, if the pleadings do not present this question. (Carr v. Brennan, 119.)

5. MARRIED WOMEN—ESTOPPEL.—If a husband and wife holding land by entireties make application to the county recorder to obtain a loan from the school fund, comply with all the statutory requirements, and execute a mortgage upon their land to secure the loan so obtained, the wife is thereby estopped from disputing the validity of the mortgage, although the auditor, at the time the loan was made, knew that the money so loaned was to be used to pay the individual debts of the husband. (Trimble v. State, 163.)

6. HUSBAND AND WIFE—SUITS AGAINST WIFE—CONSTRUCTION OF STATUTE.—A statute providing that a married woman may be sued at law jointly with her husband upon any note, contract, or agreement which she may have executed jointly with him includes only contracts or agreements reduced to writing

signed by both husband and wife. (Harvard Publishing Co. v. Benjamin, 402.)

9. HUSBAND AND WIFE—WIFE IS NOT LIABLE UNLESS HER CONTRACT IS WHOLLY IN WRITING.—If a married woman is, by statute, not liable upon her contract or agreement, unless it is in writing and is executed by her jointly with her husband, she is not liable where part of the contract or agreement is in writing and part in parol. Hence, in an action against a husband and wife, where one count of the declaration sets forth a promissory note made by the wife alone, payable to the husband, and by him indorsed in blank, evidence is inadmissible to show that a note, which, on its face, is her note alone, was, in reality, the joint note of the two, as this would make her liability depend, in part, upon parol testimony while the statute prescribes a writing. (Harvard Publishing Co. v. Benjamin, 402.)

10. HUSBAND AND WIFE—NOTE OF WIFE INDORSED BY HUSBAND AS PAYEE—JOINT LIABILITY.—In an action against husband and wife, where one count of the declaration sets forth a promissory note made by the wife alone, payable to the husband and by him indorsed in blank, the note sued on is not evidence of a contract executed by the wife jointly with her husband, as the liability of the maker of a promissory note is quite different from the liability of an indorser, who is also named as payee. The two contracts are wholly different, and do not form one joint undertaking. (Harvard Publishing Co. v. Benjamin, 402.)

11. HUSBAND AND WIFE—LIABILITY OF WIFE TO BE SUEDED.—A wife is liable to be sued at law only upon such contracts and agreements as she is empowered by statute to make. Her common-law disability still continues as to all other undertakings. (Harvard Publishing Co. v. Benjamin, 402.)

12. CONFLICT OF LAWS.—A COVENANT MADE BY A HUSBAND AND WIFE in the state of their domicile to surrender all marital rights in her lands, situated in another state, if valid where made, is valid in the state where such land is situated, though it would not have been valid had the parties been residents of that state. (Polson v. Stewart, 452.)

13. HUSBAND AND WIFE—COVENANT TO SURRENDER INTEREST IN WIFE'S PROPERTY.—If a husband covenants to surrender, convey, and transfer to his wife and her heirs all interests in and to specific real property which he may have acquired by reason of his marriage, and that she is to have full and absolute control and possession of such property, free and discharged of all his debts, claims, and demands of every nature, he thereby releases not only the rights which he then had, but also those which he might have acquired upon her death. (Polson v. Stewart, 452.)

14. HUSBAND AND WIFE, EFFECT OF HIS COVENANTS IN JOINING IN A CONVEYANCE OF HER LANDS.—If a husband joining in a conveyance with his wife of her separate property covenants that she has a good title, and the deed also contains covenants of general warranty, such covenants on the part of the husband are personal, and do not pass to a subsequent grantee of the land. (Myatt v. Coe, 521.)

15. HUSBAND AND WIFE—EVIDENCE OF HIS RIGHT TO THE POSSESSION OF HER LAND.—The fact that a husband negotiates for the sale of his wife's land, executes a written contract for the sale in his own name, delivers the deed to the purchaser, receives a check for a part of the purchase price payable to his order, and releases the bond and mortgage to his wife for the balance of the purchase price, does not show that she had surrendered possession of

such land to him, or conveyed to him any interest therein sufficient to carry with the land, as against him, any covenant contained in a conveyance thereof in which he joined with her. (*Mygatt v. Coe*, 521.)

14. HUSBAND AND WIFE—HUSBAND'S POSSESSION OF, OR INTEREST IN, HIS WIFE'S LANDS.—Though a husband lives with his wife and family on her lands, and pays taxes thereon, and keeps them in repair, this does not impair her title to the possession, nor give him the possession of the property or any right to the possession thereof. (*Mygatt v. Coe*, 521.)

15. HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORT OF WIFE BEFORE MARRIAGE.—A husband is not liable for the torts of his wife, committed before he married her, and while she was the wife of another man. (*Culmer v. Wilson*, 713.)

16. HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORTS OF WIFE.—While the statutes of the state of Utah have not expressly repealed the common-law rule that the husband is liable for the torts of his wife, they have made such modifications of his rights and her disabilities as wholly to remove the reason for the liability. It is assumed that she is fully capable of controlling her own actions, and can, and will, act independently of her husband, and she must, therefore, respond alone for her torts. (*Culmer v. Wilson*, 713.)

See Covenants, 4; Deeds, 5; Homesteads, 3; Negligence, 4, 5; Process; Trusts, 4; Wills, 11, 14-17.

INJUNCTIONS.

1. INJUNCTION AGAINST WATER COMPANIES—ENFORCEMENT OF PUBLIC DUTY—SHUTTING OFF WATER SUPPLY.—After a water company has entered into a contract with a city to furnish it with a supply of water for public purposes, it may be enjoined from summarily shutting off such water to enforce a disputed demand for water already furnished. Such proceeding by injunction is not strictly one for the specific performance of the contract, but rather a proceeding to enforce the performance of a public duty. (*Blenville Water etc. Supply Co. v. Mobile*, 28.)

2. INJUNCTION AGAINST CRIMINAL ACTS.—The fact that the defendants' acts may subject them to indictment does not prevent a court of equity from issuing an injunction. (*Vegelahn v. Guntner*, 443.)

3. EMPLOYERS AND EMPLOYEES—NUISANCE IN PATROLLING EMPLOYER'S PREMISES.—An injunction will issue against the maintenance in front of complainant's place of business of a patrol to prevent the carrying on of the business unless and until he shall adopt a certain scale of prices to be paid to his employes, where the patrol is employed as one of the means of carrying out a plan to coerce the complainant, and is used in addition with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. (*Vegelahn v. Guntner*, 443.)

See Judgment, 10; Master and Servant, 2.

INNKEEPERS.

1. AN INNKEEPER IS ANSWERABLE TO HIS GUESTS for the theft of the latter's money committed by the former's employes. (*Cunningham v. Bucky*, 878.)

2. INNKEEPERS—NEGLIGENCE OF GUESTS.—The fact that the guest was drinking and was careless of his money, exhibiting it freely and refusing to give it into the care of the innkeeper's wife

does not establish such negligence on the part of the guest as to relieve the innkeeper from liability for the loss of such money through the theft of one of his employes. (Cunningham v. Bucky, 878.)

INSANE DELUSION.

See Wills, 1, 3.

INSANE PERSONS.

See Marriage and Divorce, 7.

INSOLVENCY.

See Corporations, 2; Chattel Mortgages, 2; Banks and Banking; False Pretenses, 2; Fraudulent Conveyances, 1-3, 5; Partnership, 8-10, 13-16; Stoppage in Transitu, 1.

INSTRUCTIONS.

1. JURY TRIAL—HARMLESS ERROR.—Though an instruction is objectionable, a verdict will not be set aside nor the judgment reversed, if they clearly appear from the whole evidence to be right. (Lumberman's Mut. Ins. Co. v. Bell, 140.)

2. JURY TRIAL—INSTRUCTIONS AS TO AGENCY.—An instruction summing up the facts bearing upon the question of agency and telling the jury that if they find the facts to be true from the evidence as stated, then, as conclusions of law, certain designated persons are to be deemed agents of others, is objectionable. The question of agency is a mixed one of law and fact, and the jury should be directed to determine from the evidence in the case for whom the persons claimed to act who were acting. (Lumberman's Mut. Ins. Co. v. Bell, 140.)

3. INSTRUCTIONS—REQUISITE OF EXCEPTION AVAILABLE ON APPEAL.—An exception to a charge given by the court to the jury is unavailing on appeal, where any portion of the charge is correct, unless the exception is strictly confined to the objectionable matter, and the judge's attention called thereto, at the time of the delivery of the charge, so as to afford him an opportunity to make a correction. (Lowe v. Salt Lake City, 708.)

4. JURY TRIAL.—A PARTY HAS A RIGHT TO HAVE AN INSTRUCTION given in his words, if it is correct in law and unambiguous. (Jordan v. Benwood, 859.)

5. JURY TRIAL—INSTRUCTIONS RESPECTING FACTS, WHEN REQUIRED.—If the attorney for one of the litigants makes a statement of a matter of fact contrary to the undisputed testimony, the court should, if requested, instruct the jury that such fact is established by the evidence, and that they are not at liberty to find to the contrary. (Davis v. Chicago etc. Ry. Co., 935.)

See Appeal, 5, 6; Homicide, 1; Negligence, 3, 18; Wills, 1, 3.

INSURANCE.

1. INSURANCE—INSURABLE INTEREST.—A vendee of land in possession, exercising acts of ownership under an executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner of the land in fee, and entitled to recover for the loss of an insured building thereon, under a policy of insurance containing a condition that it "shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not

owned by the insured in fee simple." (*Loventhal v. Home Ins. Co.*, 17.)

2. **INSURANCE.—PROOFS OF LOSS** may be made by an agent where the assured was not in a position to make them. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

3. **INSURANCE.—OBJECTIONS THAT THE PROOFS** of loss were made by an agent are waived if the insurer refuses to pay on the ground that the policy was void when issued. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

4. **INSURANCE POLICY ISSUED IN THE NAME OF A DECEASED PERSON.**—If, after the death of a person, his business is carried on by his wife or other successor in interest, and a policy of insurance is issued in such name either by accident, mistake, or design, it is not necessary to go into equity to have it reformed, but the person to whom it was issued may sue thereon in his true name, averring that the instrument was made to him or her by the name appearing therein. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

5. **INSURANCE.—A BROKER OBTAINING INSURANCE** is not necessarily the agent of the assured. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

6. **INSURANCE.—NOTICE TO AN AGENT OF FACTS** material to the risk is notice to the insurer. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

7. **INSURANCE—DECEASED PERSON, POLICY IN NAME OF.**—The fact that the person in whose name a policy of insurance was issued was at the time dead, and his death was not communicated to the insurer, does not affect the insurance, if it was communicated to the agents of the insurer. If the policy was issued in the name of a deceased through the negligence and mistake of the agents of the insurance company, it cannot avoid the policy on that ground. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

8. **INSURANCE AGENTS—PROVISIONS IN POLICIES UNDERTAKING TO DETERMINE WHOM THEY REPRESENT.**—Whether the persons who acted as brokers in procuring insurance are to be deemed agents of the insurer or of the assured is to be determined from all the evidence bearing upon the question, and not merely from statements in the policy that they were the agents of the assured. (*Lumberman's Mut. Ins. Co. v. Bell*, 140.)

9. **INSURANCE—INTEREST IN LIFE.**—An uncle who lives with and supports his thirteen year old nephew has no insurable interest in his life. (*Prudential Ins. Co. v. Jenkins*, 228.)

10. **INSURANCE—INTEREST IN LIFE.**—One who takes out insurance on the life of another payable to himself, and himself paying the premiums, must have an insurable interest in the life insured. Otherwise it is a wagering contract, and the mere fact of relationship does not constitute such insurable interest, unless there is a legal right of support arising from it. (*Prudential Ins. Co. v. Jenkins*, 228.)

11. **INSURANCE—PLEADING CONCURRENT INSURANCE—MATTER OF DEFENSE.**—Although a policy of insurance contains conditions respecting the liability of the insurer, in case of loss, where there is concurrent insurance, the plaintiff, in an action on his policy, need not mention, in his complaint, a concurrent policy of insurance, though it exists, as anything therein exempting the defendant from liability is matter of defense to be set up by answer. (*Aetna Ins. Co. v. McLead*, 820.)

12. **INSURANCE—WHAT CONDITION AS TO ARBITRATION IS NOT A CONDITION PRECEDENT TO SUIT ON POLICY.**—A

dition, in a policy of insurance, providing, in case of any difference of opinion between the insurer and the insured, that damage shall be appraised by disinterested appraisers, and the amount of any loss submitted to arbitration, and further providing that no action against the company shall be sustained, unless an award shall first have been returned, does not make arbitration a condition precedent to commencing suit on the policy, and is inoperative where no arbitrators have been agreed upon. The number of arbitrators not being specified, nor the mode of selecting them, the condition is too indefinite to be valid and enforceable. (*Ætina Ins. Co. v. McLead*, 320.)

13. INSURANCE—WHAT IS NOT PART OF PROOFS OF LOSS ACTION NOT PREMATURE, WHEN.—Under a policy of insurance making a loss payable in sixty days after proofs of loss are furnished, and fully specifying what such proofs shall be, but requiring the insured to furnish duplicate bills of goods purchased in case the company shall require them, such duplicate bills are not a part of the proofs of loss. The loss is payable in sixty days after the regular proofs are received by the company, and an action therefor is not prematurely brought though the duplicate bills are not furnished sixty days before the commencement of the action. (*Ætina Ins. Co. v. McLead*, 320.)

14. INSURANCE—OWNERSHIP.—A condition in a fire insurance policy as to the ownership of the property insured is to be understood, not in its technical sense, but as requiring that the insured shall be the actual and substantial owner. (*Yost v. McKee*, 604.)

15. INSURANCE—OWNERSHIP.—If a fire insurance policy, providing that the interest of the insured in the property shall be an unconditional and sole ownership," is issued on property acquired by the insured by devise "to be his forever for his own proper use," subject only to a restriction of alienation until he attains a certain age, having yet thirteen years to run, he is the owner of the property within the meaning of the policy. (*Yost v. McKee*, 604.)

16. INSURANCE—FIREWORKS, CONDITION AGAINST KEEPING.—If a fire insurance policy provides that it shall be void, "if the hazard be increased by any means within the control or knowledge of the insured or if there be kept, used, or allowed on the above premises fireworks," and other named explosives, the temporary storing of an assorted lot of fireworks on the insured premises, though for celebration purposes, with the knowledge and consent of the insured, is such a breach of the condition of the policy as to absolutely void it in case of loss arising from the accidental explosion of such fireworks. (*Heron v. Phoenix Mut. F. Ins. Co.*, 638.)

17. INSURANCE—LIMITATION OF TIME FOR BRINGING SUIT.—A contract of fire insurance, stipulating as to the time within which suit may be brought after loss, is not affected by a subsequent statute relating to the time for commencing actions on policies of insurance. (*Sample v. London etc. F. Ins. Co.*, 701.)

18. INSURANCE—CONSTRUCTION OF CONTRACT—LIMITATIONS ON TIME FOR BRINGING ACTION.—A condition in a fire insurance policy requiring an action for a loss thereunder to be brought within twelve months next after the fire must be construed in connection with other conditions providing that the loss shall not become payable until sixty days after notice and proof of loss, and that no suit shall be maintained on the policy until after full compliance by the insured with all of its requirements. Under such a policy, the insured has a right to bring suit to recover for a loss at any time within twelve months after the accrual of the right of action, regardless of the time of the fire and loss. (*Sample v. London etc. F. Ins. Co.*, 701.)

19. INSURANCE—PROOFS OF LOSS.—THE SILENCE of the agents and managers of an insurance corporation after receiving proofs of loss is a waiver of any further proofs. (*Morotock Ins. Co. v. Cheek*, 782.)

20. INSURANCE IN THE NAME OF THE MANAGER OF A WAREHOUSE for account of whom it may concern applies to the benefit of any person who may own property therein at the time of a loss, though such property was not therein when the policy issued. (*Morotock Ins. Co. v. Cheek*, 782.)

21. INSURANCE—PROOFS OF LOSS.—A MISTAKE IN DESIGNATING THE NAME of the owner of property in proofs of loss, not induced by fraud nor a desire to deceive, is not fatal to a recovery where the policy is an open, floating one, intended to cover the loss of goods while in a warehouse, under the control of its manager, and irrespective of their ownership. (*Morotock Ins. Co. v. Cheek*, 782.)

22. INSURANCE ON PROPERTY IN A WAREHOUSE, WHO MAY MAINTAIN AN ACTION THEREON.—If a policy of insurance is issued to the manager of a warehouse for the account of whom it may concern, he, upon the happening of a loss, may maintain an action on the policy in his own name to recover the value of goods destroyed, and out of the recovery pay himself to the extent of his interest, and the balance he will hold for the benefit of the owners of the property destroyed. (*Morotock Ins. Co. v. Cheek*, 782.)

INTEREST.

INTEREST, ADDITIONAL FOR FORBEARANCE TO SUE. If the indorsers of a note bearing interest at the rate of six per cent per annum agree with the holder after maturity to pay interest at the rate of two per cent per month so long as the note remains unpaid, the agreement is valid and enforceable. (*Glidden v. Chamberlain*, 479.)

See Mortgages, 2; Partnership, 1; Usury, 2.

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE AND THE POLICE POWER.—A statute enacted in the bona fide exercise of the police power of a state for the suppression of a recognized vice, the prohibition of the sale or manufacture of adulterated or impure food, or the prevention of the spread of disease among men or beasts, will not be held invalid as repugnant to the clause of the national constitution giving Congress exclusive power to regulate commerce among the states. (*Lacey v. Palmer*, 795.)

2. INTERSTATE COMMERCE—POOLSELLING.—The purchasing and selling in this state of pools on races and games conducted in another state may be prohibited by our laws. Such prohibition is not an unauthorized interference with the power of Congress to regulate commerce, nor is it material that the money to be wagered is forwarded by telegraph to a state where it is not unlawful to make the wager. (*Lacey v. Palmer*, 795.)

3. INTERSTATE COMMERCE AND THE SUNDAY LAWS.—A statute prohibiting the running, loading, or unloading, on Sunday, of any trains, cars, or locomotives not used for the transportation of passengers, livestock, the United States mails, or articles of a perishable nature, or for the relief of wrecked or disabled trains, is constitutional, and may be applied as against trains engaged in interstate commerce. (*Norfolk etc. Ry. Co. v. Commonwealth*, 827.)

4. INTERSTATE COMMERCE AND THE POLICE POWERS OF THE STATES.—A state may, in order to protect the lives and

health of its citizens or to preserve good order and the public morals, legislate for such purposes in good faith and without discrimination against interstate or foreign commerce, although such legislation may touch in its exercise the lines respecting the respective domains of the national and the state authority, and, to some extent, affect foreign or interstate commerce. (*Norfolk etc. Ry. Co. v. Commonwealth*, 827.)

5. INTERSTATE COMMERCE—CARS, WHEN DEEMED TO BE EMPLOYED IN.—A train of empty cars, which had been used in the past, and was intended to be used in the future, exclusively in carrying articles of interstate commerce, is nevertheless not to be considered as engaged in interstate commerce until loaded with articles committed to the carrier to be transported to another state. (*Norfolk etc. Ry. Co. v. Commonwealth*, 827.)

6. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—OLEOMARGARINE IN ORIGINAL PACKAGES.—The fact that oleomargarine is imported into one state from another in original packages does not exempt it from the operation of a statute prohibiting its sale in the latter state unless colored pink as by such statute required. (*State v. Myers*, 887.)

7. INTERSTATE COMMERCE—CONTRACTS LIMITING LIABILITY OF CARRIERS.—Until Congress shall enact statutes controlling the subject, the right of carriers operating lines in two or more states to exact and enforce stipulations limiting their liability for negligence is controlled by the common law, and the common law upon the subject is not superseded by the nonexercise of the authority of Congress. (*Davis v. Chicago etc. Ry. Co.*, 935.)

JOINT LIABILITY.

1. JOINT LIABILITY — CONTRIBUTION AMONG JOINT TORT FEASORS—WHEN ALLOWABLE.—If one charged with being a joint tort feasor was innocent of any illegal purpose, ignorant of the nature of his act, which was apparently honest and proper, and he apparently acted in good faith, with an honest purpose, in what appeared to be right, and, from the nature of the case, could not be presumed to know that he was doing an illegal act, and the tort was one arising from construction or inference of law, and not arising from a known meditated wrong, he may then have contribution. (*Culmer v. Wilson*, 713.)

2. JOINT LIABILITY — CONTRIBUTION AMONG JOINT TORT FEASORS—WHERE ALLOWABLE—FORCIBLE ENTRY AND DETAINER.—If a party claiming property in good faith seeks to obtain possession thereof by legal process, as by an action of forcible entry and detainer, in a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting the claimant's rights; and if it is decided that such claim is invalid, or that the court has no jurisdiction, the law will imply an indemnity to such agent, who believes as his principal does, for any damages he was made to pay on account of such acts done in pursuance of his principal's directions, within the scope of his instructions and employment. (*Culmer v. Wilson*, 713.)

3. JOINT LIABILITY — CONTRIBUTION AMONG JOINT TORT FEASORS—WHEN ALLOWABLE—ILLUSTRATION—FORCIBLE ENTRY AND DETAINER.—If a naked trustee, or agent, enters a suit of forcible entry and detainer at the request, and for the benefit, of the cestui que trust, and obtains a judgment in a court having no jurisdiction in the case; but such trustee, or agent, is afterward sued jointly with the principal for damages arising out of the illegal proceedings, and judgment is rendered against both the principal and the trustee, or agent, which the latter pays,

such innocent trustee, or agent, may have contribution from the principal, the other joint tortfeasor, as the tort is one arising from a construction or influence of law, and not from a known meditated wrong. (Culmer v. Wilson, 713.)

4. JOINT LIABILITY — CONTRIBUTION AMONG JOINT TORT FEASORS—WHEN NOT ALLOWABLE.—It is a maxim that there shall be no contribution among wrongdoers, but this rule has many exceptions and applies only to cases where the tort is a known and meditated wrong. No right of action can be based upon a violation of the law, and if a wrongdoer knows that his act is illegal, or if the circumstances are such as to render ignorance of its illegality inexcusable, then he will be left by the law where his wrongful action has placed him. When the act is known to be a violation of law, or is apparently of that nature, the wrongdoer will not be allowed to appeal to the law for indemnity. (Culmer v. Wilson, 713.)

See Trespass; Husband and Wife, 8.

JOINT TORT FEASORS.

See Joint Liability, 1-4; Trespass.

JUDGMENT.

1. JUDGMENT AS EVIDENCE OF PRIOR INDEBTEDNESS. A judgment is conclusive evidence of the existence of a debt at the time of its rendition, but it is not evidence against strangers or innocent purchasers that such debt existed at any time anterior to the rendition of such judgment. (Simmons v. Shelton, 39.)

2. JUDGMENTS—RES JUDICATA—VALIDITY OF CONSIDERATION.—A judgment and recovery upon a gambling contract establishes the validity of the consideration as between the parties to the action, and precludes inquiry into such consideration by a court of equity, although no reason is shown why the defense was not made at law. (Peet v. Hatcher, 45.)

3. JUDGMENTS OF OTHER STATES—CONCLUSIVENESS.—A judgment rendered in one state has the same effect and is as conclusive in any other state where brought into controversy as it has or is in the state where rendered. (Peet v. Hatcher, 45.)

4. JUDGMENTS OF OTHER STATES—WHEN CONCLUSIVE. If a judgment obtained in one state has the same effect and is afterward sued and recovered upon in another in a court having jurisdiction of the parties and of the subject matter, the latter judgment is conclusive of the validity of the consideration of the former judgment, and is enforceable in the latter state, although by the statute of the former state judgments obtained upon such contracts are void, and may, in any proceeding seeking their enforcement, be annulled by proof of the nature of the consideration. (Peet v. Hatcher, 45.)

5. JUDGMENTS—RES JUDICATA—EVIDENCE OF CONSIDERATION.—If a note is given to close an account which is subsequently sued on, a recovery on the account establishes the validity of its consideration and of the consideration of the note, and if a subsequent suit is brought in equity to foreclose a mortgage given to secure such note, the validity of its consideration is res judicata, and no other or further defenses as to the validity of the debt are open than could be made if the action were one at law upon the debt. (Peet v. Hatcher, 45.)

6. JUDGMENT—RES JUDICATA—IDENTICAL PARTIES — SAME CAPACITY.—A former judgment is not admissible as conclusive evidence of a material fact therein adjudicated, unless the par-

ties are identical in the two cases, and also sue or defend in the same right or capacity. (Fuller v. Metropolitan etc. Ins. Co., 84.)

7. JUDGMENT—RES JUDICATA—LIMITS OF DOCTRINE.—It is true that a fact once decided shall not be again disputed between the same parties; but the fact must be established by a final judgment; it must have been in issue under the pleadings, and must also have been actually litigated and determined; it must be identical with the fact sought to be established in the second action; and the identical persons between whom the fact was adjudicated, in the same right or capacity, or their privies claiming under them, must be the parties to the second action. (Fuller v. Metropolitan etc. Ins. Co., 84.)

8. JUDGMENT—RES JUDICATA—SUITS IN DIFFERENT CAPACITIES.—The doctrine of res judicata does not apply where the first suit is upon a cause of action arising between the parties in their individual capacity, and the second suit is brought by one of the parties in his capacity as assignee of a cause of action arising between the other party and a third party, which the plaintiff has purchased of such third person after his right thereon has become fixed, and since the judgment in the first action was rendered. (Fuller v. Metropolitan etc. Ins. Co., 84.)

9. JUDGMENT—RES JUDICATA—SUIT BY ASSIGNEE—CLAIM ON POLICY OF LIFE INSURANCE.—If a party sues upon an insurance policy, and obtains judgment, and afterward sues the company upon like causes of action in favor of third persons, but which have been assigned to him since judgment in the first case was rendered, and the validity of certain receipts purporting to have been given to the defendant in full payment and discharge by the plaintiff's assignors is a material issue in the present action, the record of the judgment in the first suit is not conclusive evidence of the invalidity of such receipts, and is not admissible as such, for the assignee, in such a case, is not acting in the same capacity as when he prosecuted his own suit. (Fuller v. Metropolitan etc. Ins. Co., 84.)

10. JUDGMENT—RES JUDICATA—FACT NOT IN ISSUE IN FORMER ACTION.—If a party sues upon an insurance policy and obtains judgment, and afterward sues the company upon like causes of action in favor of third persons, but which have been assigned to him since judgment in the first case was rendered, and the validity of certain receipts purporting to have been given to the defendant in full payment and discharge by the plaintiff's assignors is a material issue in the present action, the record of an intervening injunction suit brought by the defendant against the plaintiff to prevent him from suing upon the claims assigned to him is not conclusive evidence of the invalidity of such receipts, and is not admissible as such, where it appears from the record in the injunction case that the validity of the receipts was not tried, and was not determined because it was not a fact in issue. (Fuller v. Metropolitan Ins. Co., 84.)

11. JUDGMENT—MOTION TO SET ASIDE FOR IRREGULARITIES IN ENTRY.—It is proper practice to attack all the irregularities in the entry of a judgment by a motion to set it aside. (Nichells v. Nichells, 540.)

12. JUDGMENT—RES JUDICATA, WHAT IS NOT—APPEAL.—A decision that sweeps away the rights of a party without giving him a chance to be heard is not res judicata, and does not force him to an appeal as a first step in seeking a remedy. (Nichells v. Nichells, 540.)

13. JUDGMENT—WHEN WITHDRAWAL OF ANSWER DOES NOT LEAVE DEFENDANT IN DEFAULT.—If an attorney at law enters an appearance and files an answer, his subsequent withdrawal thereof, in bad faith and without notice to his client, because his fees have not been paid, does not leave the defendant in default for want

of an answer, for such attempted withdrawal is without authority. The answer still stands, and will continue to stand until it is lawfully withdrawn, or the case is regularly tried. (Nichells v. Nichells, 540.)

14. JUDGMENT BY DEFAULT AFTER WITHDRAWAL OF ANSWER, WHEN INVALID.—If the defendant's attorney, in bad faith, and in hostility to his client, withdraws his answer and appearance, without notice to the latter, because his fees have not been paid, and judgment by default is taken against the defendant for want of an answer, the court having notice, from the record, of the act of bad faith, the judgment entered is illegal in its inception and should be set aside on motion of the defendant as a matter of strict legal right, and not as a matter of favor. This rule applies to actions for divorce as well as to other actions. (Nichells v. Nichells, 540.)

15. JUDGMENTS ARE DEEMED TO HAVE BEEN ENTERED on the first day of the term of the court at which they were recovered, if the action was in such a condition that it might have been tried on that day, had it occupied the first place on the docket. (Hockman v. Hockman, 816.)

16. THE LIEN OF A JUDGMENT HAS PRIORITY OVER A CONVEYANCE RECORDED ON THE SAME DAY on which the judgment was entered, though the indorsement of the clerk shows that the judgment was, in fact, entered after the deed was filed for record. (Hockman v. Hockman, 816.)

17. THE LIEN OF A JUDGMENT OR DECREE BEGINS WITH THE FIRST MOMENT OF THE DAY on which it attaches. If it is a judgment by confession entered in vacation, the lien commences with the first moment of the day of such entry, irrespective of the hour at which the entry was in fact made. (Hockman v. Hockman, 816.)

18. JUDGMENT.—IF AN ORDER FOR THE SERVICE OF SUMMONS IS NOT BASED UPON a verified complaint, it is void, and cannot support a judgment founded thereon. (Oelbermann v. Ide, 947.)

19. TAXATION OF JUDGMENTS IN FAVOR OF NONRESIDENTS.—Judgments rendered by the courts of Kansas in favor of nonresidents are not taxable in that state, as they have not been given a situs, by statute, for the purpose of taxation. (County Commissioners v. Leonard, 847.)

See Attachment, 8; Attorney and Client, 1; Marriage and Divorce, 10; Negligence, 12.

JUDICIAL SALES.

1. JUDICIAL SALES.—AN ASSIGNEE OF A CERTIFICATE OF PURCHASE issued upon a judicial sale is subject to all equities existing against his assignor and relating to the property sold, whether he had notice thereof or not. (Bruschke v. Wright, 125.)

2. JUDICIAL SALE—RESALE AND REDEMPTION.—If a judicial sale is set aside and a resale ordered, with a direction that out of its proceeds the purchaser at the former sale, or his assignee, be repaid the sum bid at such former sale, such resale must be made subject to the same right of redemption as the original sale. (Bruschke v. Wright, 125.)

3. SUBROGATION.—A PURCHASER AT A JUDICIAL SALE or his grantee or assignee, in the event that it proves insufficient to convey the title to the property sold, is entitled to be subrogated to the rights of the judgment creditor to the extent that his bid has discharged a valid claim against the property sold. (Bruschke v. Wright, 125.)

4. JUDICIAL SALES—TERMS UPON WHICH MAY BE SET ASIDE IN EQUITY.—If an agreement is made to purchase the property of minors for a sum specified, and the mode stipulated for carrying out the agreement is that the purchaser will bid off the property at a foreclosure sale about to be had, paying the amount necessary to satisfy the judgment, and will afterward pay the guardian an additional sum, sufficient, with that already paid at the sale, to make the whole sum agreed to be paid, and such purchaser procures another person to make the bid, who, to secure money with which to pay the sum bid, assigns the certificate of sale to a stranger, who has no notice of any of the extrinsic facts, he is not entitled to hold the property as against the minors who have not been paid, nor are they entitled to have him pay the balance of the bid. Their rights are limited to having the sale set aside and a resale made, out of which the holder of the certificate shall be paid the sum which has been paid to him and applied to the satisfaction of the decree of foreclosure. (*Bruschke v. Wright*, 125.)

JURISDICTION.

1. CRIMINAL LAW—PRESENTING QUESTIONS OF JURISDICTION.—A court must at all times be prepared to vindicate its own authority to proceed in a case, and the right to be heard, at least to the extent of presenting objections to the jurisdiction of the court in which one is charged with a criminal offense, is fundamental, and to deny the accused that right is to deny him "due process of law." The question of jurisdiction may even be raised, for the first time, in the appellate court. (*State v. Root*, 568.)

2. JURISDICTION.—IF A STATUTE GIVES JUSTICES OF THE PEACE EXCLUSIVE JURISDICTION of all misdemeanors occurring within their jurisdictions, and confers a right of appeal to the county courts, the latter have no original jurisdiction of such misdemeanors. (*Lacey v. Palmer*, 795.)

See Contempt, 12; Covenants, 2; Equity, 3; Executors and Administrators, 1; Marriage and Divorce, 4; Receivers, 5, 6.

JUSTICES OF THE PEACE.

See Jurisdiction, 2.

LABOR AND TRADES UNIONS.

AGREEMENT TO COERCE WORKMEN INTO BECOMING MEMBERS OF AN ASSOCIATION.—An agreement between an association of brewers and an assembly of workmen that all employes of the former shall be members of the latter, and that no employe shall work more than four weeks without becoming such member, is against public policy and the interests of society, and cannot justify an action of members of such assembly in procuring the discharge of a workman because of his failure to become a member thereof. (*Curran v. Galen*, 496.)

LACHES.

See Equity, 4-6; Executors and Administrators, 5; Notice, 8.

LARCENY.

1. LARCENY.—IF ONE OBTAINS POSSESSION OF PROPERTY BY FRAUD, it has the same effect as obtaining possession by a trespass, and the fact that the possession was obtained by the former rather than by the latter method does not show that he was not guilty of larceny, if he obtained the possession with intent to

appropriate the property to his own use. (Commonwealth v. Flynn, 472.)

2. **LARCENY.**—If a person sells another a ticket for twenty-five cents on the representation that he will furnish photographs therefor, and on being offered a dollar bill, says he will go and get it changed, and departs with it, and never returns, and, on being confronted with the other person, says he has never seen her, and gives different names to the arresting officer, and says he will have to suffer for some one else, he may be convicted of larceny of the bill if the jury are of the opinion that he received it as agent of the other person for the purpose of getting it changed and retaining the twenty-five cents for himself, but with the intent of appropriating the whole of the bill to his own use. (Commonwealth v. Flynn, 472.)

See Evidence, 7.

LEGISLATURE.

See Elections, 8.

LETTERS.

1. **LETTERS—PROPERTY IN.**—Letters written by one to another are the latter's property, and he has a right, not only to have them produced in litigation, but also to have them delivered to him as the true owner thereof. (Dock v. Dock, 617.)

2. **LETTERS—PROPERTY IN.**—A writer of letters has a special property in them to prevent their publication or communication to others, or their use for any illegal purpose by the party wrongfully in possession of them, and this special right can be adequately protected only in a court of equity, which, having acquired jurisdiction for discovery, may go on and order the letters to be restored to their true owner. (Dock v. Dock, 617.)

See Evidence, 9; Wills, 11.

LIMITATIONS OF ACTIONS.

1. **LIMITATIONS OF ACTIONS.—IN AN ACTION FOR INDEMNITY AGAINST ACTUAL DAMAGES,** the party indemnified has no cause of action until he is damaged. Hence, the statute of limitations does not commence to run until the judgment rendered against him for damages is paid. (Culmer v. Wilson, 713.)

2. **STATUTE OF LIMITATIONS—NEW PROMISE—EVIDENCE.**—If letters are relied upon as containing a new promise arresting the operation of the statute of limitations, but leave doubt as to what debt is meant, parol evidence is admissible to show what debt is referred to, although the letters do not state the amount due. (First Nat. Bk. v. Woodman, 287.)

See Deeds, 4; Equity, 5; Executors and Administrators, 5; Mortgages, 4, 5.

LOBBYING.

See Contracts, 20.

LOTTERIES.

LOTTERIES—PREMIUMS FOR HORSERACING.—An association which holds a meeting for the racing of horses, offering prizes or premiums to be contested for, of a definite sum, without regard to the entry fees received, and payable out of the general funds of the association, is not guilty of a violation of that part of the Penal Code forbidding lotteries and the sale of lottery tickets. (People v. Fallon, 492.)

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION.—PROBABLE CAUSE for an arrest does not depend on the state of the case in point of fact, but upon the reasonable and honest belief of the party prosecuting. What facts and circumstances amount to probable cause is a question of law, and whether they exist in a particular case is a question of fact. When the facts are in controversy, the subject must be submitted to the jury under instructions as to what facts constitute probable cause. (Burk v. Howley, 607.)

2. MALICIOUS PROSECUTION—PROBABLE CAUSE—FALSE IMPRISONMENT.—If a person, upon discovery that his house has been robbed, and knowing the good character of his servant, procures an officer, who, in his presence, charges such servant with the theft, and arrests him without a warrant, and detains him at the request of the owner of the stolen property for eight days for the purpose of forcing a confession of guilt, such owner is a party to the arrest and detention, and, if it turns out to be illegal and without probable cause, he is liable for false imprisonment in an action of malicious prosecution. (Burk v. Howley, 607.)

MANDAMUS.

MANDAMUS—ELECTIONS—WHEN ISSUANCE OF WRIT IS ERROR.—If a valid election law as to the qualifications of voters is ignored in the election of town commissioners, who proceed as if they had been duly elected, and choose a town treasurer, it is reversible error for the court to issue a writ of mandamus, at the instance of the latter, to compel his predecessor in office to deliver to him books, papers, and other property of the town in his possession. (Hanna v. Young, 896.)

MARRIED WOMEN.

See Husband and Wife, 2, 3, 5, 6.

MARRIAGE AND DIVORCE.

1. DEFINITIONS.—"HABITUAL INTEMPERANCE" IS A CONDITION; and when any person gets into that condition, he is said to be "habitually intemperate." (Dennis v. Dennis, 95.)

2. DEFINITIONS.—"CONNIVANCE," in the law of divorce, is the corrupt consenting of a married party to that conduct of the other of which complaint is afterward made. It may be the passive permitting of an act, or the active procurement of it. (Dennis v. Dennis, 95.)

3. MARRIAGE AND DIVORCE.—CONNIVANCE AT ACT FOR DIVORCE bars the right of divorce, because no injury is received; for what a person has consented to, he cannot set up as an injury. (Dennis v. Dennis, 95.)

4. MARRIAGE AND DIVORCE—DISCRETION OF COURTS HAVING DIVORCE JURISDICTION.—To discover and defeat any attempt to use the forms of the law of divorce for immoral, vindictive, or fraudulent purposes is a proper exercise of the legal discretion vested in all courts having divorce jurisdiction. (Dennis v. Dennis, 95.)

5. MARRIAGE AND DIVORCE—"HABITUAL INTEMPERANCE"—DIVORCE.—A wife is not entitled to a divorce upon the ground of her husband's "habitual intemperance," though he, about once in three weeks, for a period of two years, becomes intoxicated, during the evening, to such an extent that he does not go, as usual, to his work on the next morning, where this does not occasion any trouble between him and his employer, and where such intoxication

is not so gross or long continued as to produce want or suffering in the defendant's family. (*Dennis v. Dennis*, 95.)

6. MARRIAGE AND DIVORCE—ADULTERY BROUGHT ABOUT BY CONNIVANCE AS GROUND FOR DIVORCE.—If a husband's act of adultery, relied upon by his wife as a ground for divorce, was brought about by her connivance and procurement, the divorce sought by her will be refused. A finding that the act was brought by her, acting through her attorneys or agents, is not erroneous, as a matter of law, although she did not specifically direct, or have actual personal knowledge of, the doings of her general agents, in her behalf, to entrap her husband into such an act with a lewd woman employed by them for that purpose. (*Dennis v. Dennis*, 95.)

7. MARRIAGE AND DIVORCE—DIVORCE OF INSANE PERSON.—The guardian of an insane person cannot maintain an action for divorce on behalf of his ward, and a decree in such action is void. (*Mohler v. Shank*, 274.)

8. MARRIAGE AND DIVORCE—VOID DIVORCE—ESTOPPEL.—A woman who accepts the benefits of a void decree of divorce, and remarries before the death of her former husband, cannot, upon his death, claim any part of his estate. (*Mohler v. Shank*, 274.)

9. IF A MARRIAGE IS SOLEMNIZED UNDER THE MISTAKEN BELIEF THAT THE HUSBAND OF THE WIFE HAD DIED, both parties being equally informed of the previous marriage and of the circumstances from which the death of her husband was inferred, and the marriage is followed by the assumption of marital duties and privileges until the death of the man, his heirs cannot in equity compel her to surrender property or rights vested in her by an antenuptial contract, upon the ground that it was entered into upon a mistaken assumption that her husband was dead. (*Ogden v. McHugh*, 456.)

10. MARRIAGE AND DIVORCE.—JUDGMENTS ENTERED IN DIVORCE CASES ARE OPEN TO ATTACK in the same manner upon the same grounds, and within the same periods of time as other judgments, although parties divorced have entered into new matrimonial alliances, while the decree is still open to attack on appeal. (*Nichells v. Nichells*, 540.)

See Attorney and Client, 2; Contracts, 7; Judgment, 14.

MASTER AND SERVANT.

1. EMPLOYER AND EMPLOYEE.—NO ONE CAN LAWFULLY INTERFERE by force or intimidation to prevent employers or persons employed, or wishing to be employed, from the exercise of the right of employing or seeking, or remaining in, employment at such prices as may be mutually agreed upon. (*Vegelahn v. Guntner*, 443.)

2. EMPLOYERS AND EMPLOYEES—ATTEMPTING TO PREVENT PERSONS FROM ACCEPTING EMPLOYMENT.—A conspiracy to prevent persons from entering the complainant's employment and to prevent persons in such employment from continuing therein is unlawful, though such persons are not bound by contract to enter into, or continue in, such employment; and acts in furtherance of such conspiracy and by maintaining a patrol in front of his premises may be enjoined. (*Vegelahn v. Guntner*, 443.)

See Contracts, 11.

MECHANIC'S LIEN.

1. MECHANICS' LIENS FOR ALTERATIONS AND REPAIRS must show upon their face the class to which they belong. (*Wharton v. Real Estate Inv. Co.*, 629.)

2. MECHANICS' LIENS BEING PURELY STATUTORY, there is no intendment in their favor, and they must show upon their face all the statutory requisites to their validity. (Wharton v. Real Estate Inv. Co., 629.)

3. MECHANICS' LIENS — SUBCONTRACTORS — LUMPING CHARGE.—A claim for a mechanic's lien filed by a subcontractor, and containing only a lumping charge, is insufficient, and may be stricken off on motion. (Wharton v. Real Estate Inv. Co. 629.)

4. MECHANIC'S LIEN—SUFFICIENCY OF.—A mechanic's lien claim which shows upon its face by apt and sufficient words that it is for work or materials furnished to a new building indicates its class, although it does not use the statutory phrase "erection and construction," and is sufficient. (Wharton v. Real Estate Inv. Co., 629.)

5. MECHANICS' LIENS — SUFFICIENCY OF—REMEDY OF OWNER.—If a claim for a mechanic's lien does not use the statutory phrase to describe a class of such liens, nor words to show with any approach to certainty whether it is for the construction of a new building or the alteration or repair of an old one, the owner of the property is entitled to have it struck off on motion. (Wharton v. Real Estate Inv. Co., 629.)

6. MECHANICS' LIENS—SUFFICIENCY OF—REMEDY OF OWNER.—If a claim for a mechanic's lien does not show on its face to what class it belongs, or whether it is for the construction of a new building or the alteration and repair of an old one, the claim is insufficient, and the remedy of the owner of the property is by demurrer or by motion to strike off. (Wharton v. Real Estate Inv. Co., 629.)

MERGER.

See Deeds, 1; Mortgages, 7, 9.

MINES AND MINING.

MINES AND MINING—OIL AND GAS.—Petroleum oil and natural gas are minerals. (Marshall v. Mellon, 601.)

See Estates, 1; Statutes, 18.

MISTAKE.

See Arbitration and Award, 4; Insurance, 21.

MORTGAGES.

1. MORTGAGES AND NOTES SECURED THEREBY EXECUTED AT THE SAME TIME and as one transaction are to be construed together, and, so far as possible, as one instrument. (Swearingen v. Lahner, 261.)

2. MORTGAGES—RIGHT TO FORECLOSE.—If a note secured by mortgage provides that it shall become due at the option of the holder upon default in interest, and the mortgage provides that such note shall become due in thirty days after such default, the mortgagee has a right to proceed to foreclose upon the expiration of such thirty days; and a tender of the interest, long after its maturity, but before the commencement of the suit to foreclose, does not bar nor defeat the latter action. (Swearingen v. Lahner, 261.)

3. MORTGAGES — FORECLOSURE — ELECTION.—If a mortgage provides that the note secured thereby shall become due and payable in thirty days after default in the payment of interest, the mortgagee has a right upon the expiration of thirty days from such default to proceed to foreclose his mortgage. Bringing such suit is

a sufficient election to exercise his option, and is all the notice required, nor would a delay of seven months in executing such option defeat it unless the mortgagor was prejudiced thereby. (*Swearingen v. Lahner*, 261.)

4. **STATUTE OF LIMITATIONS—NEW PROMISE—MORTGAGE NOTE AND LIEN.**—An admission or new promise that suspends the operation of the statute of limitations on a mortgage note will keep alive the lien of the mortgage given to secure the indebtedness. (*First Nat. Bk. v. Woodman*, 287.)

5. **STATUTE OF LIMITATIONS—NEW PROMISE—MORTGAGES—PRIORITY.**—If a mortgage, an action on which is apparently barred by the statute of limitations, remains uncanceled of record and has actually been revived by a new promise, the lien of such mortgage, in the absence of equities to the contrary, is superior to subsequent mortgages on the same property to secure antecedent debts. (*First Nat. Bk. v. Woodman*, 287.)

6. **MORTGAGE.—THE ASSIGNEE OF A RECORDED MORTGAGE** cannot be affected by a secret agreement between the mortgagor and the mortgagee that the former shall hold the property in trust for the latter. (*Curtis v. Moore*, 506.)

7. **MORTGAGE—MERGER.**—There can be no merger of a mortgage with the legal estate upon a conveyance by the mortgagee to the mortgagor if the former has previously assigned his mortgage, though the assignment is not of record. (*Curtis v. Moore*, 506.)

8. **A PURCHASER OF PREMISES AGAINST WHICH THERE IS AN UNSATISFIED MORTGAGE OF RECORD** cannot be a bona fide purchaser thereof as against a person holding an unrecorded assignment of such mortgage, where he had not made any inquiry respecting it, nor required it or the note which it was given to secure to be produced, though the person of whom he purchased had a conveyance both from the mortgagor and the mortgagee. (*Curtis v. Moore*, 506.)

9. **ASSIGNMENT OF MORTGAGE, NONRECORD OF.**—If the holder of a note and mortgage borrows money thereon, delivering them to his creditor as collateral security, no record of such assignment or pledge is necessary, except as against a subsequent bona fide purchaser of the mortgage, and if the mortgagor subsequently conveys the mortgaged premises to his mortgagee, who sells them to a third person, the latter believing that the interests of the mortgagor and mortgagee have merged, he nevertheless acquires his mortgage subject to such mortgage and such unrecorded assignment thereof. (*Curtis v. Moore*, 506.)

10. **TIME—MORTGAGES—FORECLOSURE—PUBLICATION OF NOTICE OF SALE.**—If the statute requires a publication of notice of sale, upon the foreclosure of a mortgage, by advertisement, to be made "for six successive weeks at least once in each week," the first publication must be made at least forty-two days before the day of sale, and there must be at least six publications, one of them being in each of the six weeks between the first publication and the day of sale. If there are but six publications, all exactly a week apart, and the day of sale is less than a week after the last publication, the foreclosure proceedings are void. (*Finlayson v. Peterson*, 584.)

11. **SUBROGATION—MORTGAGES.**—If money has been loaned upon a defective mortgage for the purpose of discharging a prior valid encumbrance, and has actually been so applied, the mortgagee may be subrogated to the rights of the prior encumbrancer whom he has thus satisfied, there being no intervening encumbrances. (*Haverford Loan etc. Assn. v. Fire Assn.*, 657.)

12. SUBROGATION—MORTGAGES.—If the holder of a junior mortgage discharges the lien of a senior encumbrance upon the property, he thereby becomes entitled to all the benefits of the security represented by the lien so discharged. (Haverford Loan etc. Assn. v. Fire Assn., 657.)

13. SUBROGATION—MORTGAGE.—A person who has loaned money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for that purpose employs it himself in paying the debt and discharging the encumbrance on land given for its security, he is not to be regarded as a volunteer. After such agreement with the debtor, he is not a stranger in relation to the debt, but may, in equity, be entitled to the benefit of the security, which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid. (Haverford Loan etc. Assn. v. Fire Assn., 657.)

See Attorney and Client, 5-8, 10; Corporations, 2; Cotenancy, 3, 4; Definitions, 2; Guaranty, 2; Homestead, 3; Husband and Wife, 5; Statutes, 5.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—KNOWLEDGE OF POLICEMEN, WHEN CHARGEABLE WITH.—What a policeman knows respecting the condition of a street the municipality is chargeable with knowing after the lapse of a reasonable time to enable him to communicate his knowledge to his superiors. (Farley v. Mayor, 511.)

2. MUNICIPAL CORPORATIONS—FIREMEN, RISKS NOT ASSUMED BY.—Though the driver of a hosecart connected with the fire department assumes the risks usual to his employment of a dangerous character, he does not assume the risks of the insecurity of streets resulting from the culpable negligence of the municipality. (Farley v. Mayor, 511.)

3. A MUNICIPAL CORPORATION IS ANSWERABLE for injuries received by the driver of a hosecart from collision with a truck without negligence on his part, such truck having been left for several months standing on a public street at night, at the place where the injury was inflicted, to the knowledge of the policemen on the beat, who had never made any report of the fact. (Farley v. Mayor, 511.)

4. MUNICIPAL CORPORATIONS—UNAUTHORIZED CONTRACTS OF.—The agents and officers of a municipal corporation cannot bind it by any contract which is beyond its powers, and all persons dealing with it or them must, at their peril, ascertain the extent of its powers. (Winchester v. Redmond, 822.)

5. A MUNICIPAL CORPORATION POSSESSES NO POWERS EXCEPT THOSE CONFERRED UPON IT EXPRESSLY OR BY FAIR IMPLICATION by the law creating it, or statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It cannot do any act, nor make any contract, nor incur any liability, not thus authorized. (Winchester v. Redmond, 822.)

6. MUNICIPAL CORPORATIONS HAVE NO POWER TO OFFER REWARDS FOR THE APPREHENSION OF PERSONS guilty of incendiarism or other crimes, unless such power is specially conferred by statute. It is not given by a provision in the municipal charter or general law authorizing the municipality to do all such things as it may deem proper for the prosperity, quiet, and good order of the city. (Winchester v. Redmond, 822.)

7. MUNICIPAL CORPORATIONS—ORDERS PASSED BY AN INTERESTED BOARD.—An order adopted by two of the trustees of a school district, one of whom is personally interested in it and therefore incompetent to act, is void for want of the sanction of a competent majority of the board. (*Honaker v. Board of Education*, 847.)

8. MUNICIPAL CORPORATIONS—INJUNCTIONS AGAINST FORBIDDEN INDEBTEDNESS.—If a statute prohibits a board of education from incurring an indebtedness to be paid out of the fees of a subsequent year, a taxpayer may maintain a suit to set aside any contract made by such board in violation of this prohibition (*Honaker v. Board of Education*, 847.)

9. MUNICIPAL CORPORATIONS—LIABILITY OF FOR NOT FURNISHING DRAINS.—A municipality is not bound to furnish drains to relieve a lot upon a street of its surface water, whether its own or that flowing from other premises. It has discretion whether to make drains or sewers or not. (*Jordan v. Benwood*, 859.)

10. MUNICIPALITY—EVIDENCE TO CHARGE.—If it is claimed that injury has been done to real property by a city, and it appears that the work, instead of being done by the city, was done by a railway company under its general authority, the records of the common council must be produced, if accessible, to show such authority on the part of the railway company. (*Jordan v. Benwood*, 859.)

11. CONSTITUTIONAL LAW—DAMAGING PROPERTY.—The provision in a constitution providing that property shall neither be taken nor damaged for a public use without just compensation does not render a municipality liable to a lotowner whose property is damaged by a change in the grade of a street whereby surface waters are thrown upon it, if a private individual or corporation might have inflicted a like injury to a lotowner without being answerable therefor. In other words, this provision of the constitution was designed to make municipal corporations liable to make compensation in damages when an individual would not have been liable for causing injuries or damages of the same character. (*Jordan v. Benwood*, 859.)

12. MUNICIPAL CORPORATIONS—LIABILITY FOR THROWING SURFACE WATERS UPON A LOT BY GRADING STREET.—Though, by a change in the grade of a street, surface water is thrown upon a lot from such street, the municipality is not liable if the water flowing from such street is merely surface water, and is collected in large quantities and thrown upon the lot by means of a gutter or other artificial channel. (*Jordan v. Benwood*, 859.)

13. MUNICIPAL CORPORATION—LIABILITY FOR DAMMING UP WATER IN GRADING STREETS.—Though a change in the grade of a street prevents surface water from flowing away from a lot, or, in other words, dams it up, the municipality is not answerable to the owner, if the work was done without negligence, and with reasonable skill, and in the usual way of doing such work and the damage is a mere incident thereof. (*Jordan v. Benwood*, 859.)

14. MUNICIPALITY—WHEN NOT LIABLE FOR A CHANGE IN THE GRADE OF A STREET.—If the grade of a street is changed by a street railway company under authority conferred upon a municipality, the granting of such authority or license does not render the municipality liable for the action of the railway. If a license thus granted by the railway does not deprive the abutting property owner of his proprietary right in the street nor of his remedy to recover from the railway company any damages inflicted by it. (*Jordan v. Benwood*, 859.)

See Contracts, 17; Elections, 1, 8; Real Property, 2.

NEGLIGENCE.

1. NEGLIGENCE—DUTY TO INJURED PARTY.—An action for negligence does not lie unless the defendant was under some duty, not performed, to the party injured at the time and place where the injury was inflicted. (*Daugherty v. Herzog*, 204.)

2. NEGLIGENCE—REMOTE CAUSE—LIABILITY OF CONTRACTOR.—A contractor who is guilty of negligence in reconstructing a building is not liable to a third party to whom he owes no duty, and who is killed by the falling of the building two years after its reconstruction and acceptance by the owner. Although the building falls by reason of negligent reconstruction, there is no causal connection between the injury and the negligence. (*Daugherty v. Herzog*, 204.)

3. NEGLIGENCE OF DRIVER IS NOT IMPUTABLE TO ONE RIDING BY INVITATION.—If a person, riding in a carriage by invitation of the owner, is injured through the negligence of the driver, the latter's negligence cannot be imputed to the person injured where the driver had sole charge of the vehicle, and of the animal drawing it, and the person so riding had no control over either. Hence, the driver's negligence would not bar a recovery, and it is not erroneous to so instruct the jury. (*Leavenworth v. Hatch*, 309.)

4. NEGLIGENCE NOT IMPUTABLE TO ONE RIDING BY INVITATION.—One who merely accepts the favor of transportation in a private vehicle does not assume all risk of the driver's negligence en route. Especially is this true of a journey undertaken by a husband and wife, where he assumes to drive, and is allowed the responsible management of the journey, in accordance with the almost universal custom of mankind. (*Reading Township v. Telfer*, 355.)

5. NEGLIGENCE OF HUSBAND NOT IMPUTABLE TO WIFE—DRIVING ON DEFECTIVE HIGHWAY.—A husband's negligence, while driving in a vehicle, over a defective highway, with his wife, is not imputable to her in bar of an action for damages brought by her against the township permitting such defects, although the journey was taken at her solicitation, if it is not shown that he was under her direction and control at the time. (*Reading Township v. Telfer*, 355.)

6. NEGLIGENCE.—RELYING UPON THE ADVICE OF COUNSEL cannot make that conduct prudent which the law regards as careless. (*Doran v. Dazey*, 550.)

7. NEGLIGENCE—ELECTRIC STREET-CARS.—If a passenger on an electric-car at night is unable by reason of its crowded condition to get inside, and, at the request and invitation of the conductor, takes a standing position on the rear platform, and while in such position the electric current is turned off and the car allowed to run down a grade at the rate of twenty miles an hour, when, upon striking a curve, the passenger is thrown off and injured, the question of negligence on the part of the company and of contributory negligence on the part of the passenger is for the jury when it appears that the passenger was familiar with the locality and with the curve, and that it was the custom of the company to carry passengers on the platform of its cars. (*Reber v. Pittsburg etc. Traction Co.*, 599.)

8. NEGLIGENCE—WHEN A QUESTION OF LAW, AND WHEN OF FACT.—Before the question of negligence becomes one of law for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusions from them. If the facts proved are such that reasonable men may fairly differ

as to whether or not there was negligence, the question is one for the jury to consider. (*Lowe v. Salt Lake City*, 708.)

9. NEGLIGENCE.—THE EXISTENCE OF NEGLIGENCE MUST DEPEND, in each case, upon the circumstances peculiar to it, and which surrounded the parties at the time of the occurrence on which the controversy is based. What may be considered ordinary care in one case may amount to culpable negligence in another. Thus, an act which would have been viewed with indifference when street-cars were drawn by horses at such a low rate of speed as to be easily controlled might be gross negligence when the car is propelled by electric power at a much higher rate of speed. (*Hall v. Ogden etc. Railway Co.*, 726.)

10. NEGLIGENCE — LIABILITY WHERE INJURY COULD HAVE BEEN AVOIDED.—Although a party, injured by the negligence of another, is negligent himself in the first instance, such negligence will not defeat his right of action where it is shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence; and the question as to whose negligence was the proximate cause of the injury is one of fact for the jury to determine under the circumstances of each particular case. (*Hall v. Ogden etc. Railway Co.*, 726.)

11. NEGLIGENCE CAUSING DEATH—COMPETENT EVIDENCE.—In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband on a railroad crossing, it is competent for her, where she is called as a witness, to give the names and ages of the children of the deceased, especially where they are all parties to the action. Such testimony would be proper even if they were not parties. (*English v. Southern Pac. Co.*, 772.)

12. NEGLIGENCE CAUSING DEATH — EXCESSIVE DAMAGES—MODIFICATION OF JUDGMENT ON APPEAL.—In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband at a railroad crossing, a verdict and judgment for thirteen thousand dollars damages is excessive to the amount of three thousand dollars, where it is shown that the deceased was thirty-eight years old, in good health, and earning fifty dollars per month, which he contributed to the support of his wife and seven children, the eldest being seventeen years of age, and that the expectancy of life of the deceased was twenty-nine years. The damages should be reduced to ten thousand dollars and the judgment be modified accordingly. (*English v. Southern Pac. Co.*, 772.)

13. NEGLIGENCE, WHEN ACTIONABLE.—To warrant the finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances. (*Connell v. Chesapeake etc. Ry. Co.*, 786.)

14. NEGLIGENCE—CUSTOM.—EVIDENCE of the customary way of loading and hauling wood is not admissible for the purpose of aiding a jury to determine whether negligence was contributory. (*Simonds v. Baraboo*, 895.)

15. NEGLIGENCE—FORGETFULNESS.—One who knew of a defect in a highway, but temporarily forgot it, is not necessarily guilty of contributory negligence, and, if injured through such defect and his forgetfulness of it, the question whether he was guilty of contributory negligence should be submitted to the jury. (*Simonds v. Baraboo*, 895.)

16. NEGLIGENCE.—A TRAVELER ON A HIGHWAY HAS THE RIGHT TO PRESUME it is in a safe condition, though he knew of a defect therein a week before, if it was in a conspicuous place and of such a character that very little time and expense would safely repair it. (*Simonds v. Baraboo*, 895.)

17. NEGLIGENCE.—THE MERE FAILURE TO WARD AGAINST A RESULT which could not reasonably have been expected is not negligence. Negligence is not the proximate cause of an accident, unless, under all the circumstances, it could have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough that the accident is a natural consequence of the negligence. It must have been a probable consequence. (*Davis v. Chicago etc. Ry. Co.*, 935.)

18. JURY TRIAL—INSTRUCTIONS AS TO NEGLIGENCE.—An instruction to a jury that, if the defendant was guilty of the negligence which injured the plaintiff, the verdict should be in his favor, is fatally inadequate, because it ignores the rule that it is not enough to prove that the injury was the natural consequence of the negligence of the defendant, but that it must also be a probable consequence, and, under all the circumstances, such an injury as might have been reasonably foreseen by a man of ordinary intelligence and prudence. (*Davis v. Chicago etc. Ry. Co.*, 935.)

See Actions, 2; Attorney and Client, 5, 6; Bailments, 1, 2, 5; Innkeepers, 2; Municipal Corporations, 2, 3; Real Property, 1-3.

NEGOTIABLE INSTRUMENTS

1. NEGOTIABLE INSTRUMENTS—COST OF COLLECTION.—A stipulation in a note to pay costs of collection does not render it non-negotiable. (*Nicely v. Commercial Bk.*, 245.)

2. NEGOTIABLE INSTRUMENTS.—The essential requisites of a negotiable note are a date, an unconditional promise to pay money, a fixed time for payment, a definite amount to be paid, and a place where payment is to be made. (*Nicely v. Commercial Bk.*, 245.)

3. NEGOTIABLE INSTRUMENTS — EXCHANGE.—A stipulation in a note for the payment of "exchange" renders the sum to be paid indefinite and uncertain, and destroys the negotiability of the note. (*Nicely v. Commercial Bk.*, 245.)

4. NEGOTIABLE INSTRUMENTS—INDORSEMENT.—WAIVER of presentment for payment, protest, and notice of nonpayment, contained in the body of a note, is effectual as against an indorser thereof in blank who is also the payee. (*Phillips v. Dippe*, 254.)

5. NEGOTIABLE INSTRUMENTS — "EXCHANGE" AS AFFECTING NEGOTIABILITY.—A bill of exchange drawn for a certain sum with "exchange" is not negotiable for want of certainty in the amount to be paid. (*Culbertson v. Nelson*, 266.)

6. NEGOTIABLE INSTRUMENTS.—The use of the words "to order" or "for value received" in a bill or note does not show an intent to make it a negotiable instrument, if it contains other words inconsistent with its negotiability. (*Culbertson v. Nelson*, 266.)

7. NEGOTIABLE INSTRUMENTS—ALTERATION OF NOTE BY ADDITION OF NAME AS MAKER.—The addition of the name of another maker to a note after its delivery discharges the prior makers not assenting thereto, and the person so signing the note makes it his own, and he is liable thereon, although one of the released makers is dead and another has allowed judgment to be taken against him. (*Rhoades v. Leach*, 281.)

8. NEGOTIABLE INSTRUMENTS—ACTIONS ON—PARTIES
The maker of a promissory note and the indorser, who is also the payee, cannot be joined in one action on the note, as the contract or undertaking of one is different and distinct from that of the other. (Harvard Publishing Co. v. Benjamin, 402.)

9. NEGOTIABLE INSTRUMENTS.—THE SIGNATURE OF MAKERS need not be proved in suits against indorsers. The indorsement of a note admits the signature of the apparent makers, and such signatures need not, therefore, be proved in an action against the indorsers. (Glidden v. Chamberlin, 479.)

10. NEGOTIABLE INSTRUMENTS.—THE WAIVER OF NOTICE OF PRESENTMENT AND DISHONOR is not established by an agreement made by the indorser after such notice ought to have been given to the effect that he would pay interest at the rate of two per cent on the note while it remained unpaid. (Glidden v. Chamberlain, 479.)

11. NEGOTIABLE INSTRUMENT—EVIDENCE TO SHOW WAIVER BY INDORSER.—If it is sought to show that the indorsers of a note have waived notice to them of presentment and dishonor, the evidence must be clear and explicit. Circumstances and conversations equivocal in character and not amounting to a distinct promise, or a clear admission of liability, are not sufficient. (Glidden v. Chamberlain, 479.)

12. NEGOTIABLE INSTRUMENTS—AGREEMENT TO LOOK TO MAKERS ONLY.—The fact that prior to the purchase of a note the purchaser had it in his possession several days and agreed to look up the responsibility of the makers, and, having done so, said they were good and that he would take the note, constitutes no defense against a subsequent agreement on the part of the indorsers to pay the note and also additional interest thereon. (Glidden v. Chamberlain, 479.)

13. NEGOTIABLE INSTRUMENTS.—AN INDORSER'S PROMISE TO PAY A NOTE MADE AFTER THE FAILURE TO NOTIFY HIM of presentment and dishonor is binding on him if he knew that no notice had been given, though he did not know the legal effect of such omission. (Glidden v. Chamberlain, 479.)

14. NEGOTIABLE INSTRUMENTS—DISHONOR, WAIVER OF NOTICE OF.—An indorser's liability may be established by proving an unqualified promise to pay or an unqualified admission of liability made after the failure to give due notice to him of the dishonor, if he had knowledge of all the material facts. His knowledge of the failure to give him notice in due time of the presentment and dishonor may be inferred from the fact that he admitted he received no notice, together with the fact that the proper time for notice to have reached him had expired when he made the new promise or otherwise acknowledged his liability. (Glidden v. Chamberlain, 479.)

15. NEGOTIABLE INSTRUMENTS — FAILURE TO KEEP AGREEMENT TO PROSECUTE MAKER.—If, after the maturity of a note, the indorsers agree to pay two per cent per month interest on such note, and a part of the consideration of the agreement was the promise of the holder to go to another state and undertake to enforce the note against the maker and prior indorser, the failure of the holder to do as agreed does not release the indorsers from their agreement, but they are entitled to have deducted from the amount due from them thereon any damage resulting to them by reason of the holder's failure to comply with his agreement. (Glidden v. Chamberlain, 479.)

16. NEGOTIABLE INSTRUMENTS—ACTION BY THIRD PERSON AS PAYEE—BREACH OF WARRANTY AS A DEFENSE—AGENCY.—If a vendor of an article warrants its quality, and takes a note for the price payable to a third person, and the article proves worthless, the breach of warranty is a defense to an action on the note by the payee, although the maker may not be able to show that the payee had any knowledge of the warranty, or that he took the note otherwise than in good faith and for value. Hence, if an agent for the sale of machinery sells machinery of his own, and takes in payment therefor a horse which he sells with a warranty, taking in payment therefor a note made payable to his principal, and the latter, being ignorant of the transaction, and supposing that the note was taken in payment for his own machinery receives the note upon a settlement of the agency account, and gives his agent, the vendor, credit for the full amount thereof, the maker of the note may, in an action upon it by the payee, set up a breach of warranty of the horse, and defeat a recovery. (*McCormick etc. Machine Co. v. Taylor*, 538.)

17. NEGOTIABLE INSTRUMENTS—WHO IS AN INDORSEE.—To make one an indorsee of a negotiable promissory note, the form of indorsement is not material. An assignment in terms may be an indorsement. (*Dunham v. Peterson*, 556.)

18. NEGOTIABLE INSTRUMENTS — INDORSEMENT WITH CONTRACT OF GUARANTY.—THE LEGAL EFFECT of an indorsement with a contract of guaranty written above it is precisely the same as that of a simple indorsement with waiver of demand and notice. (*Dunham v. Peterson*, 556.)

19. NEGOTIABLE INSTRUMENTS — INDORSEMENT WITH CONTRACT OF GUARANTY—PROTECTION OF BONA FIDE INDORSEE—PURCHASER FOR VALUE.—If the payee of a negotiable promissory note indorses thereon a guaranty of payment when he transfers it, the negotiability of the note is not thereby destroyed, but the transfer is an indorsement, and the purchaser is an indorsee, within the rule which shields a bona fide indorsee, for value, before maturity, against defenses good between the original parties; and one who, in the usual course of business, takes the note in payment of an antecedent debt is a purchaser for value. (*Dunham v. Peterson*, 556.)

20. NEGOTIABLE INSTRUMENTS — INDORSEMENT WITH CONTRACT OF GUARANTY.—One who is the payee or holder of negotiable paper, and writes above his indorsement a contract of guaranty of payment, is an indorser with enlarged liability. The mere writing of a special contract above his name does not affect the character of his act as an indorsement. It is, nevertheless, an indorsement. (*Dunham v. Peterson*, 556.)

See Corporations, 19; Estoppel, 2; Forgery, 1, 2; Husband and Wife, 7, 8; Payment, 2; Process.

NEWSPAPERS.

See Notice, 2.

NEW TRIAL.

1. NEW TRIAL—WHEN INADMISSIBLE EVIDENCE IS RECEIVED, SUBJECT TO OBJECTION, AND AFTERWARD EXCLUDED, a new trial will ordinarily be granted, unless it fairly, and with reasonable certainty, appears upon the record that the party complaining could not have been harmed by the action of the court. (*Fuller v. Metropolitan etc. Ins. Co.*, 84.)

2. NEW TRIAL—OATH TO BAILIFF.—The fact that the bailiff, who took charge of the jury when the cause was finally submitted, was not sworn as the statute requires is ground for a new trial. Such oath is important in its nature, and, being specifically required, it cannot be omitted. (*State v. McCormick*, 341.)

3. NEW TRIAL—MISCONDUCT OF JURORS—PREJUDICIAL STATEMENTS OF JURORS.—In a prosecution for obtaining property by fraud and false pretenses, it is material error for the court, upon the hearing of a motion for a new trial, based upon the misconduct of the jury, to exclude evidence showing that, after the jury had retired and were deliberating upon their verdict, one of the jurors stated that the defendant had been convicted upon a former trial, and that another juror stated, as a fact, that the defendant had defrauded a witness, who had testified in behalf of the state, out of some cattle while in the state of Colorado. These statements, if made, were of an important and prejudicial character, and might have improperly influenced the verdict. (*State v. McCormick*, 341.)

4. NEW TRIAL—DAMAGES FOR PERSONAL INJURIES—WHAT IS NOT EXCESSIVE.—A verdict for five thousand one hundred and sixty-five dollars damages, for personal injuries to a woman, caused by her being thrown from a vehicle on a defective highway, is not excessive, where such injuries were of a peculiar nature, followed by much pain and prolonged confinement to the sick room, and where they, being permanent in some respects, entail consequences of a character which money can hardly compensate. (*Reading Township v. Telfer*, 355.)

NONSUIT.

See *Railroad Companies*, 15; *Trial*, 1.

NOTICE.

1. CONVEYANCE, POSSESSION AS NOTICE OF UNRECORDED.—The actual, open, and visible possession of real property is constructive notice to a purchaser thereof of whatever rights the possessor has therein. This remains true though he acquired title by a deed not recorded, was in possession of the property before the deed was made, and had an interest therein independent of it entitling him to be in possession thereof, as where the property belonged to his wife, from whom he received a conveyance which was lost before being recorded, and he continued in possession after her death. (*Carr v. Brennan*, 119.)

2. NOTICE BY PUBLICATION—NEWSPAPER OF GENERAL CIRCULATION.—A daily publication, newspaper, or journal, having a large general circulation and devoted to the general dissemination of legal news, and containing other matter of general interest to the public is a newspaper of general circulation for the purpose of service of notice by publication. (*Lynn v. Allen*, 223.)

3. NOTICE TO PURCHASER OF LAND, WHAT IS.—If a purchaser of land has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered as a bona fide purchaser. (*Anderson v. Blood*, 515.)

4. NOTICE, CONSTRUCTIVE—PRIOR UNRECORDED DEED. A grantee who has actual knowledge of facts sufficient to put a prudent man on inquiry concerning the existence of a prior unrecorded deed, but who fails to make such inquiry, is deemed to have constructive notice thereof. (*Doran v. Dazey*, 550.)

5. NOTICE, CONSTRUCTIVE — WHAT CONSTITUTES. — Knowledge of facts sufficient to put a prudent man on inquiry as to the existence of other facts, is equivalent to actual knowledge of those facts which such inquiry may, in all probability, disclose, if it is properly pursued. (*Doran v. Dazey*, 550.)

6. NOTICE, CONSTRUCTIVE — RECORDING INSTRUMENT OUT OF CHAIN OF TITLE — IGNORANCE OF PURCHASER. — The mere recording of an instrument out of the chain of title does not, of itself, constitute constructive notice of such instrument, so as to bind one who deals with the apparent owner of land according to the record, in ignorance of the existence of such instrument. (*Doran v. Dazey*, 550.)

7. NOTICE, CONSTRUCTIVE — RECORDING INSTRUMENT OUT OF CHAIN OF TITLE — KNOWLEDGE OF PURCHASER. — If land is conveyed to a vendee, by whom it is afterward mortgaged, and the mortgage placed of record, but the deed has not been recorded, a subsequent purchaser's actual knowledge that there is a mortgage of record on the property is notice to him of such mortgage, although the mortgagor appears, by the record, to have no title; and this knowledge, being sufficient to put him upon inquiry, is equivalent to actual notice of the unrecorded deed, especially where it is asserted in the mortgage that the mortgagor owns the land. (*Doran v. Dazey*, 550.)

8. LACHES — NOTICE. — Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put a man of ordinary prudence upon inquiry. (*Melms v. Pabst Brewing Co.*, 899.)

9. EVIDENCE TO PROVE NOTICE. — The fact that purchasers of land which had been sold at an executor's sale are told by the executrix, who was also the widow of the decedent, that the purchaser would give the property back to her is not sufficient to charge them with notice that the purchase was made for her benefit. (*Melms v. Pabst Brewing Co.*, 899.)

See Agency, 1; Attorney and Client, 11-14; Deeds, 2; Fraudulent Conveyances, 2-4 6, 7; Insurance, 6; Municipal Corporations, 1, 8; Vendor and Purchaser, 7.

NUISANCE.

1. NUISANCE — REMEDY FOR. — In general, the remedy for a nuisance on a highway is by indictment. If, however, by such a nuisance a party suffer special damage, an action in his favor lies. A damage, to be special, within the meaning of the rule, must result directly from the nuisance, and not as a secondary consequence thereof, and must differ in kind, and not merely in extent or degree, from that which the general public sustains. (*S. C. Steamboat Co. v. Wilmington etc. R. R. Co.*, 688.)

2. NUISANCE IN OBSTRUCTING NAVIGABLE STREAM — SPECIAL DAMAGE FROM TO PLAINTIFF, WHEN NOT SHOWN. — A complaint alleging that the plaintiff has, for a number of years, been carrying on the business of common carrier, and, as such, running a line of steamers on a designated navigable river of the state and between various points thereon, and that he in such business has built and maintained a number of steamers used exclusively therein, and has built up a large and valuable business, and that the defendant has erected and maintained a bridge which obstructs the free use of the river by plaintiff and others similarly situated, does not show any such special and peculiar damage to the plaintiff as entitles him to maintain a private action for such obstruc-

tion, nor does the additional allegation that the defendant had promised to keep the channel in the river open by opening a draw in the bridge, and thereby permitting free navigation at particular times, entitle the plaintiff to maintain the action. (*S. C. Steamboat Co. v. Wilmington etc. R. R. Co.*, 688.)

OIL AND GAS.

See Mines and Mining.

OLEOMARGARINE.

See Interstate Commerce, 6; Statutes, 14.

OPTION.

See Mortgage, 8.

PARENT AND CHILD.

1. PARENT AND CHILD—CUSTODY OF CHILD.—Ordinarily, a father is entitled to the custody of his minor child, but, if the welfare of the child is retarded by such custody, an exception to the rule exists. The interests of society and the established policy of the law make the welfare of the child paramount to the claims of the parent. (*Hussey v. Whiting*, 220.)

2. PARENT AND CHILD—RIGHT TO CUSTODY OF CHILD—HABEAS CORPUS.—If a child, six years of age and delicate in health, at the time of her mother's death, is then placed in the custody of her grandparents, who care for her until she is thirteen years old, furnishing her with every care and comfort, and who continue willing and anxious to so care for her at the time that the father takes and places such child with another relative kindly disposed toward her, but unable financially to furnish her with the care and comforts furnished by the grandparents, and which she requires by reason of her delicate health, the grandparents are entitled by habeas corpus to recover the custody of such child. (*Hussey v. Whiting*, 220.)

3. PARENT AND CHILD—RIGHT TO RECLAIM CUSTODY OF CHILD.—An oral agreement, express or implied, made by a father that a third person shall have the custody of his child during infancy does not preclude the father from reclaiming such custody. (*Hussey v. Whiting*, 220.)

4. PARENT AND CHILD—CONVEYANCES BETWEEN—PRESUMPTION.—If a parent purchases land in the name of his son, the purchase is deemed prima facie an advancement, so as to rebut the presumption of a resulting trust for the parent. (*Kern v. Howell*, 641.)

5. PARENT AND CHILD—CONVEYANCES BETWEEN—ADVANCEMENT.—If land owned by a partnership is, by direction of a father, conveyed by it to his son in part payment of a debt owing from the firm to the father, and the deed, after being recorded, is left by the son with his father for safekeeping, the firm continuing to collect part of the rents until its dissolution, after which the son collects them without interference or question, although neither the father or the son has ever been in actual possession of the property, the son is entitled to recover the property as against a tenant of his father's executor, especially when there is uncontradicted evidence to show declarations by the father that he intended to give the property to such son, and that after the execution of the deed he declared that he had provided for such son by conveying to him directly the property in dispute, together with other property. (*Kern v. Howell*, 641.)

PARTICEPS CRIMINIS.

See Fraud, 2.

PARTIES.

See Judgment, 6, 8; Negotiable Instruments, 8.

PARTNERSHIP.

1. PARTNERSHIP.—A SURVIVING PARTNER IS NOT CHARGEABLE WITH INTEREST, unless his delay in paying moneys in his hands to the representatives of the deceased partner is unreasonable and vexatious. (Maynard v. Richards, 145.)

2. PARTNERSHIP—COMPENSATION FOR PARTNER'S SERVICES.—One partner cannot charge the firm or his copartners for services in attending to the partnership business in the absence of a special agreement entitling him to do so. (Maynard v. Richards, 145.)

3. PARTNERSHIP—SURVIVING PARTNER'S COMPENSATION.—An agreement to pay a surviving partner for his services may be implied where they are extraordinary and unusual and such as could not reasonably have been contemplated. (Maynard v. Richards, 145.)

4. PARTNERSHIP.—THE SURVIVING PARTNER MAY PROPERLY BE AWARDED COMPENSATION FOR HIS SERVICES in commencing and maintaining an action after the dissolution of the firm by the death of his copartner, where the prosecution of such action occupied the greater portion of several years and resulted in a judgment for a large sum of money, constituting a partnership asset. (Maynard v. Richards, 145.)

5. PARTNERSHIP DISSOLUTION BY DEATH, EFFECT OF UPON EXISTING CONTRACTS.—If a partnership enters into a contract requiring a number of years for its performance, and is afterward dissolved by the death of one of its members, it is the duty of the surviving member to complete the contract and to account to the representative of the deceased partner for the profits thereof or for damages recoverable for its breach by the other contractor. (Maynard v. Richards, 145.)

6. PARTNERSHIP—SURVIVING PARTNER, DUTY OF TO ACCOUNT FOR MONEYS COLLECTED FOR BREACH OF A CONTRACT.—If partners enter into a contract with a third person, requiring several years for its performance, and the latter commits a breach of such contract and refuses to proceed therewith, after which one of the partners dies, and the surviving partner maintains an action in which he recovers damages for the breach of such contract or compensation for the loss of the profits which would have accrued had he been permitted to perform it to the end of the time designated therein, the right of the representative of the deceased partner to participate in the sum so recovered is not limited to the profits which would have accrued up to such death, but extends to the profits for the whole term for which any recovery has been had. (Maynard v. Richards, 145.)

7. PARTNERSHIP—SURVIVING PARTNER'S RIGHT TO COMPENSATION.—A surviving partner has not, as between himself and the representative of the deceased partner, any right to charge for his services in winding up the affairs of the partnership. The winding up of these affairs, within the meaning of this rule, is restricted to selling the firm property, receiving moneys due the firm, paying its debts, returning the capital contributed by each partner, and dividing the profits. For services in excess of these,

the survivor may be entitled to compensation. (*Maynard v. Richards*, 145.)

8. A PARTNERSHIP MAY MAINTAIN AN ACTION IN THE NAME OF ALL THE PARTNERS, notwithstanding proceedings in insolvency against one of them, and notwithstanding he was guilty of fraud in forming the partnership to prevent the attachment of the property for which the firm brings an action. (*Russell v. Cole*, 432.)

9. INSOLVENCY OF PARTNERSHIP, WHAT IS NOT.—It is only when the partnership is insolvent through the insolvency of all the members thereof that a court of insolvency in Massachusetts acquires jurisdiction to settle the affairs of the partnership. Therefore, a court having jurisdiction of proceedings against one only of the partners, the other and the partnership being solvent, acquires no title over the partnership property. (*Russell v. Cole*, 432.)

10. PARTNERSHIP.—ON THE INSOLVENCY OF A MEMBER OF A PARTNERSHIP, the solvent member is entitled to the possession of the property, and is bound to wind up its affairs and to discharge its liabilities. The assignee of the insolvent partner has no right to the possession of the property, and his only remedy is by proceedings in equity. (*Russell v. Cole*, 432.)

11. PARTNERSHIP—APPLICATION OF ASSETS TO PAYMENT OF DEBTS.—The individual property of a member of a firm is applicable, in the first instance, to the payment of his individual debts, just as the partnership assets are liable for the firm debts in preference to the debts due by the copartners personally. (*Pott v. Schmucker*, 415.)

12. PARTNERSHIP—IMPLIED CONSENT TO MANAGEMENT OF JOINT PROPERTY—RESULT AS TO CREDITORS.—If one partner puts the other in absolute possession of the partnership funds and leaves to him the sole management of the concern, this is *prima facie* an implied consent to any measure which the latter may adopt regarding the joint property; and joint creditors must abide by the consequences of such arrangement. (*Pott v. Schmucker*, 415.)

13. PARTNERSHIP—INSOLVENCY—CASES IN WHICH A CREDITOR FIRM MAY SHARE WITH INDIVIDUAL CREDITORS.—There are two cases in which a creditor firm of which an insolvent is a member may prove in competition with his individual creditors: 1. Where money has been fraudulently abstracted from one estate and applied for the benefit of the other; 2. Where some of the members of the partnership form a distinct body for carrying on a distinct trade and the articles of one trade have been furnished by one firm to the other. (*Pott v. Schmucker*, 415.)

14. PARTNERSHIP—SEPARATE BUSINESS—MEMBER'S DEBT TO FIRM—INSOLVENCY—COMPETITION OF CREDITORS.—If one partner of a firm engages in a separate venture of his own, becomes a debtor in the latter business to his own firm for advances or loans of money made by the firm to him, and finally becomes insolvent, the firm of which he is a member, though it is also one of his creditors, cannot share in his individual assets until his individual creditors are paid in full, where the debt to the firm was not surreptitiously or fraudulently created. (*Pott v. Schmucker*, 415.)

15. PARTNERSHIP—SEPARATE BUSINESS—MEMBER'S DEBT TO FIRM—INSOLVENCY—RIGHT OF INDIVIDUAL CREDITORS TO PRIORITY OF PAYMENT.—If a member of a firm conducts a separate business venture of his own, under the name of a corporation, of whose assets he is sole owner, and such corporation becomes indebted to the firm, then upon the insolvency of both the firm and the corporation, the separate creditors of the

latter are entitled to priority of payment out of the assets of the corporation as against the firm, and its trustee in insolvency, as well as against the individual who, in reality, owns all the assets of the corporation, and his trustee in insolvency, though such creditors of the corporation are, in fact, though not in form, the individual's own creditors. (Pott v. Schmucker, 415.)

16. PARTNERSHIP — SEPARATE BUSINESS — MEMBER'S DEBT TO FIRM—INSOLVENCY—RIGHT OF INDIVIDUAL CREDITORS TO PRIORITY OF PAYMENT—ILLUSTRATION.—

A member of a banking firm went into a separate and distinct business of his own and organized a corporation for convenience in conducting the enterprise. The whole of the capital stock and the entire assets of the company belonged to him, and he conducted its business, which was regarded by him and every one else as his business. The corporation kept an account with the firm, and made overdrafts to a large amount, which were known to the other members of the firm and not objected to, and which, though entered on the bank-books as debits of the corporation, were regarded by the drawer, not as a debt due by the company to the bank, but as cash capital advanced to the concern for which he, and not the company, was a debtor to the firm. Both the firm and the corporation became insolvent and trustees in insolvency were appointed, one for the firm and the other for the organizer of the corporation. The assets of the corporation were collected by receivers and paid into court for distribution. In determining the proper application of such funds, the court held that, as the corporation was, in reality, the individual business of the partner who owned all of its capital stock, the creditors of the corporation were entitled to be paid out of its assets in the hands of the receivers before the trustee in insolvency of the banking firm could claim to be paid the indebtedness due to it by the corporation, and before the trustee in insolvency of the partner individually could demand any part of the funds. (Pott v. Schmucker, 415.)

17. PARTNERSHIP REAL ESTATE—TENANTS IN COMMON.

If two or more persons who are partners take title to lands as cotenants, the presumption arising from the deed is that they hold as cotenants in equal shares. As between themselves, the deed is not conclusive, and they hold in accordance with the facts, but, as to purchasers and creditors, they hold in accordance with the recorded title. (Stover v. Stover, 654.)

18. PARTNERSHIP—REAL ESTATE PURCHASED AS COTENANTS—DISTRIBUTION OF PROCEEDS—PRIORITIES.—If one of two partners purchases real estate with partnership assets, taking the deed thereto to the partners as cotenants, an individual judgment creditor of the other partner is entitled to priority in a distribution of the proceeds of a sale of the lands over a claim of the first partner for a balance due from the firm in a final accounting. (Stover v. Stover, 654.)

19. PARTNERSHIP REAL ESTATE—DISTRIBUTION OF PROCEEDS—PRIORITIES.—Real estate purchased with partnership funds and for partnership purposes generally becomes partnership assets, but, as to purchasers and creditors, the deed reciting that the partners take title to the lands as cotenants controls, and, in a distribution of the proceeds of a sale of the lands so held, the individual creditor of a cotenant has priority over the firm claiming by virtue of its title, and in contradiction of such deed. (Stover v. Stover, 654.)

See Attachment, 1; Equity, 2; Execution, 2; Fraud, 8; Fraudulent Conveyances, 5.

PATENTS.

1. PATENT RIGHTS—CONTRACT—RELIEF FOR PARTY NOT IN PARI DELICTO.—The general rule that courts will not enforce contracts prohibited by statute or allow the recovery of money or property paid or delivered in pursuance of them does not apply to the vendee of a patent right, for he has committed no wrong, and is not precluded from asking and obtaining relief. (*Mason v. McLeod*, 327.)

2. PATENT RIGHTS—CONTRACT AS TO, WHEN VOID UNDER STATE LAW.—A contract made by a vendor of patent rights in violation of a state statute regulating the transfer of patent rights, and which declares a noncompliance with its provisions to be a misdemeanor, punishable by fine or imprisonment, is void as between the parties, for the penalty implies a prohibition, and the purpose of the statute is to prevent and punish fraud. (*Mason v. McLeod*, 327.)

3. PATENT RIGHTS—POWERS OF STATE—POLICE REGULATIONS.—Patent laws do not prevent a state from enacting police regulations for the protection and security of its citizens. Hence, statutory regulations concerning the transfer of patent rights, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights, or to own patent rights to sell, should be upheld. (*Mason v. McLeod*, 327.)

4. PATENT RIGHTS—VALIDITY OF STATE STATUTE—POLICE REGULATIONS.—A state statute requiring the vendor of patent rights to file copies of the letters patent with a clerk of court, and to make and file an affidavit that the letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell, and providing further that any person who takes a written obligation in consideration of a patent right shall insert in the body of it, in writing or print, the words, "Given for a patent right," is a reasonable police regulation, designed to protect people against imposition and fraud, and is valid, because it does not usurp any of the powers of the government, or infringe upon the exclusive rights of the patentee. (*Mason v. McLeod*, 327.)

PAYMENT

1. PAYMENT—DEBTOR AND CREDITOR.—A creditor may agree to receive anything in payment; and, when the thing is accepted as so much money, the debt is to that extent extinguished, and the creditor cannot, thereafter, repudiate his act. (*Dunham v. Peterson*, 550.)

2. PAYMENT—WHEN NOT PRESUMED FROM THE TAKING OF A NOTE OF A THIRD PERSON.—If the seller of real property takes the note of a third person for the amount of the purchase price, but retains the legal title, such note will not be presumed to have been accepted as payment, and will not deprive the vendor of the right to hold the land as security for the payment of the note. (*Mausfield v. Dameron*, 884.)

See *Contracts*, 16; *Vendor and Purchaser*, 6.

PENALTIES.

See *Statutes*, 12.

PLEADING.

1. CONFLICT OF LAWS—LAWS OF ANOTHER STATE WHEN NOT CONSIDERED.—The supreme court of one state will not look into the codes and opinions of the supreme court of another state to ascertain what the law of that state is, unless such opinions

track at a public crossing where, before reaching a position of actual danger, there is a space of seven feet, from which an unobstructed view up and down the track may be had, and who does not dismount, but circles on his wheel round and round at a distance of from five to ten yards from the track waiting for a freight train to pass, and then, without dismounting and in attempting to cross the track, is killed by a train approaching from an opposite direction, is guilty of contributory negligence, and his widow cannot recover damages for his death. (Robertson v. Penn. R. R. Co., 620.)

8. RAILROADS.—A STREET RAILWAY HAS NO SUPERIOR RIGHT, on a public street, to that of the public at large, except the right to lay its track and operate its cars; and, if it adopts a propelling power, such as electricity, which increases the danger to the public, it must be held to a degree of care proportionate to such increase of danger. (Hall v. Ogden etc. Ry. Co., 726.)

9. RAILROADS—STREET RAILWAYS—ORDINANCE AS EVIDENCE OF SPEED ALLOWED.—In an action against a street railway company for injuries caused by its alleged negligence, a city ordinance, if not invalid, or inapplicable to the case, ought to be admitted in evidence to show the rate of speed allowed on street railways in the city. (Hall v. Ogden etc. Ry. Co., 726.)

10. RAILROADS—STREET RAILWAYS—RIGHT OF WAY—AVOIDANCE OF ACCIDENT.—A street-car has the right of way when a person or vehicle is met on the track, but each party, in order to avoid accident, must exercise ordinary care, and such reasonable prudence and precaution as the surrounding circumstances may require. (Hall v. Ogden etc. Ry. Co., 726.)

11. RAILROADS—DUTY OF MOTORMAN AT PUBLIC CROSSING—NEGLIGENCE.—It is the duty of a motorman, when he approaches a public crossing, to look and ascertain whether or not the track is clear, to sound the gong as a warning, and to keep his car under control. A failure to do this is negligence on the part of the street railway company. (Hall v. Ogden etc. Ry. Co., 726.)

12. RAILROADS—STREET RAILWAYS—SPEED IN ABSENCE OF ORDINANCE.—Regardless of any ordinance limiting the rate of speed, a street railway company has no right to run its cars at such a high rate of speed, over a public crossing, or through a frequented street in a city, as will endanger public safety, and put those who are rightfully in the use of the street to extra hazards. (Hall v. Ogden etc. Ry. Co., 726.)

13. RAILROADS—STREET RAILWAYS—SPEED AS EVIDENCE OF NEGLIGENCE.—While some courts hold that where the speed of a street railway company is greater than that permitted by ordinance it is negligence per se, the better rule appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury. (Hall v. Ogden etc. Railway Co., 726.)

14. RAILROADS—STREET RAILWAYS—CARE REQUIRED OF TRAVELERS.—Persons traveling on a public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along, or upon, or across an ordinary steam railroad. (Hall v. Ogden etc. Railway Co., 726.)

15. RAILROADS—LIABILITY OF STREET RAILWAY COMPANY WHERE INJURY COULD HAVE BEEN AVOIDED.—Although a person, with a wagon, drives incautiously upon a street railway track, at a public crossing, the company cannot recklessly run him down, and then shield itself from liability on the ground that such person was negligent in the first instance. (Hall v. Ogden etc. Ry. Co., 726.)

16. RAILROADS—STREET RAILWAYS—NEGLIGENCE—COLLISION.—A NONSUIT, in an action to recover damages for injuries occasioned by a collision, in a city, with a street railway car, is improperly granted where it appears that the plaintiff was driving a wagon toward a public crossing on the track; that he looked before he got to the track, but saw no car coming; that he then attempted to cross the track though he did not look for a car just as his horses stepped upon the track, the view being then somewhat obstructed by electric poles; that the car was propelled by an electric motor at the rate of twenty-five to thirty miles an hour; that the brakes were not applied and no attempt made to stop the car; and that no gong was sounded until about the time of the collision. (*Hall v. Ogden etc. Ry. Co.*, 726.)

17. RAILROADS—CONTRIBUTORY NEGLIGENCE AT CROSSING—JUMPING OUT OF WAGON.—When a train of cars and a wagon in which the plaintiff was riding were approaching a railroad crossing, the question as to whether his jumping out of the wagon to avoid being hurt was contributory negligence is one for the jury to determine. (*Wilson v. Southern Pac. Co.*, 766.)

18. RAILROADS—RELATIVE RIGHTS AT CROSSINGS.—Neither a train nor a vehicle has the exclusive right to the use of a railroad crossing, but both have the right to pass over it. If they approach the crossing at the same time, the vehicle should stop and let the train pass, but the train should not stop on the crossing, or, by moving backward and forward, subject the vehicle to unreasonable delay in crossing after the train has first passed. (*Wilson v. Southern Pac. Co.*, 766.)

19. RAILROADS—DUTY AT CROSSINGS, GENERALLY—QUESTION FOR JURY.—A railroad company is not required to maintain extra precautions to prevent accident at ordinary crossings in the country, where a few persons only pass each day; but the vigilance and care to be used at public crossings in populous cities and towns, where many tracks are built across the streets, and are constantly in use, is much greater than that required at ordinary road crossings in the country, or less populous and less used localities; and the reasonable care and prudence to be used must, therefore, depend upon the facts of each particular case. (*English v. Southern Pac. Co.*, 772.)

20. RAILROADS—SIGNALS AT CROSSING—DUTY—NEGLIGENCE NOT RELIEVED BY COMPLIANCE WITH STATUTE.—Everyone must so use his property as not to injure another if it can be avoided by the use of reasonable care. Hence, a statute imposing upon a railroad company the duty of ringing a bell and sounding a whistle, upon the approach of trains at public crossings, does not relieve the company from a charge of negligence in failing to adopt such other reasonable measures for public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case. (*English v. Southern Pac. Co.*, 772.)

21. RAILROADS—COMPETENT EVIDENCE OF COMPANY'S NEGLIGENCE AT DANGEROUS CROSSING.—In an action against a railway company to recover damages for negligently causing death at a railroad crossing in a populous city, it is proper to submit to the jury, under careful instructions from the court, testimony showing the locality and use of the crossing, as well as the danger of going over it, as bearing upon the question of the company's negligence in not providing a flagman, or maintaining gates, at such crossing to protect travelers from danger. (*English v. Southern Pac. Co.*, 772.)

22. RAILROADS—DUTY AT CROSSINGS EXTRAORDINARILY DANGEROUS—NEGLIGENCE.—If railroads cross a thickly populated street in a large city, at which crossing there is a network of railroad tracks, where there is much travel, and where the crossing is dangerous, reasonable care and prudence, on the part of the railroad companies, require them to keep at such crossing a flagman, or gates, during the time that the tracks are in use, so as to lessen the danger to passengers and travelers caused by the almost constant use of the tracks in operating and switching trains across the street, and a failure to provide such flagman, or to maintain gates, at the crossing, is negligence. (*English v. Southern Pac. Co.*, 772.)

23. RAILWAYS CARRYING PASSENGERS ARE BOUND TO CARRY THEM SAFELY so far as human care and foresight may provide; that is to say, they are bound to use the utmost care and diligence of very cautious persons, and they will be held liable for the slightest negligence which human care, skill, and foresight could have foreseen and guarded against. (*Connell v. Chesapeake etc. Ry. Co.*, 786.)

24. CARRIERS — SLEEPING-CAR CORPORATIONS—LIABILITY FOR MURDER.—If, while a passenger is sleeping in his berth in a sleeping-car, he is shot and killed by one who enters with intent to commit murder or robbery, neither the railway nor the sleeping-car corporation is answerable if neither, nor any employé of either, knew that any danger impended over the passenger, and there was no circumstance to rouse suspicion, however watchful and alert they might have been. (*Connell v. Chesapeake etc. Ry. Co.*, 786.)

25. NEGLIGENCE—RAILWAYS.—A special verdict against a railway corporation to recover for personal injuries suffered by the plaintiff from the derailment of a train, finding that the ties were not in good condition, and that the defendant was guilty of the negligence which occasioned the injury, is insufficient, because it does not show that such negligence was the proximate cause of the plaintiff's injury. (*Davis v. Chicago etc. Ry. Co.*, 935.)

See Damages, 2; Evidence, 14-16; Municipal Corporations, 10, 14; Negligence, 9.

REAL PROPERTY.

1. REAL PROPERTY — SAFETY OF PREMISES — NEGLIGENCE—LIABILITY OF OWNER.—The owner or occupant of premises is liable in damages to persons coming thereon, using due care, at his invitation or inducement, express or implied, on business to be transacted with, or permitted by, him, for an injury caused by the unsafe condition of such premises, known to him, and not to them, and which, through negligence, he suffered to exist without notice to them. (*Lowe v. Salt Lake City*, 708.)

2. REAL PROPERTY — SAFETY OF PREMISES — NEGLIGENCE—DUTY AND LIABILITY OF CITY AS OWNER.—If a city rents a portion of its city hall to the legislature, for legislative purposes, and a legislator, being rightfully on the premises and without knowledge of their dangerous condition, attempts to cross the back yard of the city hall, in a dark night, for the purpose of urinating, but strays from the path leading from the hall to an outhouse, and is injured by falling into an unprotected hatchway, the city, knowing the dangerous condition of the premises, and not having given notice thereof, is liable for the injury, because of its negligence in failing to have the yard lighted, and in leaving the hatchway unguarded. (*Lowe v. Salt Lake City*, 708.)

3. REAL PROPERTY—SAFETY OF PREMISES—CONTRIBUTORY NEGLIGENCE — RECOVERY NOTWITHSTANDING TECHNICAL TRESPASS.—If a person who has been injured, through the negligence of an owner or occupant, while committing a trespass, shows that he did not know that he was trespassing, or that the trespass was purely technical, and only such as he might reasonably suppose the owner or occupant would permit without objection, such trespass will not prevent a recovery. It may be a circumstance tending to show a want of proper care, but is not, of itself, sufficient to convict the injured party of contributory negligence. (*Lowe v. Salt Lake City*, 708.)

See Damages, 5; Municipal Corporations, 10, 11; Notice, 1, 3; Partnership, 17-19.

RECEIVERS.

1. FRAUDULENT CONVEYANCES—ACCOUNTING BY RECEIVER—PRACTICE.—If a bill is filed by creditors to set aside a conveyance by their debtor as fraudulent, and a receiver is appointed at their request, the bill cannot be dismissed without requiring the receiver to report and settle his account. (*Simmons v. Shelton*, 39.)

2. RECEIVERS—RIGHT TO APPOINT.—Generally, a receiver can be appointed only in cases already pending between the parties. (*State v. Union Nat. Bk.* 209.)

3. RECEIVERS—RIGHT TO APPOINT.—A receiver cannot be appointed for the property of an individual at the instance of a creditor when no action is pending, and the appointment of such receiver is the only relief sought. (*State v. Union Nat. Bk.* 209.)

4. RECEIVERS—APPOINTMENT—JURISDICTION.—A person whose only lien upon the property of another is that he holds a chattel mortgage thereon has no right to have a receiver appointed for such property without a suit to foreclose such mortgage. (*State v. Union Nat. Bk.* 209.)

5. RECEIVERS—APPOINTMENT—JURISDICTION.—To authorize the appointment of a receiver, the petitioner must show either a clear legal right in himself to the property in controversy, or that he has some lien upon, or property right in it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand. It is essential to authorize the exercise of such jurisdiction for the complainant to show that he has a present existing interest in the property. (*State v. Union Nat. Bk.*, 209.)

6. RECEIVERS—JURISDICTION TO APPOINT.—If, in a proceeding for the appointment of a receiver, the defendant does not appear in person, is not served with summons, or given notice by publication, an answer filed by the attorney for plaintiff and signed by a nonresident attorney not admitted to practice in the court in which the action is pending, purporting to appear for the defendant therein, is not a legal appearance conferring jurisdiction and proceedings based thereon are void. (*State v. Union Nat. Bk.*, 209.)

See Appeal, 2.

REMEDIES.

See Mechanics' Liens, 5, 6; Nuisances, 1; Sales, 3, 9, 14.

RESCISSION.

See Agency, 3, 4; Banks and Banking; Vendor and Purchaser, 3, 4.

REWARDS.

See Municipal Corporations, 6.

SALES.

1. SALES—SUBSTITUTION—BREACH OF CONTRACT.—If a specific, designated thing is bought and sold, the substitution and delivery of something else, by the seller, is a clear breach of the contract, and no question of warranty is involved. (Columbian I. W. etc. Co. v. Douglas, 362.)

2. SALES BY DESCRIPTION—WHAT DOES NOT JUSTIFY BREACH OF CONTRACT.—It can make no possible difference whether the failure of a buyer to receive what he contracted to get grew out of the fraud of the seller or out of an accident unmixed with bad faith. (Columbian I. W. etc. Co. v. Douglas, 362.)

3. SALES—SUBSTITUTION—INSISTING ON TERMS OF CONTRACT.—If a person buys a particular thing, he cannot be compelled to take some other thing, even if like the thing he bought. He has a right to insist on the terms of his contract. (Columbian I. W. etc. Co. v. Douglas, 362.)

4. SALES BY DESCRIPTION—BREACH OF CONTRACT—DAMAGES RECOVERABLE.—If a buyer contracts to purchase a certain quantity of steel scrap, consisting only of clippings, etc., from the steel plates of cruisers built by the seller for the United States navy, and it is found, after the scrap is delivered and paid for, that a very large part of it is not cruiser steel, and which part the buyer is obliged to sell for much less than what he gave for it, he is entitled to recover of the seller the difference between the price paid and the value of the article delivered. (Columbian I. W. etc. Co. v. Douglas, 362.)

5. SALES BY DESCRIPTION—WHEN QUESTION AS TO CONTRACT IS FOR JURY.—If a contract of sale was partly in writing and partly by parol, it is for the jury to determine what the contract was, and whether it was orally agreed that inspection by the buyer should take the place of description, where the written part of the contract was for the sale of goods by description. (Columbian I. W. etc. Co. v. Douglas, 362.)

6. SALES BY DESCRIPTION—SUBORDINATING DELIVERY TO INSPECTION.—If a sale of goods by description is made subject to the buyer's inspection, the description is not subordinated to the inspection, unless the parties both agree to substitute an inspection by the buyer for the description furnished by the seller. (Columbian I. W. etc. Co. v. Douglas, 362.)

7. SALES BY DESCRIPTION—WARRANTY—RECOVERY.—Conceding that a contract of sale is wholly in writing, the question of warranty is not involved, where the sale of the goods is by description, and, if the thing described is not delivered, it would be palpable error to deny the buyer a recovery upon the ground that there was no warranty. (Columbian I. W. etc. Co. v. Douglas, 362.)

8. SALES—SUBSTITUTION—REMEDY OF BUYER.—If a buyer has unwittingly received that which he has not bought, he has the right to return it; or, keeping it, to recoup, when sued for the stipulated price, the damages which a failure to comply with the contract has caused him; or, if he has paid the purchase price, he has the legal right to sue for and to recover back the difference in value between the price which he paid for an article he did not get, and the market price of the substituted article delivered to and retained by him. (Columbian I. W. etc. Co. v. Douglas, 362.)

9. SALES BY DESCRIPTION—TENDER—CONDITION PRECEDENT—REMEDY OF BUYER.—If a sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and, if this condition is not per-

formed, the purchaser is entitled to reject the article; or, if he has paid the purchase price, he is entitled to recover back the price as money had and received for his use. (*Columbian L. W. etc. Co. v. Douglas*, 362.)

10. **SALES—SUBSTITUTION—BUYER NEED NOT ACCEPT THAT NOT BOUGHT.**—Before a defendant can be compelled to take anything in fulfillment of a contract of sale, it must be shown not merely that it is equally as good as the article that was sold, but that it is the same article he has bargained for, and none other. (*Columbian L. W. etc. Co. v. Douglas*, 362.)

11. **SALES—WARRANTY, WHAT IS NOT—BREACH OF CONTRACT.**—If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas. The contract is to sell peas, and if he sells him anything else in their stead, it is simply a nonperformance of it. If the buyer has purchased a cargo of peas, he cannot be required to take a cargo of beans. (*Columbian L. W. etc. Co. v. Douglas*, 362.)

12. **SALES BY DESCRIPTION—IMPLIED WARRANTY.**—A sale of goods by particular description imports a warranty that the goods are of that description. Hence, if a buyer orders "pure Manilla twine," and the order is filled by sending Manilla twine, there is an implied warranty that the twine delivered is "pure Manilla twine." (*Northwestern Cordage Co. v. Rice*, 563.)

13. **SALES BY DESCRIPTION—ACCEPTANCE WITH KNOWLEDGE OF DEFECT.**—A purchaser's acceptance of goods bought by description, even with a knowledge that they do not correspond with the warranty implied, does not, as a matter of law, bar his right to rely upon the warranty, because the purchaser does not owe the duty of careful inspection to one who has warranted an article. (*Northwestern Cordage Co. v. Rice*, 563.)

14. **SALES BY DESCRIPTION—BREACH OF WARRANTY—REMEDY OF BUYER.**—If goods sold by description do not correspond with the warranty, the vendee may either reject them, or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods. (*Northwestern Cordage Co. v. Rice*, 563.)

15. **SALES BY DESCRIPTION—BREACH OF WARRANTY—WAIVER—QUESTIONS FOR JURY.**—In cases of sales by a particular description, where goods not corresponding to the implied warranty have been accepted, it should be left to the jury to determine whether there is a breach of warranty, whether the purchaser relies on the warranty, and whether he has waived his right to take advantage of its breach. (*Northwestern Cordage Co. v. Rice*, 563.)

16. **SALES BY DESCRIPTION—EFFECT OF GIVING NOTES FOR PURCHASE PRICE AFTER KNOWLEDGE OF DEFECT.**—The fact that a purchaser, who has bought goods by description, gives his renewal notes for the purchase price, after knowledge that the goods do not correspond with the warranty, does not prejudice his rights, especially where he expressly asserts his right to rely upon his claim for damages, and where the notes are given with the understanding that such claim will be recognized by the seller. In other words, the mere giving of renewal notes would not, of itself, extinguish his cause of action, if it once existed. (*Northwestern Cordage Co. v. Rice*, 563.)

SCHOOL DISTRICTS.

1. SCHOOL DISTRICT, POWERS OF.—A board of education cannot exercise any powers not expressly conferred upon it by statute or fairly arising by necessary implication. All who deal with it are charged with notice of the scope of its authority, and that it can bind the district only to the extent and by such contracts as are authorized by law. (*Honaker v. Board of Education*, 847.)

2. SCHOOL DISTRICTS—BOARDS OF EDUCATION, POWER OF TO ACT INDIVIDUALLY AND SEPARATELY.—The members of a board of education acting separately and individually, and not as a board convened for the transaction of business, cannot make a contract binding on them as a corporation. (*Honaker v. Board of Education*, 847.)

3. SCHOOL DISTRICTS—APPLIANCES FOR WHICH MAY PROVIDE.—An educational appliance is something necessary and useful to enable a teacher to teach school children, but a statute authorizing a board of education to provide such appliances for school-houses as the health, comfort, and convenience of scholars may require, refers to appliances which are for the use of the whole school, and not to books or things necessary for individual pupils only. (*Honaker v. Board of Education*, 847.)

See *Municipal Corporations*, 7.

SEALS.

1. SEAL, OFFICIAL, OMISSION OF.—If the law provides that an officer shall have an official seal, that his acts shall be certified to under his hand and seal of office, his certificate of verification of a complaint which is not impressed with such seal is void. (*Oelbermann v. Ide*, 947.)

2. OFFICIAL SEALS.—If the verification of a complaint is made before an officer outside of the state, his official character must be authenticated by his official seal, if the law provides for that method of establishing such character. Otherwise, the complaint cannot be treated as verified. (*Oelbermann v. Ide*, 947.)

3. SEAL, OFFICIAL, WHAT IS NOT.—If a commissioner of deeds impresses on his certificate a seal containing his name and designating him as a commissioner for the state of New York, and writes in a blank place the word "Wisconsin," such impression can not be treated as his official seal for the last-named state. (*Oelbermann v. Ide*, 947.)

4. SEALS.—AN OFFICIAL SEAL MUST CONTAIN enough to show the official character of the officer, and must be capable of making a distinct and uniform impression upon the paper on which the certificate is written, or on some tenacious substance, as wax, or on wafers, or some adhesive substance attached thereto, capable of receiving an impression. Words or figures made by the pen or otherwise than impressed, so as to show in the paper itself, or some substance attached thereto, cannot be considered as forming any part of the seal. (*Oelbermann v. Ide*, 947.)

SELF-DEFENSE.

See *Homicide*, 1, 2.

SEWERS.

See *Municipal Corporations*, 9.

SHERIFFS.

1. SHERIFFS—LEVY OF EXECUTION—JUSTIFICATION—ADMISSIBILITY OF EXECUTION WITHOUT JUDGMENT.—IF

an officer, under an execution which purports to be on a judgment against the party defendant to the writ, and which is fair upon its face, levies upon money of such party, who brings an action, not to recover the specific money taken, but to recover damages for its wrongful conversion, the execution is admissible in evidence without the judgment upon which it issued. (*Hamner v. Ballantyne*, 736.)

2. SHERIFFS—LEVY OF EXECUTION—JUSTIFICATION WITHOUT PRODUCING JUDGMENT.—An officer who, in good faith, seizes or sells property under an execution may justify, in a suit for damages against him in consequence of such seizure or sale, without producing the judgment, though he knew of irregularities or defects that rendered it voidable; and he will be regarded as having acted in good faith, when the writ was fair on its face, and he was not advised that there was no judgment, or that, if there was, it was void. (*Hamner v. Ballantyne*, 736.)

See Executions, 3, 4.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—CONTRACT FOR PURCHASE AND SALE OF LAND—ENCUMBRANCES AS A BAR.—The existence of mortgages and other encumbrances amounting to much less than the contract price to be paid by a purchaser for land, and which can be completely discharged out of the proceeds of the sale, does not constitute a bar to an action by the vendor to enforce the specific performance of a contract for the sale of the land, especially where such encumbrances were known to the vendee, because the court is able to provide for the conveyance of a clear title to the vendee; and the existence of unpaid taxes, even though unknown to the defendant, furnish no obstacle to the performance of the contract, where the fund is ample for their payment. (*Guild v. Atchison, Topeka etc. R. R. Co.*, 812.)

See Injunction, 1.

STATUTES.

1. STATUTE AUTHORIZING ASSIGNEE TO SUE—CONSTRUCTION.—A statute authorizing the assignee of a chose in action to bring a suit in his own name, alleging the assignment, his equitable ownership in good faith, and the manner of acquiring such ownership, does not alter the relations of assignor and assignee; they remain unchanged. (*Fuller v. Metropolitan etc. Ins. Co.*, 84.)

2. STATUTES—DECLARING UNCONSTITUTIONALITY OF.—A law will not be declared unconstitutional unless it is clearly and palpably in violation of the constitution. (*Hanna v. Young*, 396.)

3. SPECIAL LAWS.—If a statute prohibits the racing for stakes except as allowed by special laws, a statute authorizing the organization of a racing association, and permitting it to offer prizes or purses to the owner of horses competing therein, is a special law, and justifies the association in doing the acts permitted by the last-named statute. (*People v. Fallon*, 492.)

4. FIRE DEPARTMENT, RATE OF SPEED.—A statute purporting to regulate the speed of horses in the public streets is not applicable to drivers of hosecarts and engines connected with the fire department when going to a fire. (*Farley v. Mayor*, 511.)

5. STATUTES—CURATIVE LAWS, WHEN VOID.—The legislature have no power to validate void foreclosure proceedings by retroactive legislation which attempts to cure defects in failing to publish the notice of sale for the full period prescribed by statute, as this invades the vested right which the mortgagor had to

Insist upon the full statutory notice being given, and in which there was no injustice. The tendency of recent judicial decision is to limit strictly the power to pass curative laws. (*Finlayson v. Peterson*, 584.)

6. **STATUTES—CURATIVE LAWS, WHEN VALID.**—Defects, such as those in a deed or acknowledgment, or other defects which it would be unjust for one to take advantage of, may be cured by retroactive legislation, for the reason that no one has a vested right to be unjust or to do a moral wrong. (*Finlayson v. Peterson*, 584.)

7. **CONSTITUTIONAL LAW.—IF A STATUTE IS BROADER THAN ITS TITLE**, the part within the title can stand, while the parts not indicated thereby must be denied effect. (*Lacey v. Palmer*, 795.)

8. **STATUTE, TITLE OF.**—THE USE OF THE TERM “AND SO FORTH” cannot enlarge the meaning of other words employed in the title of an act, nor supply any omission therein. (*Lacey v. Palmer*, 795.)

9. **STATUTES, WHEN NOT REPEALED BY IMPLICATION.**—A statute to prevent gambling and the selling and making of books, pools, or mutuels, within the commonwealth, is not repealed by implication by another statute enacted previously on the same day making it unlawful for anyone to make any bet or wager upon the result of any trial of speed or power of endurance of animals which is to take place beyond the limits of the state. (*Lacey v. Palmer*, 795.)

10. **CONSTITUTIONAL LAW—STATUTE, WHEN DOES NOT EMBRACE MORE THAN ONE OBJECT.**—If the subjects embraced in a statute, but not specified in its title, have congruity or are naturally connected with the subjects stated in the title, or are cognate or germane thereto, it does not embrace more than one object. Therefore, a statute, having as its object the suppression of gambling upon the speed or endurance of animals, may make unlawful and provide for punishing every device for making, receiving, forwarding, or registering, any bet or wager upon the speed or endurance of animals. (*Lacey v. Palmer*, 795.)

11. **CONSTITUTIONAL LAW—STATUTE, WHEN EMBRACES MORE THAN ONE SUBJECT.**—A statute entitled “An act to prevent poolselling, and so forth, upon the result of any trials of speed of any animals or beasts taking place without the limits of the commonwealth,” and which makes it unlawful for any person, association, or corporation, by any means or device, to make any bet or wager, or to receive, record, register, or forward, purport or pretend to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trials of speed, power of endurance, or skill of animals which is to take place beyond the commonwealth, conflicts with that provision of the state constitution declaring that no law shall embrace more than one object, which shall be expressed in its title, because it prohibits acts which are not included in the term “poolselling.” (*Lacey v. Palmer*, 795.)

12. **PENALTY—PERSON INJURED, WHO DEEMED TO BE.**—If a statute prohibits any owner of land from excavating within five feet of the boundary of any other owner, and declares that every person violating the statute shall forfeit a sum specified to any person injured thereby who may sue for the same, any person may maintain an action for the penalty by proving that the excavation was made within five feet of his lands, without his consent. He need not establish that the excavation was otherwise injurious to him. The term “injury” as used in the statute indicates that the person whose right has thus been violated is the proper one to sue for the penalty. (*Maple v. John*, 839.)

13. CONSTITUTIONAL LAW—POLICE POWER.—A statute prohibiting the mining for coal within five feet of the boundary line of another's land, without his consent, and imposing a penalty for so doing, is a valid exercise of the police power of the state. (*Maple v. John*, 839.)

14. CONSTITUTIONAL LAW—OLEOMARGARINE.—A statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink is constitutional, though applicable to that manufactured without, as well as within, the state. Such a statute has for its object the prevention of fraud on the public, and is therefore within the police power of the state. (*State v. Myera*, 887.)

See Actions, 1, 2; Contempt, 10; Corporations, 8; Deeds, 6; Elections, 4; Evidence, 5; Executors and Administrators, 2; Highways, 1; Husband and Wife, 3, 6, 7, 9; Insurance, 17; Interstate Commerce, 1-3, 6; Judgment, 4; Jurisdiction, 2; Mechanics Liens, 2, 5; Mortgages, 10; Municipal Corporations, 5, 6, 8; New Trial, 2; Patents, 1-4; Railroad Companies, 19; Wills, 19.

STATUTE OF FRAUDS

See Contracts, 8-10, 13; Wills, 12.

STATUTE OF LIMITATIONS

See Limitations of Actions.

STOPPAGE IN TRANSITU.

1. STOPPAGE IN TRANSITU.—STRICT PROOF OF INSOLVENCY is not required to justify the exercise of the right of stoppage in transitu. It is sufficient that there has been a failure to pay the debt on account of which the right is claimed, and that the debtor cannot be found at his reputed place of business. (*Jeffris v. Fitchburg R. R. Co.*, 919.)

2. STOPPAGE IN TRANSITU—GOODS, WHEN NOT BEYOND RIGHT OF.—If the property sold and not paid for is shipped by railway to the purchaser, and reaches its place of destination, where it remains in possession of the carrier with the freight unpaid, it will be presumed to continue subject to the exercise of the right of stoppage in transitu, in the absence of evidence that the carrier had become the agent of the purchaser and was keeping the goods for him as such, and not as carrier. (*Jeffris v. Fitchburg R. R. Co.*, 919.)

3. STOPPAGE IN TRANSITU—RIGHT OF, WHEN TERMINATES.—DELIVERY, ACTUAL OR CONSTRUCTIVE, BY A CARRIER to a consignee or his agent is essential to terminate the right of stoppage in transitu; and the fair implication of the law is, where the goods remain in the carrier's warehouse with charges unpaid, that the transitus has not been ended. No inference of its termination arises from evidence that it was the custom of the assignee of goods of the character of those in question to leave them in charge of the carrier, at the consignee's risk and expense, to be taken away at any time, on payment of freight. (*Jeffris v. Fitchburg R. R. Co.*, 919.)

4. STOPPAGE IN TRANSITU.—THE DELIVERY OF PART OF THE GOODS does not amount to a delivery of the whole, so as to terminate the right of stoppage in transitu, unless the circumstances show that it was the intention that such part delivery should operate as a constructive delivery of the remainder of the goods. (*Jeffries v. Fitchburg R. R. Co.*, 919.)

5. STOPPAGE IN TRANSITU.—THE GIVING OF AN ORDER BY A CONSIGNEE of goods to a carrier in whose possession they remain, directing him to deliver them to a third person, on payment

of freight, does not terminate the transit, nor put an end to the right of stoppage in transitu. (*Jeffris v. Fitchburg R. R. Co.*, 919.)

STREET RAILWAYS.

See Railroad Companies.

STREETS.

See Municipal Corporations, 11-14.

SUBROGATION.

See Cotenancy, 3, 4; Judicial Sales, 8; Mortgages, 11-12.

SUNDAY.

See Interstate Commerce, 3.

SURETYSHIP.

1. **PRINCIPAL AND SURETY.**—If the principal did not execute the contract purporting to be executed by him, his sureties thereon are not liable. They are presumed to rely on the right of the creditor to proceed against the principal and upon their own right to recover from the principal, if they are compelled to pay for his benefit. (*Dole Bros. Co. v. Cosmopolitan Pres. Co.*, 477.)

2. **PRINCIPAL AND SURETY—OBLIGATIONS SIGNED BY AN AGENT WITHOUT AUTHORITY.**—If sureties sign an obligation purporting to be executed for their principal by an agent, they are not bound thereby if the agent acted without authority, unless they had knowledge of his want of authority. It is not sufficient that they had reasonable cause to know of the absence of such authority. (*Dole Bros. Co. v. Cosmopolitan Pres. Co.*, 477.)

See Husband and Wife, 2, 3.

SURFACE WATER.

See Municipal Corporations, 12, 13.

TAXATION.

See Judgment, 19.

TELEGRAPH COMPANIES.

1. **EVIDENCE—MENTAL SUFFERING.**—In an action to recover damages for mental suffering caused by negligent delay in the delivery of a telegram announcing the death and time of the funeral of a near relative of the addressee, evidence that the latter desired to attend the funeral, felt "hard" over the delay in delivering the message, and upon its delivery, while excited and anxious, telegraphed to ascertain if he could yet be present at the funeral, is sufficient to sustain a finding that he endured mental suffering. (*Mentzer v. Western Union Tel. Co.*, 294.)

2. **TELEGRAPH COMPANIES—NEGLIGENT DELAY—DAMAGES FOR MENTAL SUFFERING.**—If a telegraph company, knowing the character and contents of a telegram announcing the death and the time of the funeral of a near relative of the addressee, negligently fails to deliver it, whereby such addressee is prevented from attending the funeral, he may recover for mental suffering caused by such delay, although no physical injury is sus-

tained. The recovery may be either *ex contractu* or *ex delicto* (*Mentzer v. Western Union Tel. Co.*, 294.)

TRESPASS.

TRESPASS—JOINT TORT FEASORS.—Of two joint trespassers the party injured may sue both or either, and, if he proceed against one, that one cannot relieve himself from responsibility by showing that the other participated in the illegal act. (*Burk v. Howley*, 607.)

See Real Property, 8.

TRIAL.

1. TRIAL—PRACTICE AS TO NONSUIT, AND ALLOWANCE THEREOF.—Upon a motion for a nonsuit, it is the duty of the court to assume as true all facts which could be properly found by a jury from the evidence, and to give the plaintiff the benefit of every fair and legitimate inference and intendment which can arise from the evidence; and, unless it appears, after this is done, that the plaintiff has failed to prove his case, a nonsuit should not be granted (*Lowe v. Salt Lake City*, 708.)

2. JURY TRIAL—MISCONDUCT OR PREJUDICE OF JURY.—If, after a jury has been sworn, it is shown that improper influences were brought to bear upon its members or some of them, or that any of them were guilty of improper conduct, which might have resulted prejudicially to the losing party, a presumption arises against the purity of the verdict, entitling him to a new trial, unless such presumption is met by testimony showing that the verdict was not due to such influence or conduct. The same presumption arises when it appears that one of the jurors had a feeling of prejudice against the losing litigant. (*Rowe v. Shenandoah Pulp Co.*, 870.)

3. JURY TRIAL.—A SPECIAL VERDICT is that by which the jury finds the facts only, leaving the judgment to the court. (*Davis v. Chicago etc. Ry. Co.*, 935.)

4. JURY TRIAL.—A SPECIAL VERDICT IS FATALLY DEFECTIVE in an action to recover for personal injuries alleged to have resulted to the plaintiff from the negligence of the defendant, if it leaves the proximate cause of the accident unanswered. (*Davis v. Chicago etc. Ry. Co.*, 935.)

See Railroad Companies, 12, 16, 18; Equity, 1, 2; Highways, 6; Instructions, 1, 2, 5; Larceny, 2; Malicious Prosecution, 1; Negligence, 7, 8, 10, 18; New Trial; Sales, 5, 15.

TRUSTS.

1. TRUSTS—EXECUTORY RESTING IN PAROL.—Equity does not enforce, in behalf of a mere volunteer, an executory parol trust. (*Orth v. Orth*, 185.)

2. WILLS—TRUSTS EX MALEFICIO.—The violation of a parol promise made by the sole beneficiary under a will to carry out the wishes of testator expressed in a letter written by the latter to the former, is not such a fraud as creates a trust *ex maleficio*. (*Orth v. Orth*, 185.)

3. WILLS—RECOMMENDATIONS, WHEN DO NOT CREATE A TRUST.—If there is doubt whether a testator intended by words of advice or recommendation to narrow an otherwise free and unfettered devise or bequest, the courts incline in favor of the absolute title of the devisee or legatee. (*Orth v. Orth*, 185.)

4. WILLS—PRECATORY TRUST.—If a husband by his will makes his wife his sole beneficiary, a letter from him to her of the

same date as the will informing her of the disposition made of his property, advising her in the management of the estate, expressing the hope that she will convey certain property to a person named, have a competence during life and sufficient to assist his children from time to time, as they may need it, and closing with the desire that she shall give what remains at her death to his children equally, does not create any enforceable trust in favor of such children. (Orth v. Orth, 188.)

5. TRUST, RESULTING.—If a person buys property with the money of another, a trust results in favor of the latter giving him the real ownership, and the property may be followed through any transmutations as long as it can be traced, unless the rights of a bona fide purchaser for value intervene, in a case where his rights call for protection. No subsequent dealing with the property with the agent of the trustee can remove its stamp as between him and his principal, the beneficiary. (Stevenson v. Kyle, 854.)

See Mortgages, 6; Wills, 12.

UNBORN CHILD.

See Wills, 8-10.

USER.

See Highways, 8-9.

USURY.

1. USURY, CONFLICT OF LAWS.—A contract between the seller and purchaser of a note is governed by the laws of the state where its sale or transfer is made, and cannot be affected by the laws against usury in the state where the note was executed. (Gilden v. Chamberlain, 479.)

2. USURY.—A BUILDING AND LOAN ASSOCIATION organized under the laws of the state of Indiana, and by them entitled to exact premiums and fines in addition to legal interest, may, upon principles of comity, exercise the same powers within another state, if not inconsistent with its laws or public policy; and such powers are not deemed so inconsistent, if their exercise is permitted to similar corporations organized within the state. (Frele v. No. 4 Fidelity B. & S. Union, 123.)

VARIANCE.

See Pleading, 5.

VENDOR AND PURCHASER.

1. PURCHASERS, INNOCENT, WHO ARE NOT ENTITLED TO PROTECTION AS.—To entitle one to protection as an innocent purchaser he must have the legal title. (Bruschke v. Wright, 125.)

2. VENDOR AND PURCHASER—SETTLEMENT OF PAST DIFFERENCES AS A CONSIDERATION.—The settlement of past differences on the basis of the purchase and sale of land at a value to be fixed by appraisers is a valid consideration for the agreement to purchase and sell, and sufficient to render the contract irrevocable. (Guld v. Atchison, Topeka etc. R. R. Co., 312.)

3. RESCISSION, PROPER REMEDY TO ENFORCE.—Where a purchaser of land who has given a note or mortgage in part payment of the purchase price wishes to rescind, his remedy is in equity. (Rackemann v. Riverbank Imp. Co., 427.)

4. A RESCISSION OF THE PURCHASE OF LAND is not prevented by the fact that the purchaser has been in possession for a considerable length of time. (Rackemann v. Riverbank Imp. Co., 427.)

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4. WILLS—PRECATORY TRUST.—If a husband by his will makes his wife his sole beneficiary, a letter from him to her of the

same date as the will informing her of the disposition made of his property, advising her in the management of the estate, expressing the hope that she will convey certain property to a person named, have a competence during life and sufficient to assist his children from time to time, as they may need it, and closing with the desire that she shall give what remains at her death to his children equally, does not create any enforceable trust in favor of such children. (Orth v. Orth, 188.)

5. TRUST, RESULTING.—If a person buys property with the money of another, a trust results in favor of the latter giving him the real ownership, and the property may be followed through any transmutations as long as it can be traced, unless the rights of a bona fide purchaser for value intervene, in a case where his rights call for protection. No subsequent dealing with the property with the agent of the trustee can remove its stamp as between him and his principal, the beneficiary. (Stevenson v. Kyle, 854.)

See Mortgages, 6; Wills, 18.

UNBORN CHILD.

See Wills, 8-10.

USER.

See Highways, 8-9.

USURY.

1. USURY, CONFLICT OF LAWS.—A contract between the seller and purchaser of a note is governed by the laws of the state where its sale or transfer is made, and cannot be affected by the laws against usury in the state where the note was executed. (Glidden v. Chamberlain, 479.)

2. USURY.—A BUILDING AND LOAN ASSOCIATION organized under the laws of the state of Indiana, and by them entitled to exact premiums and fines in addition to legal interest, may, upon principles of comity, exercise the same powers within another state, if not inconsistent with its laws or public policy; and such powers are not deemed so inconsistent, if their exercise is permitted to similar corporations organized within the state. (Freie v. No. 4 Fidelity B. & S. Union, 123.)

VARIANCE.

See Pleading, 5.

VENDOR AND PURCHASER.

1. PURCHASERS, INNOCENT, WHO ARE NOT ENTITLED TO PROTECTION AS.—To entitle one to protection as an innocent purchaser he must have the legal title. (Bruschke v. Wright, 125.)

2. VENDOR AND PURCHASER—SETTLEMENT OF PAST DIFFERENCES AS A CONSIDERATION.—The settlement of past differences on the basis of the purchase and sale of land at a value to be fixed by appraisers is a valid consideration for the agreement to purchase and sell, and sufficient to render the contract irrevocable. (Guild v. Atchison, Topeka etc. R. R. Co., 312.)

3. RESCISSION, PROPER REMEDY TO ENFORCE.—Where a purchaser of land who has given a note or mortgage in part payment of the purchase price wishes to rescind, his remedy is in equity. (Rackemann v. Riverbank Imp. Co., 427.)

4. A RESCISSION OF THE PURCHASE OF LAND is not prevented by the fact that the purchaser has been in possession for a considerable length of time. (Rackemann v. Riverbank Imp. Co., 427.)

5. VENDOR AND PURCHASER—WHO IS NOT A BONA FIDE PURCHASER—RECORDING ACT.—To entitle one to protection as a bona fide purchaser, he must have parted with his consideration before notice of a prior conflicting right. Hence, if a purchaser of land has actual knowledge of a mortgage thereon, of record, in which the mortgagor asserts title, and pays for the land without any investigation as to title, where that would probably lead to a discovery of the owner, he is chargeable with notice of the existence of title in the mortgagor, and cannot claim protection as a bona fide purchaser under the recording act. (*Doran v. Dasey*, 550.)

6. VENDOR'S LIEN—NOTE FOR PURCHASE MONEY.—The taking of a note of a third person for the purchase price of real property where the vendor does not convey the legal title, but stipulates that he will convey it when payment is made or secured, is not equivalent to payment, and cannot deprive him of his right to enforce a vendor's lien on the land for the payment of such price. (*Mansfield v. Dameron*, 884.)

7. NOTICE TO A PURCHASER, AFTER HE HAD COMPLETED HIS PURCHASE and received a conveyance of the property, of facts entitling other persons to avoid an executor's sale cannot defeat the title of such purchaser. (*Melms v. Pabst Brewing Co.*, 899.)

See Agency, 3, 7; Attorney and Client, 12, 14; Contracts, 6; Deeds, 4; Specific Performance.

VERDICT.

See Railroad Companies, 24; Trial, 3, 4.

WAIVER.

See Insurance, 3, 19; Negotiable Instruments, 4, 10, 11, 14, 18.

WARRANTS.

See Arrest, 2.

WARRANTY.

See Sales, 7, 11-15.

WATERS AND WATERCOURSES.

See Injunction, 1; Nuisance, 2.

WILLS.

1. WILLS—TESTAMENTARY CAPACITY—INSTRUCTION AS TO INSANE DELUSION—QUESTIONS OF LAW.—Whether testamentary capacity exists in any given case is always matter of law for the court to determine. It is, therefore, the province of the court, where testamentary capacity is attacked on the ground that the testator had an "insane delusion," to instruct the jury what constitutes such a delusion. (*Kimberly's Appeal*, 101.)

2. WITNESSES—EXAMINATION OF NONEXPERTS AS TO MENTAL CONDITION OF TESTATOR.—After a nonexpert witness, upon the contest of a will, has, without objection, testified to his acquaintance with the testator, giving the details and particulars, and has then, without objection, given his opinion, founded upon such recited facts, that the testator was of sound mind, it does prejudice the contestant of the will to afterward ask the witness, on direct examination, if he ever observed anything in the appearance, conduct, or conversation of the testator to indicate any unsoundness of mind,

for there is full opportunity, on cross-examination, to elicit how much in each answer is matter of fact, and how much is matter of opinion as to what would indicate mental weakness. (Kimberly's Appeal, 101.)

3. **WILLS—TESTAMENTARY CAPACITY—CORRECT INSTRUCTION AS TO "INSANE DELUSION."**—To instruct the jury, in a case where testamentary capacity is attacked on the ground that the testator had an "insane delusion," that "an insane delusion is a false belief for which there is no reasonable foundation, and which would be incredible, under the given circumstances, to the same person, if of sound mind and concerning which the mind of the decedent was not open to permanent correction through evidence or argument"; that "a false belief is not necessarily an insane delusion"; and that it is only where "false beliefs are such as a reasonable man would not, under the circumstances, entertain that they become insane delusions," is as accurate as could reasonably be expected, or justly required, especially where the jury has been elsewhere fully, clearly, and correctly charged upon the subject of testamentary capacity. (Kimberly's Appeal, 101.)

4. **WILLS—EXECUTOR'S RIGHT TO APPEAL FROM ORDER DENYING OR REVOKING THE PROBATE OF.**—If a will is set aside in a suit in which the executor is one of the defendants, he has the right to prosecute an appeal or writ of error. (Hesterberg v. Clark, 135.)

5. **WILLS—BURDEN OF PROOF IN SUITS TO SET ASIDE.**—If, in a suit in chancery to set aside the probate of a will, the complainant offers the will and the certificate of all the subscribing witnesses in the probate court, and their testimony is there given, a prima facie case is made out in favor of the will, which the complainants must meet and overcome. (Hesterberg v. Clark, 135.)

6. **WILLS—CLAUSE ADDED WITHOUT PROPER ATTESTATION.**—If, after a will has been properly executed and attested, the testator caused a further provision to be written therein in his presence and that of the subscribing witnesses, without any further signing on his part or attestation on theirs, this does not add anything to, nor does it revoke, a pre-existing will or any part thereof. (Hesterberg v. Clark, 135.)

7. **WILLS, INTERLINEATIONS AFTER EXECUTION.**—An interlineation in a will after it has been duly executed and attested, though made in the presence of the testator and that of the witnesses to the will, there being no further signing by him nor attestation by them, has no effect whatever on the will. (Hesterberg v. Clark, 135.)

8. **WILLS—UNBORN CHILD, INTENTION TO DISINHERIT.** Though it appears by the will that a testator had an unborn child in his mind, and that he did not therein make any provision for it, yet such will does not manifest an intention to disinherit the child, and it is entitled to the same share in its parent's estate as if he died intestate. (Lurie v. Radnitzer, 157.)

9. **WILLS.—PARTS OF A WILL WHICH HAVE BEEN ERASED** by a testator are no more a part of such will than if they had never been written therein. Hence, if the part erased made provision for an unborn child, it cannot, having been erased, constitute evidence that he intended to disinherit such child. (Lurie v. Radnitzer, 157.)

10. **WILLS—EVIDENCE OF INTENTION TO DISINHERIT.**—Evidence of what a testator said at a time when he erased a clause in his will in favor of an unborn child cannot be received for the purpose of proving that he intended to disinherit such child. (Lurie v. Radnitzer, 157.)

11. WILLS—TESTAMENTARY WRITINGS.—A letter from a husband, to his wife informing her of the disposition of his property made by will, not attested or acknowledged, is not testamentary in its character. (Orth v. Orth, 185.)

12. WILLS—PAROL PROMISE—STATUTE OF FRAUDS.—A parol promise made to a testator by the sole beneficiary under his will to convey certain property to a person named is void if it involves the transfer of property exceeding in value the limit fixed by the statute of frauds. (Orth v. Orth, 185.)

13. WILLS—REVOCATION.—PAROL TRUSTS in personal property cannot be permitted to revoke a will contrary to the requirements of the statute upon the subject of such revocation. (Orth v. Orth, 185.)

14. WILLS—PRESUMPTION OF FRAUD.—The rule that one occupying a fiduciary relation to another, and thereby obtaining an advantage is presumed to have obtained it fraudulently, does not apply to a testamentary disposition made by a husband in favor of his wife. (Orth v. Orth, 185.)

15. WILLS—PRESUMPTION OF FRAUD.—A devise by a husband to his wife is not presumptively fraudulent, requiring equity to charge the devise with a trust in favor of those who may stand in the relation of heirs. (Orth v. Orth, 185.)

16. WILLS—CONSTRUCTION OF PROVISIONS IN FAVOR OF A TESTATOR'S WIFE.—Provisions in a will in favor of the wife of a testator should be liberally construed in her favor, and the revocation of a devise to her will not be presumed in the absence of express words of a clear, unequivocal implication. (Moffett v. Elmendorf, 529.)

17. WILLS—LAPSED DEVISE, WHEN VESTS IN THE WIFE AS RESIDUARY DEVISEE.—If a will purports to give to the wife of the testator all his real estate except therein otherwise given, and in a succeeding clause gives to certain persons therein designated certain real property to hold, share and share alike, and some of the devisees die before the testator, and the devise as to their share lapses, such shares vest in the wife as residuary devisee, although the will in a subsequent clause declares that all the residue of the testator's estate, if any there be, is devised to his heirs at law at the time of his decease. This last clause can become operative only in the event of the death of the wife before that of the testator, and her consequent inability to take under the residuary devise to her. (Moffett v. Elmendorf, 529.)

18. WILLS—DEVISE IN FEE—CUTTING DOWN.—If there is a clear gift in a will of an estate in fee, such estate cannot afterward be cut down except by something in the will which with reasonable certainty indicates the intention of the testator to cut it down or to defeat or modify it. (Yost v. McKee, 604.)

19. WILLS—CONFLICT OF LAWS.—An olographic paper, purporting to be the will of a married woman, but invalid at the time of its execution for want of witnesses, is not rendered valid by a subsequent statute dispensing with that requirement. (Packer v. Packer, 615.)

20. WILLS—CONFLICT OF LAWS.—The validity of a will must be determined by the law as it stood at the time of the execution of the will, and not at the time of the death of the testator. (Packer v. Packer, 615.)

21. WILLS.—EVIDENCE AS TO THE INTENTION of a testator separate and apart from that conveyed by the language used in the will is not admissible for the purpose of interpreting the will. (Clarke v. Clarke, 675.)

22. WILLS — INTERPRETATION — "DEVISE."— Although the technical meaning of the term "devise" in a will is usually to pass realty as realty, yet this technical meaning is not allowed to prevail when such use of the word is negatived by other words in the will clearly indicating a different and contrary intention. (Clarke v. Clarke, 675.)

23. WILLS—INTERPRETATION—CONVERSION OF REALTY INTO PERSONALTY.—If a testator uses such words as "invest" and "pay over" in his will, thus conveying the idea that his entire estate, both real and personal, is to be distributed as personalty, his executor is authorized to convert the real estate into personalty, though no such direct authority is contained in the will. (Clarke v. Clarke, 675.)

24. WILLS—ATTESTATION.—If a will is duly executed, and contains, in the appropriate place, the names of the three persons selected by the testatrix as witnesses thereto, the fact that the name of one of such witnesses was not written with her own hand, but with the hand of another, at her request, and in her presence, and in the presence of the other witnesses, and the testatrix, does not vitiate her attestation nor render the will void. (Smythe v. Irick, 704.)

See Trusts, 2-4.

WITNESSES.

See Negligence, 11; Wills, 2.

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